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# The Refugee Status Determination of Transgender Asylum- Seekers: a Queer Critique

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## ABSTRACT

This publication results from the master's dissertation written by Irene Manganini under the supervision of Prof. Vincent Chetail (Master in international law, Graduate Institute). In 2019, it received the prestigious *Award Ladislas Mysyrowicz* for its high quality dissertation dedicated to the issue of refugees.

This research deals with the topic of transgender asylum-seekers and specifically with their refugee status determination process. It aims at finding out if and in which way a queer critical framework could help explain the shortcomings and misunderstandings which often arise during said process. After analysing the main controversial legal and practical issues occurring during transgender asylum-seekers refugee status determination processes, it argues that a good insight into the reason why these issues arise can be found in the queer concept of hierarchies of power, and in the ways they underlie and shape the whole asylum system. Building on that, the research finally argues that these narratives cannot be subverted by simply modernising refugee law but that it is rather the whole conceptual foundations of the asylum system that need to change and that transgender asylum-seekers' experiences could help in showing the way forward.

**Keywords:** migration, refugee status determination, transgender, queer theories, international asylum law

## ACKNOWLEDGEMENTS

*To those who fled and never arrived.*

*To those who arrived and were rejected.*

*To those who could not flee.*

*And to Prof. Mysyrowicz.*

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## ABBREVIATIONS

CAT	(UN) Committee against Torture
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
COI	Country of origin information
DSSH	Difference, Stigma, Shame and Harm
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EDAL	European Database of Asylum Law
ExCom	Executive Committee
EU	European Union
FRA	European Union Agency for Fundamental Rights
FtM	Female to Male
ICD	International Classification of Diseases
ICJ	International Commission of Jurists
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
INS	Immigration and Naturalization Service (US)
IOM	International Organization for Migration
LGBT(IQ/+)	Lesbian, gay, bisexual, trans, intersex and queer
(M)PSG	(Membership of a) particular social group
MtF	Male to Female
RSD	Refugee Status Determination
SOGI(ESC)	Sexual orientation, gender identity expression and sex characteristics
TGEU	Transgender Europe
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
US(A)	United States of America
WHO	World Health Organisation
YP	Yogyakarta Principles

## INTRODUCTION

### i. Why this research?

Transgender asylum-seekers are individuals finding themselves at the intersection of two challenging life conditions: that of being transgender in a world that does not seem to understand and accept this identity quite yet on one side, and that of looking for asylum in a foreign country because of one's fear for one's own life on the other. This peculiar condition of vulnerability and the relevance that further analysis and investigation on the topic could constitute for many different fields of study is to date profoundly underestimated. In the legal field, for instance, only few authors are dealing with this issue, or at least with this issue specifically: while quite a big number of legal scholars are conducting research into various aspects related to the situation of Lesbian, Gay, Bisexual, Transgender, Intersex (LGBTI) asylum-seekers and refugees,<sup>1</sup> very few are actually addressing the "T" aspect in detail.<sup>2</sup> Yet, the chances that this subject offers to explore the links and possible reciprocal influences that queer studies and international refugee law could exercise on each other are quite evident, and the feeling is that such a complex topic should be regarded by international refugee law scholars as a tool for the discipline to develop and change, thus to stay modern. At the same time, it should never be forgotten that, like any category of asylum-seekers, transgender individuals are precisely *individuals* before being an "object of study", and that therefore a broader understanding of their situation from an academic point of view could lead to nothing less than literally saving lives.

This research aims to be a contribution to this academic gap and bring to attention this intersecting field of study. It will firstly offer a brief review of the current legal framework for international protection in place for transgender asylum-seekers; then it will focus on one legal aspect of the asylum procedure, the refugee status determination, and highlight the main obstacles that trans asylum-seekers encounter because of, I argue, miscomprehension of the law and of their identity by the adjudicators; and finally, will try to explain these issues through the lens of the newly emerging international queer legal theory. My main argument will be that the reason of these flaws in the system through which trans asylum-seekers usually slip are not to be found in the law itself but rather in an overarching system which is inscribed in certain hierarchies of power, and that queer theories can help to unveil these hierarchies and to offer a critical framework through which they can be dismantled, for the benefit of the entire international refugee law system.

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<sup>1</sup> Among recent works, see for instance those of Thomas Spijkerboer, Sabine Jansen, Hemme Battjes, Janna Weßels, Volker Türk.

<sup>2</sup> For example Nicole LaViolette, Jenni Millbank, Bina Fernandez.



## ii. What does “transgender” even mean?

What do we mean when we talk about “transgender” individuals? Being transgender is one of the ways people experience their gender identity and is therefore, as any aspect of identity, a multi-faceted, intricate and most importantly personal one, in the sense that every individual will experience it in their own slightly different way. This should be kept in mind anytime we try to have something as enigmatic as identity fit into a legal definition, despite acknowledging how necessary legal definitions are, especially for the purpose of deciding who belongs to a group and who does not, which is the main exercise of international refugee law.

According to the Yogyakarta Principles,<sup>3</sup> the definition of “gender identity” stands for:

each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.<sup>4</sup>

As already mentioned above, every person’s experience of gender is different, but there are nonetheless common traits. Most individuals would, for instance, identify with the category of “cisgender”, which means that the gender they identify with, that they feel their own, the gender role they perform in the society, matches the sex they were assigned at birth.<sup>5</sup> “Transgender” people, on the other hand, feel that their gender identity does not match the sex they were assigned at birth. These people might decide to transition, i.e. go through a long and complex process of alteration of their birth sex, whereas some others might not want to, or might want to do so only partially.<sup>6</sup> The decision of undergoing a transition process may depend on different factors, but many individuals who would wish to transition are unable to do so because of lack of financial resources, lack of emotional and psychological support, lack of facilities, fear of stigma or, relevant to the purpose of our research, fear of persecution.<sup>7</sup> The

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<sup>3</sup> International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, ICJ, Nov. 2006, available at <http://yogyakartaprinciples.org/principles-en/> (last visited 4 Apr. 2018); see below at Chapter 1.3.

<sup>4</sup> *Ibid.*, Introduction, [2].

<sup>5</sup> In simpler terms: individuals being born biologically male who identify with, feel like, perform as *men* and individuals being born biologically female who identify with, feel like, perform as *women*.

<sup>6</sup> “Transition” is rightly described by UNHCR’s Guidelines n.9 as including “some or all of the following personal, legal and medical adjustments: telling one’s family, friends or co-workers; changing one’s name and/or sex on legal documents; hormone therapy; and possibly (but not always) one or more forms of surgery”; United Nations High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, UN Doc. HCR/GIP/12/09, 23 Oct. 2012.

<sup>7</sup> For an interesting study on the topic (though exclusively US-specific), see J. M. White Hughto et al., “Barriers to Gender Transition-Related Healthcare: Identifying Underserved Transgender Adults in Massachusetts,” *Transgender Health* 2, no. 1 (2017), 107–18.

medical definition for individuals who have completed or are completing a transition process is “transsexual”. In this research, the more broadly-encompassing term of “transgender” will though be used, and, more specifically, the definition provided by the United Nations High Commissioner for Refugees (UNHCR) in its Guidelines on International Protection related to Claims to Refugee Status based on Sexual Orientation and/or Gender Identity [Guidelines n.9/SOGI Guidelines]:<sup>8</sup>

Transgender describes people whose gender identity and/or gender expression differs from the biological sex they were assigned at birth. Transgender is a gender identity, not a sexual orientation and a transgender individual may be heterosexual, gay, lesbian or bisexual. Transgender individuals dress or act in ways that are often different from what is generally expected by society on the basis of their sex assigned at birth. Also, they may not appear or act in these ways at all times. For example, individuals may choose to express their chosen gender only at certain times in environments where they feel safe. Not fitting within accepted binary perceptions of being male and female, they may be perceived as threatening social norms and values. This non-conformity exposes them to risk of harm. Transgender individuals are often highly marginalised and their claims may reveal experiences of severe physical, psychological and/or sexual violence. When their self-identification and physical appearance do not match the legal sex on official documentation and identity documents, transgender people are at particular risk. The transition to alter one's birth sex is not a one-step process and may involve a range of personal, legal and medical adjustments. Not all transgender individuals choose medical treatment or other steps to help their outward appearance match their internal identity. It is therefore important for decision makers to avoid overemphasis on sex-reassignment surgery.

This definition contains a lot of elements worth analysing. It can be considered quite “generous” (in the sense that it really seems to seek to encompass all the currently accepted hues of transgender identity known nowadays) but it still presents some alarming signs. I propose here a somewhat thorough analysis of its main components in order to lay down the conceptual and terminological grounds this research will base itself upon.

First of all, it is to be stressed how important for the purpose of refugee law interpretation it is that it is made clear that “not all transgender individuals choose medical treatment or other steps to help their outward appearance match their internal identity”. As we will see, there is a risk that some asylum claims based on the claimant’s transgender identity

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<sup>8</sup> See above footnote 6.

would be dismissed as “not credible” because the claimant has not undergone any medical treatment aimed at transitioning.<sup>9</sup> The stress this definition puts on the fact that medical transition is a (willing or unwilling) choice, thus shifting the focus on the identity aspect, is to be welcomed.

Another element of this definition worth spending some time analysing is the “non-conformity” of transgender individuals, which is here defined as the fact of “not fitting within accepted binary perceptions of being male and female”. The new edition of the very same reference guide that the UNHCR used in its Guidelines describes gender non-conformity today with very different terms and stresses the importance of not intending the term as a synonym of “transgender”. According to the new edition, in fact, “gender non-conforming” is:

[a] term used to describe some people whose gender expression is different from conventional expectations of masculinity and femininity. Please note that not all gender non-conforming people identify as transgender; nor are all transgender people gender non-conforming. Many people have gender expressions that are not entirely conventional – that fact alone does not make them transgender. Many transgender men and women have gender expressions that are conventionally masculine or feminine. Simply being transgender does not make someone gender non-conforming. The term is not a synonym for transgender or transsexual and should only be used if someone self-identifies as gender non-conforming.<sup>10</sup>

Put in simpler terms, this means that some trans people will identify with either the male or the female gender, which would not match the sex they were assigned at birth. Other transgender people, on the other hand, will identify as gender non-conforming precisely because, as the definition says, their gender expression will be different from conventional expectations of masculinity and femininity. The characteristics they will have in common, nonetheless, is that of having their gender<sup>11</sup> not matching the sex they were assigned at birth. Again, this might comprise “binary” transgender individuals (which are usually referred to as FtM, Female to Male, when it is about individuals who identify as men but were assigned a female sex at birth, and MtF, Male to Female, when it is about individuals identifying as female but assigned men at birth), but also all those individuals whose gender identity is “non-binary”, meaning whose gender identity and/or expression fall outside the category of man or woman. Nonetheless,

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<sup>9</sup> On the still very present “credibility test” issue, see below Chapter 2.4.1.

<sup>10</sup> Gay & Lesbian Alliance Against Defamation (GLAAD), *Media Reference Guide - 10th Edition*, GLAAD, Oct. 2016, available at: <https://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf>, (last visited 6 Apr. 2018). The previous one quoted by UNHCR being the 8<sup>th</sup> edition, which did not mention “gender non-conformity” at all.

<sup>11</sup> Which could be feminine, masculine, third gender, agender, genderqueer etc.

even if it is crucial to understand all the different elements and hues that shape transgender identities, the already scarce information and jurisprudence I have found about transgender asylum-seekers always only refer to binary individuals. It is unlikely that the reason of this finding is that only binary transgender individuals have looked for asylum in the past, whereas it is much more possible that this reflects how limited the research and understanding of international (refugee) law is when it comes to non-binarity and gender non-conformity.<sup>12</sup>

Despite not having found throughout this research any account of gender non-conformity in the jurisprudence and very rarely in UNHCR or other organization's documents,<sup>13</sup> the term "*transgender*" will here nonetheless encompass all the experiences of those whose gender identities do not match the sex they were assigned at birth, knowing that this would potentially include non-binary individuals who identify as transgender, but that the totality of our examples refers to binary transgender asylum-seekers (or at least that this is the way these individuals present themselves or are presented). Additionally, the term "*queer*" will be preferred to "LGBT" or "LGBTI",<sup>14</sup> with "queer" being a more fluid and inclusive term for all those who do not identify purely as straight and cisgender;<sup>15</sup> and, in respect of non-binary trans identities, or in case the individual's gender identity is unknown, the pronoun "*they/them*" instead of "he/him" or "she/her" will be used as "default" option.<sup>16</sup> Finally, I will mostly talk about *Sexual Orientation and Gender Identity (SOGI)* claims rather than Sexual Orientation, Gender Identity and Expression and Sex Characteristics (SOGIESC) since the aspect of sex characteristics, in specific the claims and needs of intersex asylum-seekers, are not covered in this research.<sup>17</sup> "SOGI" will be intended as encompassing Gender Expression as well, but SOGI will be used instead of "SOGIE" to conform to the common trend.

Going back to the definition of "transgender" proposed by the UNHCR, it is very relevant to notice how it rightly highlights the difference between sexual orientation and gender identity by specifying that "a transgender individual may be heterosexual, gay, lesbian or bisexual".<sup>18</sup> As it will be shown multiple times throughout this research, the difference is still

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<sup>12</sup> For a study about how the binary narrative structures the international law system, see L. Holzer, *The Binary Gender Model: An Unrecognized Narrative Structuring International Law*, Geneva, Graduate Institute of International and Development Studies, forthcoming.

<sup>13</sup> A UNHCR's discussion paper of 2010 on LGBTI asylum-seekers and refugees protection includes "other gender-variant people" in the definition of transgender; UNHCR, *The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees*, 22 Sep. 2010.

<sup>14</sup> Terms usually preferred by the international community.

<sup>15</sup> There are two meanings of "queer": one intended as an all-encompassing term like the one described above, the other referring to a field of critical theory which constitutes the topic of this research's Chapter Three. For more on the difference between these terms, see below Chapter 3.1.

<sup>16</sup> The possibility of using they/them instead of one of the two binary versions of the third person singular pronoun is every day more used in English-speaking media. See for example The Associated Press, *The Associated Press Stylebook and Briefing on Media Law*, 19 Jun. 2017.

<sup>17</sup> Intersex indicating a variety of conditions in which a person is born with a reproductive or sexual anatomy which does not entirely fit the typical definition of male and female.

<sup>18</sup> On the other hand, it has to be mentioned that the "list" presented is quite exclusive, since it does not leave any space or possibility of inclusion to other sexual orientations such as pansexual, asexual and so on.

not clear in many asylum contexts, and it happens shockingly often that transgender individuals are labelled as homosexuals or that gender identity becomes a subset, a “part” of sexual orientation. It is almost certain that the difficulty I encountered in finding substantial jurisprudence on this topic was also caused by the confusion arising from the difference between sexual orientation and gender identity, in the sense that many trans asylum-seekers who could have applied for asylum on ground of their transgender identity ended up using their (imputed) homosexual orientation instead,<sup>19</sup> or sometimes were even advised to do so by their lawyers, as we will see further on.<sup>20</sup> There is luckily no lack of good practice, as the case of a lesbian transgender woman from Singapore asking for asylum in the UK shows: “The appellant says that she will be unable to marry. It seems to me that technically she could marry another woman, on the basis of being officially male, but I accept that she could not marry another woman on the basis that she is herself also female”.<sup>21</sup>

Finally, a very worrying element needs to be highlighted in the UNHCR definition. When explaining how transgender people’s gender expression usually differs from what is expected from them, the UNHCR adds that “individuals may choose to express their chosen gender only at certain times in environments where they feel safe”. The term “chosen” inserted there should be treated as a red signal, because it carries with itself years and years of discrimination that transgender people had to face because of society dismissing their identity claims as a whim, as something they could simply avoid doing.<sup>22</sup> A gender is not chosen. Nobody would ask a cisgender man at what point in life he chose to identify as a man. One’s sense of one’s own gender is not a rational choice, so much so that some people, such as trans asylum-seekers, risk their life in their attempt to live faithfully to it. The term “chosen” is offensive, misleading and even dangerous, and it is quite surprising that the UNHCR did not pay enough attention on its wording of such a crucial definition.

To conclude, while all this might sound confusing and overwhelming, the importance that a basic understanding of these terms plays cannot be stressed enough, and effort has to be put in the exercise of shifting one’s own paradigms and broadening one’s own horizons so to later approach the issue in an insightful and respectful manner.

### **iii. A numerical overview**

In order to properly understand the size and the implications of the issue analysed here, it would be very useful to turn to numbers and figures to see how many transgender asylum-seekers file asylum claims, where they do so, what the outcomes usually are, if certain

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<sup>19</sup> Put in very colloquial terms: many trans women, for example, might have simply be labelled or labelled themselves as “evidently gay” because of their female gender expression, and the same way around with trans men being misunderstood as “lesbians”.

<sup>20</sup> See below Chapter 2.4.

<sup>21</sup> Upper Tribunal (Immigration and Asylum Chamber), *No. IA/27528/2013* [2014] at 50.

<sup>22</sup> *Doing*, instead of *being*.

countries appear more lenient to grant asylum on this ground than others and so on. Unfortunately, though, finding any kind of data collection about this topic is incredibly problematic.

In Europe, for instance, only Belgium and Norway collect data about the exact numbers of applications filed on LGBTI grounds, while Sweden, Italy and the Netherlands only provide an approximation.<sup>23</sup> Other countries at best share data about the applications filed on the ground of the “membership of a particular social group” (MPSG), but nobody collects the numbers of claims specifically filed on ground of the applicants’ fear of persecution due to their gender identity. There are few cases to be found in the jurisprudence, which are the cases I will rely on during my research, but they are still very likely to be under-representative of the reality. One of the most comprehensive databases on the matter, the European Database of Asylum Law (EDAL),<sup>24</sup> counts with a total of 153 cases dealing with MPSG, out of which 24 relate to sexual orientation, 43 to gender-based persecution (which mostly relates to women who have been or might be victims of female genital mutilation, forced marriage, human trafficking, forced prostitution and so on, but is nowadays considered to apply to persecution against gender minorities, as it will be shown later on<sup>25</sup>) and a total of two only related to trans individuals.<sup>26</sup> Another up-to-date database which deals exclusively with SOGI asylum claims, the SOGICA project’s database,<sup>27</sup> reveals an additional four cases coming from UK courts,<sup>28</sup> 1 coming from the Czech Republic,<sup>29</sup> one from Italy<sup>30</sup> and one from Germany.<sup>31</sup> When it comes to European Courts, there is only one account of a case related to a trans applicant at the European Court of Human Rights (pending),<sup>32</sup> whereas nothing related is to be found in the Court of Justice of the European Union’s jurisprudence. Outside of Europe, in their in-depth study about the jurisprudence of transgender as particular social group,<sup>33</sup> Laurie Berg and Jenni Millbank tried to “gather all publicly available decisions which concerned a trans applicant made by administrative tribunals and courts” throughout several years in English-speaking countries and could only count a slim pool of 37 cases. At the international level there is only one case, before the Human Rights Committee, which dealt with a trans

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<sup>23</sup> T. Spijkerboer & S. Jansen, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, Amsterdam, Vrije Universiteit Amsterdam, 2011.

<sup>24</sup> European Database of Asylum Law (EDAL), <http://www.asylumlawdatabase.eu/>.

<sup>25</sup> See below Chapter 1.1.

<sup>26</sup> Asylgerichthof (Asylum Court), No. A4 213316-0/2008 [2011]; No. E1 432053-1/2013 [2013].

<sup>27</sup> SOGICA project: Sexual Orientation and Gender Identity Claims of Asylum database, [www.sogica.org/database](http://www.sogica.org/database).

<sup>28</sup> Upper Tribunal (Immigration and Asylum Chamber), No. AA/02811/2013 [2013]; No. AA/02811/2013 [2014]; No. IA/53010/2013 [2015]; No. PA/11792/2016 [2017].

<sup>29</sup> Supreme Administrative Court, No. 6 Azs. 102/2007 [2017].

<sup>30</sup> Tribunale di Roma, *Ordinanza n. 53610/2011 R.G.* [2011].

<sup>31</sup> Verwaltungsgericht Dresden, No. A 1 K 30157/07 [2009]; Verwaltungsgericht Potsdam, No. 6 K 338/17.A [2017].

<sup>32</sup> European Court of Human Rights (ECtHR), *Jafarizad Barenji Rana v. Hungary* (Communicated), (2017), Application No. 40888/17.

<sup>33</sup> L. Berg & J. Millbank, “Developing a Jurisprudence of Transgender Particular Social Group,” in *Fleeing Homophobia*, T. Spijkerboer (ed.), London/New York, Routledge, 2013, 121–53.

applicant.<sup>34</sup> An interesting approximation has been proposed by the European Union Agency for Fundamental Rights about the number of SOGI claimants divided per member state, but only for one state, Greece, was the approximation divided between sexual and gender minorities.<sup>35</sup>

The reasons for this scarcity include, amongst others, the fact that many gender identity claims are mistaken for sexual orientation ones as specified above, that territorial commissions or generally lower courts do not publish the content or outcomes of the claims, that cases are not translated, that asylum-seekers are not aware of the fact that their gender identity may constitute a valid ground for their application and so on. On the other hand, the contribution of the civil society on the topic is dense and in continuous development, together with the arising interest of the academia.

This research will thus attempt to situate itself in the last category and to contribute in shedding some light on the legal and practical issues that a still-too-forgotten category, that of transgender asylum-seekers, is unfairly encountering. It will do so by firstly analysing which is the legal framework for protection of transgender asylum-seekers; then focusing on the refugee status determination process, in an attempt to detect the misconceptions present both in the law and in the practice; and then applying the critical framework of queer theories in order to see whether a different perspective could contribute to a new reading of these issues and perhaps suggest a way forward.

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<sup>34</sup> United Nations Human Rights Committee, *M.Z.B.M. v. Denmark* (Admissibility), (2017) No. CCPR/C/119/D/2593/2015.

<sup>35</sup> European Union Agency for Fundamental Rights (FRA), *Current Migration Situation in the EU: Lesbian, Gay, Bisexual, Transgender and Intersex Asylum Seekers*, FRA, Mar. 2017, available at: <https://fra.europa.eu/en/publication/2017/march-monthly-migration-focus-lgbti> (last visited 12 Apr. 2018). The total number of trans claimants is of 7. Decisions not public or not translated.

## 1. THE LEGAL FRAMEWORK FOR PROTECTION

A huge gulf has opened up in attitudes to and understanding of gay persons between societies... It is one of the most demanding social issues of our time. Our own government has pledged to do what it can to resolve the problem, but it seems likely to grow and to remain with us for many years. In the meantime more and more gays and lesbians are likely to have to seek protection here, as protection is being denied to them by the state in their home countries. It is crucially important that they are provided with the protection that they are entitled to under the Convention—no more, if I may be permitted to coin a well-known phrase, but certainly no less.<sup>1</sup>

In what is considered one of the most famous passages of the *HJ (Iran) and HT (Cameroon)* cases,<sup>2</sup> Lord Hope hints at how the constantly growing attention reserved to the characteristics and needs of the queer community around the world nowadays is producing a twofold effect. On one side, it causes a more widespread visibility and acceptance of the community itself, a development of human rights instruments for its protection and the like; on the other, this same visibility makes queer people easier to identify and thus leads to more targeted violence, a resurgence of criminalising laws and generally many more hate episodes, often created by political forces that need a “common enemy” for the population to channel its rage, need for which queer people have historically been the ideal scapegoat. In such a climate, it is only obvious that more and more individuals who are at the receiving end of this hate and violence will look for better life chances in countries where they know they could find them or, in other words, “until and unless the rights of sexual minorities are comparably ensured in most Southern countries, Northern states can expect to receive asylum claims from those at risk, requiring them to strike precisely the balance posited by Lord Hope”.<sup>3</sup> While Lord Hope, Hathaway and Pobjoy were all referring to homosexuals, or generally to sexual orientation minorities, this reasoning applies by extension to transgender individuals alike, perhaps even in a more intense fashion given the discrimination that these people face everywhere in the world.<sup>4</sup>

Legal instruments for international protection have developed and adapted along with this recent increase of visibility of the queer community, including both the “traditional” refugee law regime, meaning the asylum system created by the Geneva Convention relating to the

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<sup>1</sup> Supreme Court, *HJ (Iran) and HT (Cameroon) v Secretary of the State for the Home Department* [2010] UKSC 31 at 3.

<sup>2</sup> For a more thorough analysis of the case, see Chapter 2.3.

<sup>3</sup> J. C. Hathaway & J. M. Pobjoy, “Queer Cases Make Bad Law,” *New York University Journal of International Law and Politics* 44(2), 2012, 315–89.

<sup>4</sup> For an overview over the level of discrimination and violence faced by SOGI minorities in the world, see among others United Nations General Assembly, *Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity: Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/29/23*, 4 May 2015.



status of Refugees of 1951<sup>5</sup> [Refugee Convention] as well as other forms of international protection derived for example from prohibitions of *refoulement* present in various international human rights instruments, or from regional and national asylum systems. As it will be shown, it is quite well established that those fleeing persecution, torture or inhumane and degrading treatment for reasons related to their sexual orientation and gender identity are eligible for international protection, but there is yet a lot of incoherence in the way this principle is implemented and the protection attributed, as well as, again, a lot of confusion when it comes to the specific needs of the transgender group. In this chapter I will present an overview of the legal framework for protection of SOGI claimants and transgender in particular as it stands nowadays.

## 1.1 The UNHCR

The 1951 Refugee Convention, the main pillar on which the international asylum system is based, does not explicitly mention sexual orientation and/or gender identity as one of the possible grounds of persecution. This should not come as a surprise given the historical period in which the Convention was drafted, a period which considered as refugees mostly (if not solely) the political refugees escaping the “Eastern block” and thus saw them as the main beneficiaries of the Refugee Convention,<sup>6</sup> as well as a period in which the deep implications and nuances of human’s sexual and gender identities were far from being considered relevant in the international agenda. The UNHCR, the main interpretative body of the Refugee Convention, has relatively recently started to try and actively fill this gap. The “UN Refugee Agency” firstly manifested an interest in the gender aspect of the refugee definition in the 80’s, when it started analysing the aspect of the persecution of *women* for reasons of their (female) gender and in the specific needs of refugee women. After the World Conference on Women happened in Nairobi in 1985, the UNHCR’s Executive Committee (ExCom) published the *Conclusion n. 39 on Refugee Women and International Protection*, which underlined the vulnerable position of women refugees and prompted States and the UNHCR itself to adopt strategies to address the issue. The UNHCR has ever since adopted and published a wide range of documents on the topic, and it is now well-established that “gender-based persecution” is a legitimate persecution ground, to be found in the refugee definition under the “membership of a particular social group” denomination.<sup>7</sup> Among these documents, the

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<sup>5</sup> Geneva Convention Relating to the Status of Refugees, 189 UNTS I-2545, 28 Jul. 1951 (entry into force: 22 Apr. 1954).

<sup>6</sup> Cfr. for example the 1952 US Immigration Act, which defined refugees as people fleeing “*from a Communist-dominated country or area, or from any country within the general area of the Middle-East*”; 82nd US Congress, “Immigration and Nationality Act,” Pub. L. No. 82–414, 66 Stat. 163 (1952).

<sup>7</sup> This is understood to include both “gender-specific” persecution, which is the serious harm perpetuated against women as women, i.e. specific only to women (for example, female genital mutilation) and “gender-related” persecution, which is perpetuated against women *because* they are women, i.e. it addresses the causal relationship between gender and persecution (for example, women trafficking). For more about the topic, see R. Haines,

*Guidelines n.1<sup>8</sup>* (2002) [the Gender Guidelines] were the first to ever mention SOGI in relation to asylum claims. The guidelines 16 and 17 there contained relate to “persecution on account of one’s sexual orientation”, in which it is explicitly mentioned that “refugee claims based on differing sexual orientation contain a gender element”. The guidelines touch upon the relevance of both one’s “sexuality or sexual practices” and of potential criminalising laws in the country of origin for the establishment of persecution during the refugee status determination process. From there on, the UNHCR has been analysing the issue of claims made by queer refugees more and more and providing substantial sources for interpretation. The most relevant documents in this sense are the *Guidance Note* (2008),<sup>9</sup> the *Discussion Paper* (2010),<sup>10</sup> both of which were then included and replaced by the *Guidelines n.9* (2012).<sup>11</sup> Without explaining in detail the content of the documents just enlisted, from which I will nonetheless heavily draw in the next section of this chapter, it is interesting to briefly touch upon the development of the concept of gender and its interrelation with the concept of SOGI throughout them.

As seen before, the 2002 Gender Guidelines, mostly related to the protection of women refugees, briefly mention sexual orientation as relevant to the assessment of a persecution ground because it *contains a gender element*. The 2008 Guidance Note on SOGI claims then subverts the narrative by stating that “the Note supplements and should be read in conjunction with UNHCR’s Guidelines 1 which *remain applicable to LGBT asylum claims made by both men and women*”,<sup>12</sup> thus making it explicit that the reach of the whole Guidelines 1 extends to “LGBTI” asylum claims as well. This is made even clearer thanks to the 2010 Discussion Paper which, aside from the merits of providing a reference glossary for the terms used<sup>13</sup> and introducing for the first time the topic of intersex individuals’ asylum claims, specifies that “although the term ‘gender-based violence’ has mainly been used to describe violence against women and girls, it can also be understood in a broader sense to encompass violence against women and men because of how they experience and express their gender and sexuality”<sup>14</sup> and, at the same time, introduces a new crucial factor, that of “intersectionality”. The Paper

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“Gender-Related Persecution”, in E. Feller, V. Türk & F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge/New York, Cambridge University Press, 2003, 320–50; A. Binder, “Gender and the ‘Membership in a Particular Social Group’ Category of the 1951 Refugee Convention,” *Columbia Journal of Gender and Law*, 10(2), 2001.

<sup>8</sup> UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, UN Doc. HCR/GIP/02/01, 7 May 2002.

<sup>9</sup> UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 Nov. 2008.

<sup>10</sup> UNHCR, *Discussion Paper on The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees*, UNHCR Roundtable on Asylum-Seekers and Refugees Seeking Protection on Account of Their Sexual Orientation and Gender Identity, 22 Sep. 2010.

<sup>11</sup> UNHCR, *Guidelines No. 9*.

<sup>12</sup> See above footnote 10 (emphasis added).

<sup>13</sup> Mostly drawing them from the abovementioned Yogyakarta Principles, which is a vivid example on how much weight civil society contribution can have in shaping international refugee law.

<sup>14</sup> See above footnote 11.

states in fact that “the *intersection* between gender, sexual orientation and gender identity needs to be better addressed and understood as it is often at the heart of harm perpetrated against LGBTI individuals”.<sup>15</sup> This crucial addition, which clearly departs from the confusion created with the first gender guidelines (which talked about sexual orientation as containing a gender element without providing any definition and additionally mentioned that those most concerned were *homosexuals, transsexuals and transvestites*, thus completely disregarding the difference between sexual orientation and gender identity) further improves in the 2012 Guidelines n.9, where an explanation of the phenomenon is given: “*intersecting factors* that may contribute to and compound the effects of violence and discrimination include sex, age, nationality, ethnicity/race, social or economic status and HIV status.”<sup>16</sup> The definition of “transgender” analysed in the Introduction is also to be found in the same Guidelines.

Despite some shortcomings, such as the fact that somehow the guidelines still warn about LGBTI individuals harbouring potential feeling of homophobia (only), thus contributing to the continuous erasure or belittlement of transgender experiences, it can well be said that the efforts of the UNHCR to develop its interpretative approach in line with the new findings of social sciences are to be appreciated.

## 1.2 Human rights law and the prohibition of *refoulement*

Individuals fleeing persecution are often granted international protection through regional asylum systems<sup>17</sup> or through state’s human rights obligations. Throughout this research, both the Refugee Convention and other international human rights or regional protection mechanisms will be analysed. Thus, it is necessary to outline the main sources of human rights obligations of international protection, and in particular the main one: the principle of *non-refoulement*, which is the prohibition to expel or return (*refouler*) an alien to their country of origin or to another country when there are substantial grounds for believing that the person would be in danger of being subjected to violations of certain fundamental rights. It is considered a principle of customary international law<sup>18</sup> and by some even a *jus cogens*

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<sup>15</sup> *Ibid.*

<sup>16</sup> See above footnote 12. The concept of intersectionality has been shaped and informed in the past years by feminist debates. Its starting point was the growing awareness in feminist circles that not all women have the same struggles since not all are white, Western and able-bodied, and that thus feminist protests had to understand and include the different identity *intersections* in order to be universal and effective. This theory has proved to be very relevant to many other social disciplines, and its inclusion in UNHCR’s guidelines perfectly shows it.

<sup>17</sup> For example, the Common European Asylum System, the Organisation of African Unity’s 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa or the 1984 Cartagena’s Declaration on Refugees applicable in most of the American states.

<sup>18</sup> Sir E. Lauterpacht & D. Bethlehem, “The Scope and Content of the Principle of Non-Refoulement: Opinion” in E. Feller, V. Türk & F. Nicholson (eds.), *Refugee Protection in International Law. UNHCR’s Global Consultations on International Protection*, Cambridge/New York, Cambridge University Press, 2003.

principle.<sup>19</sup> Its legal basis is to be found in art.33 of the Refugee Convention,<sup>20</sup> as well as in many international and regional human rights instruments, for example the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>21</sup> the International Convention for the Protection of All Persons from Enforced Disappearance,<sup>22</sup> the InterAmerican Convention on Human Rights,<sup>23</sup> the Charter of Fundamental Rights of the European Union.<sup>24</sup>

Despite its potential, the prohibition has not been used often in international jurisprudence related to SOGI claims. On an international human rights level, for example, the only UN monitoring body to have heard a complaint based on SOGI grounds was the Committee against Torture in *K.S.Y. vs the Netherlands*,<sup>25</sup> in which a gay Iranian citizen who had been denied refugee status by the Netherlands claimed that his deportation to Iran would constitute a violation of art.3 of the Convention. The Court found that there were no sufficient grounds to establish a real risk since there were no active policies of discrimination against homosexuals in Iran.

When it comes to regional human rights mechanisms, it is interesting to analyse the jurisprudence of the two main European Courts in relation to *refoulement* of SOGI claimants, as, taken together, they are the ones who produced the most jurisprudence on the topic. Art.3 of the European Convention on Human Rights<sup>26</sup> prohibits torture and inhuman or degrading treatment or punishment with no exceptions or limitations. By way of jurisprudential interpretation,<sup>27</sup> the prohibition is now read as containing an absolute prohibition of *refoulement*, which applies to anyone, irrespective of their immigration status, contrarily from the already mentioned art.33 of the 1951 Refugee Convention which applies only to the expulsion of refugees to territories where their “life or freedom would be threatened” on account of “race, religion, nationality, membership of a particular social group or political opinion”. The EU Charter, as we already saw, contains a specific *non-refoulement* provision, together with an explicit right to asylum. Despite the differences between said systems and between the

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<sup>19</sup> C. Costello & M. Foster, “Non-Refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test” in *Netherlands Yearbook of International Law 2015*, The Hague, T.M.C. Asser Press, 2016, 273–327.

<sup>20</sup> See above footnote 5.

<sup>21</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS I-28481, 10 Dec. 1984 (entry into force: 26 Jun. 1987).

<sup>22</sup> International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS I-48088, 20 Dec. 2006 (entry into force: 23 Dec. 2010), art.16.

<sup>23</sup> American Convention on Human Rights, OAS, Treaty Series, No.36, 22 Nov. 1969 (entry into force: 18 Jul. 1978), art.22(8).

<sup>24</sup> Charter of Fundamental Rights of the European Union, [2000] OJ C 364/1, 18 Dec. 2000 (entry into force: 1 Dec. 2009), art.19.

<sup>25</sup> UN Committee against Torture (CAT), *K.S.Y. v. The Netherlands*, No. CAT/C/30/D/190/2001, Decision, 26 May 2003.

<sup>26</sup> European Convention on Human Rights (ECHR), ETS No. 5, 4 Nov. 1950 (entry into force: 3 Sep. 1953).

<sup>27</sup> See ECtHR, *Soering v. United Kingdom*, (Judgment) (1989), Application No. 14038/88; *Chahal v. United Kingdom* (Judgment), (1996), Application No. 22414/93.

different contents and interpretations of their *non-refoulement* provisions, they could play a major role in protecting SOGI claimants, but they have so far barely been used in this sense.

The European Court of Human Rights (ECHR) is, among the two, the Court that dealt or is dealing with the biggest number of SOGI asylum claims.<sup>28</sup> Nevertheless, in none of the adjudicated cases based on art.3 a violation of the same has been found yet, whereas few more are pending.<sup>29</sup> When it comes to gender identity, the only case concerning a trans applicant that the Court was called to pronounce itself upon relates to art.8 of the Convention (Right to respect for private and family life) of a refugee who was already granted the status.<sup>30</sup> When it comes to the Court of Justice of the European Union (ECJ), even less jurisprudence is to be found: the Court only adjudicated upon three SOGI cases so far, none of which concerned art.19 of the Charter, the *non-refoulement* provision. No claim related to gender identity was heard by the Court yet.

Again, the prohibition of *refoulement* contained in the human rights instruments we have just examined could be a very powerful tool for SOGI individuals who are not recognised as refugees but who would yet be subject to persecution, torture or inhuman or degrading treatment if returned to their country of nationality. Yet the numbers show how poorly this instrument has been used. It would be very interesting to further research on the reasons behind the scarce application of this potentially life-saving instrument in relation to SOGI claimants.

### **1.3 Contribution from civil society**

A very relevant contribution from civil society regarding the whole sphere of sexual and gender minorities' human rights protection have been the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. Drafted by the International Commission of Jurists in 2006, they are a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity formulated with the aim of bringing greater clarity and coherence to States' human rights obligations towards this category of individuals. They have been extensively relied upon since their publication, both by scholars and by practitioners, and can be currently considered the main interpretative framework when it comes to queer minorities' human rights protection. The 29 initial principles, which already covered a broad range of civil and political rights, as well as economic, social and cultural ones, were supplemented in November 2017 by ten additional principles (YP +10),<sup>31</sup> following the

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<sup>28</sup> 18 cases in total, both ruled upon and pending, at the time of writing (April 2018).

<sup>29</sup> 13 cases in total, three of which pending.

<sup>30</sup> See above footnote 32, Introduction.

<sup>31</sup> ICJ, *Yogyakarta Principles plus 10 (YP+10) -Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex*

“emerging understanding of violations suffered by persons on grounds of sexual orientation and gender identity and the recognition of the distinct and intersectional grounds of gender expression and sex characteristics”.<sup>32</sup> The aim is, thus, that of encompassing all the SOGIESC minorities. Despite non-binding in nature, the Principles have been said by the UNHCR to “reflect binding international legal standards with regard to *sexual orientation* which are derived from key human rights instruments”<sup>33</sup> (note, once again, UNHCR’s unthoughtfulness when it comes to gender identity). Of particular relevance for the purpose of this research is the Principles’ art. 23, related to the “right to seek asylum”. Among other recommendations, the Principle stresses the need for States to “ensure that a well-founded fear of persecution on the basis of sexual orientation, gender identity, gender expression or sex characteristics is accepted as a ground for the recognition of refugee status, including where sexual orientation, gender identity, gender expression or sex characteristics are criminalised and such laws, directly or indirectly, create or contribute to an oppressive environment of intolerance and a climate of discrimination and violence”.<sup>34</sup> This principle is way too often misapplied, as we will see in the next section. The Principles have been criticised for uncritically embracing (bio)logic and heteronormative family forms.<sup>35</sup> In Chapter Three I will analyse how and why this constitutes a problem, especially for transgender asylum-seekers.

After having listed and briefly analysed the instruments aimed at the protection of transgender asylum-seekers, it is necessary to see if and how these instruments are applied in practice. I will do so by focusing on one specific key moment of the whole process of asylum seeking: the refugee status determination (RSD), which is the crucial process through which an asylum seeker has to pass in order to have the refugee status or some other forms of international protection granted. In order to maintain coherence, I will refer to the constitutive elements of the refugee status as listed in the Refugee Convention, because the refugee definition contained there has historically served as main reference for the determination of who deserves international protection. We will see, though, that the examples and the jurisprudence will come from all sorts of different protection systems.

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*Characteristics*, ICJ, Nov. 2017, available at <http://yogyakartaprinciples.org/principles-en/yp10> (last visited 20 Apr. 2018).

<sup>32</sup> *Ibid.*

<sup>33</sup> See above footnote 9 (emphasis added).

<sup>34</sup> ICJ, *Yogyakarta Principles*, Art.23.

<sup>35</sup> D. Otto, “Queering Gender [Identity] in International Law”, *Nordic Journal of Human Rights*, 33(4), 2015, 299–318.

## 2. REFUGEE STATUS DETERMINATION

Refugee Status Determination (RSD) is a multistage process in which identities are experienced, articulated, framed and translated – literally and figuratively – for the purposes of making the Self intelligible within both the terms of the Convention and the decision maker’s own understandings of human sexuality and behaviour.<sup>1</sup>

Refugee Status Determination is the “legal or administrative process by which governments or UNHCR determine whether a person seeking international protection is considered a refugee under international, regional or national law”.<sup>2</sup> It is a very delicate and vital step in the life of an asylum-seeker, and there is no exaggeration in saying that it can tip the scales towards somebody’s life or death and it should therefore always be conducted with attention, professionalism and fairness. This should ideally mean that, regardless of who the adjudicator is, the outcome of the claim will result in a grant of international protection to those individuals who actually meet the criteria of the refugee definition under the instrument following which their claim is being assessed.<sup>3</sup> Yet, “in many cases, the most important moment in an asylum case is the instant in which a clerk randomly assigns an application to a particular asylum officer or immigration judge”.<sup>4</sup> Critical mistakes at the moment of RSD can happen because of various reasons, both exogenous and endogenous to the process. The exogenous may derive for example from the political pressures exercised on the receiving country in the international arena which are then transposed into the national, regional or local arena,<sup>5</sup> while the endogenous may derive from a personal element such as the adjudicator’s beliefs, background and personality, but also from a genuine lack of knowledge about the subject.

In my view, there is a rampant lack of clarity about the cases of transgender asylum-seekers, not only regarding the psycho-social aspect of their self-identification but also in the way the law is applied to them. While Chapter Three will be dedicated to explaining the “societal” element, this Chapter will attempt to make some clarity on the legal aspect. It will thus start from the 1951 Convention’s refugee definition and, by focusing on its elements

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<sup>1</sup> Berg & Millbank, “Developing a Jurisprudence”.

<sup>2</sup> UNHCR, “Refugee Status Determination”, <http://www.unhcr.org/refugee-status-determination.html> (last accessed: 2 May 2018).

<sup>3</sup> It is useful to remind here that “from an analysis of the international legal instruments relating to refugees, it is obvious that determination of refugee status can only be of a declaratory nature. Indeed, any person is a refugee within the framework of a given instrument if he meets the criteria of the refugee definition in that instrument, whether he is formally recognized as a refugee or not”, Executive Committee for the Programme of the United Nations High Commissioner for Refugees, *Note on Determination of Refugee Status under International Instruments*, UN Doc. EC/SCP/5, 24 Aug. 1977.

<sup>4</sup> Former Attorney General Robert Jackson during a speech in the US Congress in 1940, quoted in J. Ramji-Nogales, A. Schoenholtz, & P. G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 *Stanford Law Review* 295 (2007)

<sup>5</sup> See how S. Shakshari very convincingly shows how “the notion of ‘refugee’ is not abstracted from constitutive temporal and spatial trajectories, [but] it also depends on politics” in S. Shakshari, “The Queer Time of Death: Temporality, Geopolitics, and Refugee Rights,” *Sexualities*, 17(8), 2014, 998–1015.

separately and rely on current jurisprudence, it will highlight step by step which are the most common misunderstandings or mistakes which need to be addressed.

## 2.1 Well-founded fear

According to art.1(2) of the Refugee Convention, one of the constitutive requirements of a refugee is that the person is fleeing because of a *well-founded fear* of being persecuted. As the International Commission of Jurists explains,<sup>6</sup> the test of what constitutes a “well-founded fear” is “forward-looking”, because it asks what will happen to the person concerned if they were to return to their country of nationality or former habitual residence. To determine this, past persecution is a strong indicator of risk of future persecution. That is why if the claimant has already been persecuted in the past and the circumstances have not substantially changed, the “well-founded fear” test is very likely to be met. It can also be the case, though, that those “who have not been persecuted in the past may apprehend fear about a situation entailing a real risk of being persecuted in the future”,<sup>7</sup> or that “those whose behaviour outside their country of origin may, on return, give rise to a real risk that did not previously exist, may also legitimately have a well-founded fear of persecution”.<sup>8</sup>

In the case of transgender asylum-seekers, all three types of fear may have plausibly been experienced. Past persecution may easily have happened when the claimant has come out or has been outed in their country of nationality<sup>9</sup>. As it has already been hinted at in the introduction, it is very likely that, given the lack of knowledge of the phenomenon worldwide, the coming out or outing happened because the claimant was believed to be “homosexual”, which in many areas of the world still can lead to persecution.<sup>10</sup> Even more, past persecution could have happened in case the claimant has started any form of hormone therapy or has undergone surgery, making in that case their own condition even “visible”. Similarly, it is very plausible that an asylum-seeker might “apprehend fear” when the person comes to term about their gender identity throughout their journey to the country of asylum or when in the new country (perhaps by being exposed to the concept of gender identity for the first time, or by meeting other transgender people, or by receiving some psychological assistance for example) and realises the threat that going back to their country of origin would entail. This might happen, for instance, in cases in which an individual initially decided to flee for reasons different than their gender identity and then “apprehended fear” after starting to understand their own gender

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<sup>6</sup> ICJ, *Refugee Status Claims Based on Sexual Orientation and Gender Identity - A Practitioners' Guide (No. 11)*, ICJ, Feb. 2016, available at: <https://www.icj.org/refugee-status-claims-based-on-sexual-orientation-and-gender-identity-icj-practitioners-guide-n-11-launched/> (last visited 5 May 2018).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> “Coming out” being when somebody openly declares their sexual orientation/gender identity, “outing” being the public disclosure of said characteristics by thirds.

<sup>10</sup> UNGA, *Discrimination and violence*.



identity. Lastly, when it comes to the “behaviour [engaged in] outside the country of origin” which might “entail a real risk of being persecuted in the future”, any kind of body modification enacted for reasons of gender dysphoria,<sup>11</sup> any kind of revelation about one’s own situation made public or at least made available to the community of the country the individual is fleeing<sup>12</sup> or, similarly, any kind of public activity that might reveal one’s own transgender identity to those “back home”, may well justify a “well-founded fear” of (future) persecution.

In addition to this aspect, the “well-founded” fear test should comprise both the subjective condition of fear, which stems from the asylum-seeker’s state of mind, but also the more objective element of the “well-founded”, i.e.: there has to be an objective situation of threat to support this sensation of fear. In other words, “the term ‘well-founded fear’ [...] contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration”.<sup>13</sup> This approach has been criticised for excessively focusing on the “subjective” element, which risks being misleading if placed on the same level as the “objective” element.<sup>14</sup> In the case of SOGI claimants, both the subjective and the objective element can be and have been misinterpreted. We will see some examples of recurrent interpretative trends which I believe derive from a misunderstanding of either transgender identity or of the law itself.

### 2.1.1 Concealment

One of the arguments raised in courts to justify a lack of *objective* “well-founded fear” is the so called “concealment option” (sometimes referred to as “discretion requirement”). The argument goes that, if an asylum-seeker would hide their sexual orientation or gender identity once back to their country of origin, then the “well-founded fear” would not be *objectively* justified anymore, because one’s own concealment of one’s own sexual or gender identity would prevent the persecution from happening. This reasoning has been consistently applied in the jurisprudence,<sup>15</sup> even though more and more courts are pronouncing themselves against it, together with the UNHCR.<sup>16</sup> The development of this line of reasoning and the strength it exercised and sometimes still exercises on asylum decision-making is quite surprising. Indeed,

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<sup>11</sup> Gender dysphoria being defined by “strong, persistent feelings of identification with the opposite gender and discomfort with one’s own assigned sex that results in significant distress or impairment”, Psychology Today, “Gender Dysphoria”, <https://www.psychologytoday.com/conditions/gender-dysphoria> (last accessed 9 Jun. 2018).

<sup>12</sup> For instance, through social media such as Facebook, widely used by asylum-seekers nowadays to keep in contact with their families and connections back home. See for example Centre for Citizenship, Identities and Governance (CCIG) - Open University, “Mapping Refugee Media Journeys”, <http://www.open.ac.uk/ccig/research/projects/mapping-refugee-media-journeys> (21 May 2018).

<sup>13</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/FRE/REV.1, Dec. 2011.

<sup>14</sup> Note for example ICJ’s criticism at footnote 6 (above), 58.

<sup>15</sup> See for instance an impressive list in J. Weßels, “Discretion in Sexuality-Based Asylum Cases: An Adaptive phenomenon” in *Fleeing Homophobia* or generally above at footnote 6, 84-106.

<sup>16</sup> UNHCR, *Guidelines No. 9*.

it might be considered a coherent line of thought to think that if you conceal your SOGI, then persecution would not happen, and that thus your fear is not objective. Yet, this goes strongly against the whole purpose of the Refugee Convention. What this reasoning seems not to grasp is the fact that “concealing requires coerced, self-enforced suppression of one’s sexual orientation and/or gender identity”,<sup>17</sup> which might by itself amount to persecution.<sup>18</sup> Having to hide one’s own true self, such an important element of one’s own individuality like gender or sexual identity throughout one’s life, without ever being able to live as one wishes, is something that on the long run could have the same psychological (and even physical) repercussions that persecution by thirds would exercise on an individual. Additionally, this is all if we assume that somebody can conceal their sexual or gender identity for their whole life. Such an attempt might likely bring up suspicions from the circle of friends and family which might then result in outing and subsequent persecution. One could decide as a “protective” measure to conform to the local (heterosexual, cisgender) standards and marry somebody they would not marry otherwise and/or fake one’s own gender, constantly lying about themselves to themselves and to others till death. This is what the “discretion” requirement entails.

One of the strongest arguments against this kind of reasoning is that no competent adjudicator would apply it to a claimant asking for asylum on the basis of political opinion or religion. A “you should just pretend you are not a human rights defender”, or a “you should just not pray in public and conceal your religious beliefs to everybody, while pretending you follow the main local religion in case people ask” pronounced by an asylum judge would create quite a scandal. One’s own political opinion or religious beliefs are considered as elements so constitutive to one’s identity that hiding them would not be an option: quite the contrary, they are considered so sacred that other countries are willing to protect them by granting asylum to the person bearing them. The whole asylum system was actually put in place so that those who had a different *political opinion* would not be persecuted. This ideal was so strong that states committed to giving asylum to individuals whose opinions were very different from the state’s ones just because of the principle that one’s freedom of thought (or of religion) was considered to be so untouchable that the international community could and should not accept that individuals could be persecuted because of that. Why is it then not the case when it comes to gender identity? After all, there is hardly any identity that is deeper than gender identity and yet people are asked to hide it.

“Unfortunately”, no jurisprudence related to concealment can be found in relation to gender identity, so we will have to rely on sexual orientation claims. One of the strongest and furthest-reaching rejections of the “discretion requirement” came from the High Court of Australia in 2002 in the cases *Appellant S395/2002 and S396/2002 v. Minister for*

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<sup>17</sup> See above footnote 6.

<sup>18</sup> Hathaway & Pobjoy, *Queer Cases*.

*Immigration*.<sup>19</sup> The appellants, two gay men from Bangladesh, were denied the refugee status from the Refugee Review Tribunal on the basis that, since they had conducted themselves discreetly in the past without suffering serious harm, then they would not experience it in the future. The High Court reversed the decision and stated that persecution is still real even if those persecuted could eliminate harm by avoiding action, and that it was fallacious to assume that the applicants' conduct was not influenced by fear of persecution when it was precisely that fear which had likely led to their own modification of their behaviour. The Tribunal had thus failed to consider whether the only reason why the applicants acted discreetly was precisely that doing otherwise would have led to persecution or fear thereof. A similar decision came from the United Kingdom in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*,<sup>20</sup> where in 2010 the Supreme Court reversed a judgment of the lower court which had concluded that the appellants could reasonably be expected to tolerate concealment of their sexuality in their country of origin. The appeal judgment contains many strong passages against the discretion requirement which have often been quoted and used in the years following. Lord Roger, for instance, found the discretion reasoning "unacceptable as being inconsistent with the underlying purpose of the Convention since it involves the applicant denying or hiding precisely the innate characteristic which forms the basis of his claim to persecution"<sup>21</sup>, as well as the fact that "sexual identity is inherent to one's very identity as a person"<sup>22</sup>, and that an applicant for asylum does not need to "show that his homosexuality plays a particularly prominent part in his life. All that matters is that he has a well-founded fear that he will be persecuted because of that particular characteristic which he either cannot change or cannot be required to change".<sup>23</sup> All this is clearly applicable to gender identity claims as well.

To sum up, the concealment requirement, if used to deny somebody refugee status because it invalidates the "well-founded fear" test, both shows a misunderstanding that it is that same concealment which proves the very existence of the well-founded fear ("the only way the appellant could live openly in Malaysia without a risk of persecution is by acting discreetly and concealing his sexual orientation and gender identity but I am satisfied that his reason for doing so would be because he genuinely feared that otherwise he would be persecuted"<sup>24</sup>), and, even more broadly, a misunderstanding of the very purpose of the Refugee Convention ("[One's gender identity] is a characteristic that may be revealed, to a

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<sup>19</sup> High Court, *Appellant S395/2002 & Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* [2003] HCA 71.

<sup>20</sup> *HJ and HT* [2010].

<sup>21</sup> Freely taken by ICJ, *Sexual Orientation, Gender Identity, and Justice: A Comparative Law Casebook*, ICJ, Sep. 2011, available at: <https://www.icj.org/sexual-orientation-gender-identity-and-justice-a-comparative-law-casebook/> (last visited 15 May 2018).

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *PA/11792/2016* [2017].

greater or lesser degree, by the way the members of this group behave. In that sense, because it manifests itself in behaviour, it is less immediately visible than a person's race. But unlike a person's religion or political opinion, it is incapable of being changed. To pretend that it does not exist, or that the behaviour by which it manifests itself can be suppressed, is to deny the members of this group their fundamental right to be what they are"<sup>25</sup>).

### 2.1.2 Country of origin information

Another "objective" element that has often been misused to the detriment of SOGI asylum-seekers' claims is that of the country of origin information (COI), which is supposed to be the main tool for adjudicators to understand how the situation in the claimant's country of origin looks when it comes to sexual and gender minorities and to assess, based *also* on that information, whether the "well-founded fear" can be objectively justified. The COI is "decisive in determining who is in need of international protection and should be accorded asylum and protection",<sup>26</sup> from which derives that, at least in principle, "[d]ecision-makers should have access to accurate, impartial and up-to-date country of origin information from a variety of sources",<sup>27</sup> still keeping in mind that "[t]he individual applicant's testimony is the primary consideration in reaching a decision, but 'cannot [...] be considered in the abstract, and must be viewed in the context of the relevant background situation'".<sup>28</sup>

When it comes to SOGI claims, the questions a complete and accurate COI should be able to answer are for instance "Are homosexuality, transgender identity and other non-dominant sexual orientations or gender identities criminalised in the country of origin? What is the general attitude of the authorities towards LGBTIs?"<sup>29</sup> as well as "What is the legal and social position of LGBTI people? Is effective State protection against non-State persecution available for LGBTIs? How is the situation in different parts of the country?"<sup>30</sup> and similar. The problem is that this kind of questions are usually not followed by proper answers. The COI in relation to SOGI asylum claims are both incomplete or misleading on one side and misused on the other side. An example of lack of information which was not dealt with professionally can be found in a Czech case of 2007. The claimant was a trans woman from Ukraine who was denied asylum after the Court examined the COI and, seeing that "transsexuality" was not mentioned anywhere, stated that "Ukrainian society is tolerant towards homosexuality. Therefore, it can be reasonably inferred that it is tolerant towards transsexuality, as well".<sup>31</sup> Not

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<sup>25</sup> See above footnote 20.

<sup>26</sup> UNHCR, *Country of Origin Information: Towards Enhanced International Cooperation*, Feb. 2004, 1.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, 2.

<sup>29</sup> Spijkerboer & Jansen, *Fleeing Homophobia*.

<sup>30</sup> S. Jansen, "Introduction: Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe," in *Fleeing Homophobia*.

<sup>31</sup> *Azs 102/2007* [2007].

only it is blatantly admitted here the lack of understanding (or of care?) towards the differences between sexual orientation and gender identity, but also a quite strong misunderstanding of the role of the COI, which should be, as quoted above, “accurate [...] and up-to-date” and not used as approximation and standalone source. The UNHCR SOGI Guidelines advise that, where there is a lack of country of origin information, the refugee status decision-maker will have to rely on the applicant’s statements alone and that, in these cases, claimants are to be granted the “benefit of the doubt”.<sup>32</sup> Additionally, the ICJ recommends practitioners to consider instructing a country expert when information is lacking, as well as relying on local LGBTI advocacy groups or similar.<sup>33</sup>

In addition to that, Courts might tend sometimes to associate the lack of COI to a lack of issues of persecution, life threats, discrimination and so on in the relevant country. For instance, a trans woman from Romania claimed for asylum in the Netherlands in 2004. The relevant Court had established that, since no information is available about the persecution of this group of people in Romania, then they must not experience any problem. The case was luckily successfully appealed against. The Appeal Court used a Human Rights Watch report as a COI where it was testified how gay men and women often experienced violence and harassment from the police and reversed the judgment by stating that there would be no ground to believe that the treatment could be any better for transsexuals.<sup>34</sup> Indeed, what the first Court failed to understand is that a lack of country material showing persecution against sexual and gender minorities does not necessarily indicate an absence of persecution, but the explanation for this lack of information lies rather in the fact that “the more invisible and hidden a persecuted group is in the country of origin, the less likely there will be documented evidence of abuse, as persecuted individuals will be less likely to report to the police the abuse to which they have been subjected and, therefore, fewer reports documenting reported human rights violations are likely to be generated”.<sup>35</sup> A good practice example against this reasoning comes from the UK, where in the case of *OO (gay men: risk) Algeria v. Secretary of State for the Home Department*,<sup>36</sup> the Home Secretary recognized that, notwithstanding the lack of information regarding the treatment of gay men in Algeria, she knew about the abuses through other past successful claimants.

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<sup>32</sup> See above footnote 16, at para. 64.

<sup>33</sup> Note that the idea of relying on LGBT groups has attracted some criticism as to these groups having a specific agenda and thus their information being not entirely reliable. This has been argued against with the argument that official information produced by diplomats might also be biased because of the country’s will to show a better situation than the real one or because of diplomats not having first-hand knowledge of the topic. See above footnote 6, 53-54.

<sup>34</sup> Rechtbank (Regional Court), *No. 02/94109* [2004].

<sup>35</sup> See above footnote 6, 52.

<sup>36</sup> Upper Tribunal (Immigration and Asylum Chamber), *OO (gay men: risk) Algeria v. Secretary of State for the Home Department*, UKUT 00063, [2013].

Country of origin information is still heavily relied upon to establish the objectivity of the “well-founded fear” of persecution. The information available about the treatment reserved to transgender people in many countries of origin is still scarce, or often it happens that country reports cover the whole “LGBT” issues forgetting the final “T” or leaving it a very marginal space. Until COI about transgender people treatment will not be accurate and complete, adjudicators should refrain from extensively relying upon them, like they still seem to be doing nowadays.

### **2.1.3 Late disclosure (*sur place* claims)**

Another argument which is sometimes used against SOGI claimants and which is said to undermine this time the *subjectivity* of the “well-founded fear” test is that of the late disclosure (also known as *sur place* claims). For reasons of space, I will not analyse this argument in detail, but I still find it relevant to mention it here. Briefly, this reasoning is applied when claimants “disclose” their sexual or gender identity at a later stage of the asylum procedure. This is sometimes seen as weakening the subjectivity of the “well-founded fear” test because, was the claimant *really scared* because of this reason, they would tell it straight away. This is for example often the case in the Netherlands which applies a strict *res judicata* system and thus does not consider neither any evidence which - in theory - could have been submitted at an earlier stage, nor the reasons for this late submission.<sup>37</sup>

This argument has been criticised for failing to understand or assess the reasons why claimants might disclose this aspect at a later stage.<sup>38</sup> Claimants may, for instance: have a comprehensible fear of opening up about these topics, even more in cases where they are not aware about the acceptance level of the society surrounding them (lawyers and adjudicators included) considering that they are people who flee persecution because of that exact same fear; they may come to term with their gender or sexual identity at a later stage, perhaps by being exposed to these concepts only after arriving in the country of asylum, particularly plausible in the case of transgender claimants who might not even be aware of what transgender identity is or might have always confused it with homosexuality; they may not know that SOGI would be accepted as persecution ground and so on.<sup>39</sup>

## **2.2 Persecution**

The second constitutive requirement of a refugee according to Art.1(2) of the Refugee Convention’s definition is that the individual is fleeing because of a well-founded fear of “being persecuted”. The adjudicators will thus have to assess whether the nature of the harmful act(s)

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<sup>37</sup> H. Battjes, “Accommodation: Sur Place Claims and the Accommodation Requirement in Dutch Asylum Policy”, in *Fleeing Homophobia*.

<sup>38</sup> *Ibid.*

<sup>39</sup> For some jurisprudence on the topic, see above footnote 6, Chapter 8.

that prompted the claimant to flee amount(s) to “persecution”. In order to undertake this delicate assessment, one might think that adjudicators could rely on some universal or almost universally accepted definition of persecution, but in fact no such widely accepted definition exists. Drawing from art.33 of the Refugee Convention, it seems somewhat established that “a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution”,<sup>40</sup> but then it is to establish which other human rights’ violations and of which intensity could amount to persecution. It is plausible that this lack of a clear definition has always been intentional: “the term ‘persecution’ has nowhere been defined and this was probably deliberate. It seems as if the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise; in other words, that they “capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men.”<sup>41</sup> It is interesting to notice how this condition of indeterminacy can serve a twofold purpose when it comes to SOGI claims: on the one hand, as highlighted from the quote above, it can leave space for the delineation of new forms of persecution, deriving from new understandings of violations of human rights (characteristic which is fundamental for SOGI individuals, who entered the international human rights agenda only quite recently<sup>42</sup>); on the other hand, though, it leaves the path free for very restrictive interpretations, examples of which will be seen later in this section, and it could cause and has already caused a quite heavy level of inconsistency across jurisdictions.

Leaving a detailed debate around what constitutes persecution aside, it could be helpful for the purpose of our research to at least identify few elements that are widely accepted to be characteristic of persecutory acts. Persecution is a type of harm that is: inflicted by a human persecutor and not for instance by natural catastrophes or poverty alone; it is unjust, since it is per definition discriminatory; it is “cruel” or “serious”; and it is persistent, in the sense that it does not relate to episodic harm, but rather to a sustained or systemic threat of serious and unjust harm.<sup>43</sup> Additionally, it is more and more recognised that it can emanate from the state or private parties, at least as long as the authorities are unable or unwilling to provide effective

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<sup>40</sup> See above footnote 13.

<sup>41</sup> A. Grahl-Madsen, *The Status of Refugees in International Law*, vol. 1, Leyden, A.W. Sijthoff, 1966.

<sup>42</sup> Apart from the already mentioned Yogyakarta principles, a recent important measure of inclusion of SOGI rights in the international human rights law-making process was the appointment of the first UN Independent Expert on violence and discrimination based on sexual orientation and gender identity by the Human Rights Council, Mr. Vitit Muntarbhorn, in September 2016, United Nations Human Rights Council, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, UN Doc. A/HRC/RES/32/2, 15 Jul. 2016.

<sup>43</sup> F. Maiani, “The Concept of ‘Persecution’ in Refugee Law: Indeterminacy, Context-Sensitivity, and the Quest for a Principled Approach,” *Les Dossiers Du Grihl* (28 Feb. 2010), available at: <https://journals.openedition.org/dossiersgrihl/3896#quotation> (last accessed 30 May 2018).

protection from the latter.<sup>44,45</sup> Persecution is additionally harm that can be aimed at an individual, but also at a group or a population, as long as it is connected to one of the persecution grounds.<sup>46</sup> The Convention makes no numerical distinction on this aspect but, for clear political reasons, many asylum countries still tend to apply the “singling out requirement”, or at least to try and reduce the scope of the definition of persecution to the least comprehensive possible in order to avoid “mass influxes”,<sup>47</sup> thus only rigidly applying a strict “threat to life or freedom” test. In order thus to determine what else would constitute persecution we ought to define what constitutes “serious harm”. Again, given time and space constraint, I will only be able to sketch the main parts of the debate so to then be able to apply it to the context of transgender asylum-seekers.

The serious harm test should be assessed using international human rights law as a benchmark, drawing from the strong human rights language in the Preamble of the Refugee Convention,<sup>48</sup> which confirms that “the aim of the drafters [was] to incorporate human rights values in the identification and treatment of refugees, thereby providing helpful guidance for the interpretation [...] of the provisions of the Convention”.<sup>49</sup> In order to then establish which rights are protected under the Convention, human rights standards are the fundamental interpretative tool. In determining whether violations of certain rights constitute persecutory harm, courts and adjudicators must consider the “nature of the right sought to be exercised” and whether the right is a “fundamental” or “core” human right.<sup>50</sup> Apart from threats to life or freedom, then, “other serious violations of human rights on account of a Convention reason

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<sup>44</sup> The European debate on the topic, which saw as contraposing views that of the “accountability theory”, according to which persecution was the harm that was emanated or tolerated by the state, and that of the “protection theory”, for which persecution can also be inflicted by private parties. The EU Qualification Directive [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, OJ L 337, 13 Dec. 2011] solved the debate by making it compulsory for states to abide to the second theory. See above footnote 43.

<sup>45</sup> The first SOGI asylum claim which established this principle was the US case of *Nabulwala v. Gonzales*, where a lesbian woman from Uganda, whose evidence of past history of persecution on grounds of her sexual orientation had been found to be credible, was still rejected the refugee status because these acts were said to amount “only” to “private family mistreatment”. The Court of Appeals reversed the decision by stating that the judge had erred in failing to consider whether the harm had been inflicted by persons whom the government was unable or unwilling to control, United States Court of Appeals for the Eighth Circuit, *Nabulwala v. Alberto R. Gonzales, Attorney General*, No. 05-4128 (2007).

<sup>46</sup> G. S. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 3<sup>rd</sup> ed., Oxford, Oxford University Press, 2007.

<sup>47</sup> For an analysis of how international human rights prevents the possibility of *refoulement* even in case of “massive influx”, see V. Chetail, “Armed Conflict and Forced Migration: A Systematic Approach To International Humanitarian Law, Refugee Law, And International Human Rights Law” in A. Clapham & P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford, Oxford University Press, 2014.

<sup>48</sup> “Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination”.

<sup>49</sup> UNHCR, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001.

<sup>50</sup> S. Ardalán & D. Anker, “Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law,” 44(2), *NYU Journal of International Law and Politics*, 2012, 529 – 557, available at: <https://nyujilp.org/wp-content/uploads/2010/06/44.2-Anker-Ardalan.pdf> (last visited: 20 May 2018).



will always amount to persecution”,<sup>51</sup> but it will then depend on the circumstances of the case the establishment of which other prejudicial actions could be defined as persecution. The Convention’s definition will be satisfied if the act of harm is “so oppressive that the individual cannot be expected to tolerate it so that refusal to return to the country of the applicant’s nationality is the understandable choice of that person”,<sup>52</sup> and, very relevant for SOGI claims, if it is a “measure in disregard of human dignity”.<sup>53</sup> To sum it up and move to the analysis of the transgender-specific issues related to persecution, I simply embrace the ICJ’s position on the topic, which considers that there is persecution if there is a sustained or systemic denial of internationally recognised human rights as enshrined in law and in standards, and if this gives rise to serious harm. This harm, in SOGI claims for instance, ultimately “violates the dignity, personhood, identity and equality of the person, as well as the right to equality before the law and equal protection of the law”.<sup>54</sup>

Transgender asylum-seekers may have endured past persecution or may fear persecutory acts of different forms. Their experience of persecution could, for example, “relate to accessing health care or [...] to an increased risk of exposure to harm if their gender identity is not legally recognized (where, for instance, they are not able to change their name and sex in the civil registry). Such exposure could, for instance, be prompted where a transgender individual is asked by the authorities to produce identity documents and his or her physical appearance does not correspond to the sex as indicated in the documents. Someone who is seeking to change or has changed his or her sex may particularly be perceived as challenging prevailing conceptions of gender roles”.<sup>55</sup> They may additionally be severely marginalised because they are subject to sexual abuse and violence, discrimination, extreme poverty, lack of access to education, health and psychological care, work and housing, which has reported to lead many of them to engage in sex work in order to survive. Transgender persons additionally experience difficulties in transit and at borders when their legal documents do not match their identities, as well as overall difficulties during reception and resettlement.<sup>56</sup> Transgender asylum-seekers might have been subject of cumulative denial of human rights and exposed to physical and sexual violence, examples of which include: threat of execution, forced sterilization,<sup>57</sup> forced castration, “corrective” rape, domestic violence, “honour based” violence, forced sex-working and other forms of physical and psychological harm such as

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<sup>51</sup> See above footnote 13, paras. 51-52.

<sup>52</sup> Australian High Court, *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim*, No. [2000] HCA 55, 26 Oct. 2000, para. 99.

<sup>53</sup> P. Weis, “The Concept of the Refugee in International Law”, *Journal du Droit International*, 928, 1960, at 970.

<sup>54</sup> *Ibid.*

<sup>55</sup> UNHCR, *Guidance Note*.

<sup>56</sup> UNHCR, *Discussion Paper*.

<sup>57</sup> The “infertility requirement” (forced sterilisation in order to be allowed to change one’s name on official documents) was ruled out of the EU only in 2017, ECtHR, *Affaire A.P., Garçon Et Nicot C. France* (Judgment), (2017), Applications No. 79885/12, 52471/13, 52596/13.

harassment, threats of harm, vilification, intimidation, psychological violence.<sup>58</sup> The case of Amanda DuValle is an interesting one to show how this all translates into a real life account of persecution based on one's gender identity:

Amanda DuValle fled her home country three times and has twice been deported from the United States back to Nicaragua. As a little boy, Amanda-Oscar Serrano was nicknamed "Birth Defect." Growing up Oscar mimicked feminine behavior, and preferred to play with dolls and girls. As a consequence, Oscar was subject to constant beatings and verbal assaults from family, neighbors, teachers and other children. Oscar was raped several times, once at age nine, by a family friend. When Oscar was drafted into the Army, the commanding officer threatened to shoot Oscar if he found any proof that Oscar was gay. Oscar deserted the army and came to the United States. When Amanda (Oscar) returned to Nicaragua after deportation, she was detained at the airport, stripped, beaten, raped with a broomstick, had her fingers stapled and warned at home of being unwelcome in the country. Amanda DuValle came to San Francisco by bus, hitchhiking and walking, and spent many nights homeless until she was approached by other transgendered individuals. After ten years of living illegally in San Francisco, Amanda was discovered by the INS [Immigration and Naturalization Service] while in prison. Due to numerous arrests and jail terms for larceny and prostitution, Amanda was not permitted to seek asylum. However, upon her final detainment by the INS, Amanda received legal aid and avoided deportation. To stop the deportation, Amanda's attorney invoked the U.N. Convention Against Torture, which at the time, was an entirely untested area of immigration law. Avoiding deportation under the U.N. Convention Against Torture requires a higher standard of proof than seeking asylum. At the hearing, Amanda's attorneys set forth evidence including medical and psychological exams, news reports and expert testimony to prove that being gay is illegal in Nicaragua, and thereby Amanda was subject to torture under the color of law. The U.S. Immigration Judge granted Amanda deferral of removal pursuant to the Convention Against Torture. 'While the United States has agreed to abide by the Convention Against Torture, Congress has provided no opportunity for successful applicants to gain residency'. Nonetheless, Amanda maintains that she "would prefer being in jail, because I don't want to return to my country".<sup>59</sup>

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<sup>58</sup> UK Visas and Immigration, *Transgender Identity Issues in Asylum Claims*, Jun. 2011, 5, available at: <https://www.gov.uk/government/publications/dealing-with-gender-identity-issues-in-the-asylum-claim-process> (last visited 12 May 2018).

<sup>59</sup> F. Mohyuddin, "United States Asylum Law in the Context of Sexual Orientation and Gender Identity: Justice for the Transgendered," *Hastings Women's Law Journal*, 12, 2001, 387–410.

### 2.2.1 Criminalisation

In the case of Amanda DuValle, one of the elements that the applicant's attorney puts forward to prove the risk for Amanda to be subject to torture if sent back to her country of origin are "news reports and expert testimony to prove that being gay is illegal in Nicaragua". This statement reveals two very interesting aspects of transgender claims: that of a trans person being put once again in the "*sexual* minority" box on one side, and the issue of criminalisation of "deviant" sexual orientation and/or gender identity in the country of origin as proof of risk of torture on the other. The first aspect, that of Amanda (a trans woman) risking torture because *homosexuality* was illegal in Nicaragua,<sup>60</sup> could be read in different ways. Not having access to further details about her story or about her exchanges with her attorney, we can only presume. If we presume that we are talking about a heterosexual transgender woman, then the reports and testimonies about the illegality of homosexuality in Nicaragua should not bring any additional proof to the claim. We could as well presume that Amanda was a homosexual transgender woman, which would seem to explain why the information about the criminalisation of homosexuality would have been put forward by the attorney. The feeling though is that Amanda was made pass as homosexual, a very frequent "mistake" that many trans people are victims of and that as a result, as we have already seen and will see further on, makes their specific needs and vulnerabilities overseen on one side and prevents researchers from finding numerical and reliable sources and information about trans asylum-seekers on the other side. The reason why the attorney decided to provide the Judge with this information could be either the result of a misunderstanding or lack of awareness of Amanda's situation or a strategic move of using this lack of knowledge and sensitivity about trans-specific issues in asylum contexts in favour of her client.

This brings us to the second aspect, that of criminalisation. Homosexuality has a long history of criminalisation throughout the world, dating back to centuries.<sup>61</sup> Unsurprisingly, even if they still exist, legislations criminalising transgender identity and other variations of gender identity are rarer, because these identities have only recently started being defined.<sup>62</sup> Cross-dressers and similar forms of gender expression "differing from the norm" have existed since ancient times and the stigma attributed to them has changed with the development of mores and customs, as well as with the change of the same concept of "norm". Only quite recently though were transgender people starting to be understood as "gender" variant, while before

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<sup>60</sup> Nicaragua legalised same-sexual relationships in 2008.

<sup>61</sup> See for example: R. Slovenko, "Foreword - The Homosexual and Society: A Historical Perspective," *University of Dayton Law Review*, 10, 1985, 445. Other less common or less known sexual identities (bisexuality, pansexuality and so on) have traditionally received far less attention than homosexuality. Note that some countries only criminalise *male* homosexuality.

<sup>62</sup> For a complete overview of the criminalisation and persecution of trans people throughout the world, see Trans respect vs. Transphobia - Transgender Europe (TGEU), "Criminalisation and Prosecution of Trans People," <https://transrespect.org/en/map/criminalization-and-prosecution-of-trans-people/> (last accessed: accessed 13 May 2018).

they were simply being considered as an extended version of homosexuals or simply people with “quirky habits”. Countries are thus adapting their legislations in order to accommodate this group’s needs or better integrate them in the society, even though huge steps are still to be made.<sup>63</sup> This “scarcity” of criminalising laws,<sup>64</sup> nonetheless, does not mean anything to trans asylum-seekers as long as they will be *understood* as homosexual. If countries and perpetrators do not know the difference between sexual orientation and gender identity, or do not care, transgender people will still be persecuted as “gay”, or anyhow as individuals whom society should get rid of. It is for this reason that I deem it important to analyse the second aspect that Amanda DuValle’s case highlighted above: how criminalising laws across countries of origin are regarded as a proof for the “persecution” test.

In the world, 72 States have laws criminalising sexual orientation in place, out of which 45 also specifically mention women. Among these 72, 13 provide for death penalty (implemented in eight of them). Other punishments take the form of imprisonment, lashing, detention and so on.<sup>65</sup> In some of the countries, provisions do not mention sexual activities specifically, but rather “unnatural” or “indecent” behaviour, “acts against the order of nature” or similar. All these laws are considered here as “criminalisation”. As already said, these laws are almost always exclusively directed to sexual minorities, but “it is not very bold to assume that in countries explicitly prohibiting consensual male-male sexual acts, thus reflecting the homophobic attitude of the authorities, [...] trans and intersex people will also risk persecution by the state. As an LGBTI person living in such a country, one always risks being arrested by the state authorities, and at the same time violence and discrimination by fellow citizens, family, neighbours, in the street, in the workplace, at school, in hospital, etc. will go unpunished”.<sup>66</sup> The current debate is whether and, if so, in which way, the existence of these laws is relevant to the assessment of persecution.

If we take the example of Europe we can see how in most European countries the mere existence of criminalising laws is not sufficient to meet the persecution test: most countries require additional proofs that these laws are enforced. In some countries, however, not even enforcement is sufficient: it is required that the applicants show indications that persecution will take place in their specific case.<sup>67</sup> For example, in 2009 an Irish Tribunal refused to grant

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<sup>63</sup> On the international level, the long-overdue declassification of “gender incongruence” as a mental disorder should soon be undertaken by the World Health Organisation, hopefully in the International Classification of Diseases (ICD-11) due by the end of 2018: S. Love, “The WHO Says Being Transgender Is a Mental Illness. But That’s about to Change,” *Washington Post*, Jul. 2016, available at: <https://www.washingtonpost.com/news/morning-mix/wp/2016/07/28/the-w-h-o-says-being-transgender-is-a-mental-illness-but-thats-about-to-change/> (last accessed: 13 May 2018).

<sup>64</sup> Which does not equate to a lack of legal or institutional challenges posited on trans individuals by their countries: see for instance the lack of hate speech and hate crimes prohibition, the lack of health care assistance, lack of gender recognition laws and so on.

<sup>65</sup> Data of 2017. Taken from International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), “Maps - Sexual Orientation Laws,” available at: <https://ilga.org/maps-sexual-orientation-laws>, (last accessed: 13 May 2018).

<sup>66</sup> S. Jansen, “Introduction: Fleeing Homophobia”.

<sup>67</sup> For a detailed overview, see above footnote 29.

asylum to a lesbian Pakistani woman's by asserting that, despite recognising that homosexuality was a criminal offence in her country of origin, in practice "the government rarely prosecuted cases".<sup>68</sup> In another famous occasion, that of the three joined cases *X, Y and Z v. Minister voor Immigratie en Asiel*, the Court of Justice of the European Union, after finding that homosexual individuals coming from countries where there exist criminal laws do form part of a "particular social group", determined nonetheless that "not all violations of fundamental rights suffered by a homosexual asylum-seeker will necessarily reach the level of seriousness required to constitute a persecution within the meaning of Article 1(A) of the Refugee Convention"<sup>69</sup> and placed a lot of freedom and responsibilities on the national authorities to "undertake an examination of all the relevant facts concerning [the applicants'] countries of origin".<sup>70</sup> Similarly, in its first gay asylum decision, the European Court of Human Rights decided that a threat of violation of the claimant's right to respect of private life by criminalisation did not imply that he could not be expelled to that country, since "it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention".<sup>71</sup>

These examples well display both the trends discussed before: in some countries, the existence of criminalising laws is not sufficient but proof of enforcement of these laws is needed; in others, not even that suffices, and applicants have to show that enforcement of those laws will affect them directly and will amount to persecution. In this I see a very problematic (lack of) understanding of what effects criminalising laws have on queer people living in the criminalising countries both on a psychological and, sometimes, even on a physical level. According to the UNHCR, "the very existence of such [criminalising] laws, irrespective of whether they are enforced, may have far-reaching effects on LGBT persons' enjoyment of fundamental human rights".<sup>72</sup> As a jurisprudential basis for this claim, one could also rely on the numerous cases where the European Court of Human Rights found that inhuman and degrading treatment includes acts that "arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them".<sup>73</sup> In confirmation and addition to that, legal scholars have also argued that "the psychological harm that follows from self-repression

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<sup>68</sup> Irish Refugee Appeals Tribunal (2009), see above footnote 29.

<sup>69</sup> Court of Justice of the European Communities (ECJ), Cases C-199/12-C-201/12, *X, Y, Z v Minister voor Immigratie en Asiel*, [2013]. On the issue, see the ICJ's criticism of the Court's reasoning: International Commission of Jurists, *X, Y and Z: A Glass Half Full for 'Rainbow Refugees'? - The International Commission of Jurists' Observations on the Judgment of the Court of Justice of the European Union in X, Y and Z v. Minister Voor Immigratie En Asiel*, Jun. 2014, available at: <http://www.icj.org/wp-content/uploads/2014/06/CommentaryXYZ-Advocacy-2014.pdf>, (last visited 8 Jun. 2018).

<sup>70</sup> *Ibid.*

<sup>71</sup> ECtHR, *F. v. United Kingdom* (Decision), (2014), Application No. 17341/03.

<sup>72</sup> See above footnote 55.

<sup>73</sup> ECtHR, *Soering v. The United Kingdom* (Judgment), (1989), Application No. 14038/88, para. 100; *Bader and Others v. Sweden*, (Decision) (2005), Application No. 13284/04, para. 47; *Case of D. and Others v. Turkey* (Judgment), (2006), Application No. 24245/03, para. 56.

or concealment of sexual identity is an endogenous form of persecution”.<sup>74</sup> Finally, criminalisation contributes to reinforce a general climate of homo- and transphobia, which empowers State and non-State actors to persecute queer individuals without any consequence. In other words, criminalisation makes sexual and gender minorities “into outlaws, at risk of persecution or serious harm at any time”.<sup>75</sup>

This misunderstanding of the persecutory effect criminalising laws might have on SOGI claimants, or this lack of interest in subverting the current interpretational trends, is slowly changing, and there are more and more examples of good practice to turn to. The Italian State, for instance, explicitly regards criminalisation laws in place (whether enforced or not) in the applicant’s country of origin as sufficient evidence to establish persecution. I agree with Sabine Jansen when she writes that this is simply “based on a correct interpretation of the refugee definition”.<sup>76</sup> If, as we already saw, it may be inferred from art.33 of the Refugee Convention that a threat to life or freedom on account of the five persecution grounds always constitutes persecution and if, as we will see later on, members of sexual (and gender) minorities coming from homo- and transphobic countries do belong to a “particular social group”, then it is only obvious that criminalisation of *their identity and the way they express it* undoubtedly constitutes, for the reasons just outlined, a “threat to freedom” (if not “to life”), thus undoubtedly persecution.<sup>77</sup>

### 2.3 The causal link

Another additional requirement for the obtainment of the refugee status is to demonstrate the existence of what is known as the “causal link” or nexus requirement. The refugee definition requires that the refugee is fleeing because of a “well-founded fear of being persecuted *for reasons of*” one of the Convention grounds. I will not spend much time analysing this element, as it is usually considered unproblematic to demonstrate when it comes to SOGI claims. I will just limit myself to sketch few key characteristics: the nexus requirement establishes that there has to be a “nexus”, a “causal link” between the persecution and one of the Convention grounds, which could mean that either the agents of persecution would inflict persecutory harm on the applicant *for reasons of* one of the Convention grounds; or that the failure or inability of the state to protect the applicant effectively stems from one of the grounds; or that the ground itself explains why the applicant is at risk, even if it is not the reason *why* the agents of persecution are inflicting harm or the state is unable or unwilling to protect.<sup>78</sup> Other well-

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<sup>74</sup> See above footnote 18.

<sup>75</sup> See above footnote 67.

<sup>76</sup> *Ibid.*

<sup>77</sup> Note that the dangerous concept of “safe country of origin” has not been analysed here, but it is certainly relevant to the debate.

<sup>78</sup> This is known as the “predicament approach”. See the two explanatory cases outlined in J. C. Hathaway & M. Foster, “The Casual Connection (Nexus) to a Convention Ground Development,” *International Journal of Refugee Law*, 15, 2003, 461–76.

established characteristics are, for instance, that more than one Convention ground can be relevant (which is particularly interesting especially for trans women, since most of them might be fleeing because of their transgender identity *and* because of their female gender) or that people do not need to demonstrate that they are persecuted “only” or “mainly” because of the Convention ground, it is enough if they demonstrate that the ground is one of the reasons. Additionally, these characteristics can be real or imputed, which means that it is enough that the persecutors *believe* that the claimant belongs to a certain group, which in the case of trans asylum-seekers is very relevant since, again, they are mostly imputed a “homosexual particular social group” identity. Finally, there is no need to demonstrate a punitive intent, which means that it is not necessary for the asylum-seekers to show that the perpetrator actually *wanted* to persecute,<sup>79</sup> which is also very relevant for trans asylum-seekers because often persecutory harm might derive from their family’s and friends’ or even state’s attempts to “heal” or “help” them.<sup>80</sup>

Unfortunately though, when hardships do not come from practice and jurisprudence, they might come in the form of scholarly contributions. The most famous critique of the misunderstanding of the causal link when it comes to SOGI claims derives from a piece titled “*Queer cases make bad law*” by Hathaway and Pojboy,<sup>81</sup> which does not only deal with the causal link but it also analyses the issue of “well-founded fear” and of “discretion”, and argues that the Australian and UK Courts misapplied the law in order to reach their preferred result in the two famous cases in which they completely rejected the “discretion reasoning”.<sup>82</sup> First, the authors debatably argue that the Courts failed to find a “well-founded fear” of persecution from the claimants by roughly saying that, was one comprehensibly to be “discreet” if returned home and thus avoid persecution, then the well-foundedness of the fear could not be established. Then, they state that the Courts failed to assess the real human rights costs that forced concealment would give rise to, analysis which is to be welcomed. They argue this by making a distinction between *exogenous* harm, i.e. the one that is commonly understood to come from agents of persecution and that was assessed by the Court (exactly the one that, according to the authors, would not happen were the claimant to be “discreet”), and *endogenous* harm, the one deriving from self-behaviour modification, which might amount to persecution. As a third argument, which is the core one for this section, the authors argue that the Courts, by finding that the Convention’s *for reasons of* requirement is met when the risk follows from trivial activities (referring to Lord Roger’s admittedly stereotypical allusions that gay men shall be

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<sup>79</sup> This debate is not entirely settled. On the need of punitive intent from the perpetrator in trans-specific cases, see V. Neilson, “Uncharted Territory: Choosing an Effective Approach in Transgender-Based Asylum Claims,” *Fordham Urban Law Journal*, 32, 2005, 265.

<sup>80</sup> See above footnote 6, at 171 – 181.

<sup>81</sup> See above footnote 18.

<sup>82</sup> *HJ and HT* [2010]; *Appellant S395 - S396/2002* [2002].

“free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates”<sup>83</sup>), the Courts misunderstood the importance of the link between refugee law and non-discrimination law informing the nexus requirement. The authors in fact argue first that the Courts did well in establishing that “if risk accrues from sexual identity *per se* [...] than the nexus requirement is satisfied”<sup>84</sup>, and that the nexus requirement is satisfied if the risk accrues “in response to at least some activities connected to the person’s identity”<sup>85</sup>, but then claim that “there is, however, a critical distinction between recognizing that a meaningful understanding of non-discrimination norms as the bedrock of the nexus requirement requires attention to action-based risks, and the position suggested in *S395* and *HJ and HT* that there are no limits to which action-based risks are relevant”.<sup>86</sup> This, according to them, is because “if the activity precipitating the risk is no more than marginally connected to one of the forms of protected status, then the ensuing risk of being persecuted cannot reasonably be said to be ‘for reasons of’ a Convention ground”.<sup>87</sup> What this basically means is that the authors deem the nexus requirement satisfied only in relation to certain not marginal “action-based risk activities” related to sexual orientation and gender identity, but not to all of them.

This view has been criticised by many. The main and most relevant criticism is simply that the grounds contained in the Refugee definition are fundamentally defined by beliefs and characteristics, and not by activities. In other words, “activities and actions may be key indicators or expressions of a protected characteristic, but adjudicators’ analysis of the membership in a particular social group ground should focus on immutable and/or unchangeable characteristics and beliefs, not on social perceptions of what sexual orientation or identity means and how it should manifest itself”.<sup>88</sup> This is even more relevant if we think about gender identity: if, following Hathaway’s and Pojboy’s reading, we were to think about “trivial” transgender activities not covered by the *for reasons of* test, we would have a hard time thinking of anything which is not simply a form of gender expression. If something as trivial as wearing high heels in the case of a transgender woman would be considered as not covered by the nexus requirement, that would fail both to see how much of an identity act it is for most trans women to wear what they feel expresses their gender at their best on one hand, and the fact that it is their identity, and thus their freedom to be who they are, that is in fact covered by the Convention. I agree with Spijkerboer when he sees in this reasoning another ghost of the “discretion” requirement, this time “popping up at another location of the refugee definition”.<sup>89</sup>

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<sup>83</sup> *Ibid* (*HJ and HT*), para 78.

<sup>84</sup> See above footnote 81, at 372-374.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid*. at 378.

<sup>88</sup> See above footnote 50.

<sup>89</sup> T. Spijkerboer, “Sexual Identity”.



## 2.4 Membership of a particular social group (MPSG)

As we have already seen, according to art.1(2) the well-founded fear of being persecuted has to be for “reasons of race, religion, nationality, *membership of a particular social group* or political opinion”. Despite the fact that transgender asylum-seekers could be persecuted for other grounds than MPSG, this is usually the most common Convention ground under which they (and all SOGI claimants) claim asylum, and thus the one that we will spend some time upon.<sup>90</sup> Again, I will only sketch few characteristics of the requirement to then see if and how they apply to transgender asylum-seekers situations.

The membership of a particular social groups is not a defined category in the Convention. What is known is that, though, it does not constitute a “catch-all term”, meaning that it is not meant to include all those people who are persecuted not for the other four Convention grounds, since this would render the other grounds superfluous. The MPSG has been defined mostly through interpretation and presents some well-established characteristics. The group categories have been identified by drawing from the other Convention grounds, which relate to characteristics which are either beyond the power of an individual to change (race, sometimes nationality<sup>91</sup>) or so fundamental to the individual’s identity or conscience that they cannot be required to change (religion, political opinion). By applying these concepts, three possible categories of MPSG have been identified: (a) groups defined by an innate or unchangeable characteristic; (b) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (c) groups associated by a former voluntary status, unalterable due to its historical permanence.<sup>92</sup> The group is not (only) defined by its persecution, which means that the group should exist also in absence thereof. Nonetheless, persecutory action(s) towards the group may be a relevant factor in determining its visibility and may “serve to identify or even cause the creation of a particular social group in society”<sup>93,94</sup>. The MPSG is, additionally, an “evolutionary concept”, which means that, since “the Convention includes no specific list of

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<sup>90</sup> It has been reported only in one case that the claimant, a transgender person from Iran, was found to be at risk of persecution for reasons of another Convention ground, since “such behaviour and expression is perceived by the authorities as being a defiant demonstration of political opposition to the current regime”: Immigration and Refugee Board of Canada, *Application No. V93- 01711* [1994].

<sup>91</sup> “The concept of nationality shall not be confined to citizenship but shall include, for example, membership of a group determined by its cultural, ethnic or linguistic identity, common geographical or political origins, or its relationship with the population of another state”. Qualification 6(1)c: UK Border Agency, *The Refugee or Person in Need of International Protection (Qualification) Regulations 2006*, No. 2525, Sep. 2006, available at: <http://www.legislation.gov.uk/ukxi/2006/2525/contents/made> (last visited 20 May 2018).

<sup>92</sup> UNHCR, *Guidelines on International Protection No. 2: ‘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*, UN Doc. HCR/GIP/02/02, 7 May 2002.

<sup>93</sup> UNHCR, *Guidelines No. 1*.

<sup>94</sup> The sociological debate over whether persecutory actions towards sexual and gender minorities *cause* the creation of their particular group in society is a very interesting one, but it unfortunately cannot find space in this research.

social groups, nor does the ratifying history reflect a view that there is a set of identified groups that might qualify under this ground, [then] the term [...] should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms”.<sup>95</sup> This is of course key for all those individuals, such as SOGI claimants, whose core human rights are violated and whose life and freedom are threatened because of characteristics which were not politically relevant at the moment of the drafting of the Convention, or even more in the case of transgender individuals, who were considered not at all worthy of protection back then, if not simply not existent. Another additional characteristic of MPSG is that the size of the group is irrelevant, and not all members of it need to be persecuted for one member to meet the MPSG test.

There are traditionally two different approaches that scholars and jurisprudence have adopted in order to establish MPSG: the “protected characteristics” (or “immutability”) approach, and the “social perception” approach. The first approach “examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate or unalterable for other reasons.”<sup>96</sup> The second approach examines instead “whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large”.<sup>97</sup> Given the discrepancy in application between jurisdictions,<sup>98</sup> the UNHCR opted for a reconciliatory definition, and urged states to follow it:

The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches: a particular social group is a 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.<sup>99</sup>

The focus on the social perception approach has been criticised by many. Foster has for example argued that this excessive stress on the approach, paired up with the requirement of

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<sup>95</sup> See above footnote 92.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> Among English-speaking countries, for instance, Canada and New Zealand opt for the protected characteristics approach, whereas Australia prefers the social perception approach. The US strictly requires the fulfilment of both requirements and the UK, after having long opted for the protected characteristics approach, seem to be shifting towards a “both requirements” test, M. Foster, “The Ground with the Least Clarity: A Comparative Study of Jurisprudential Developments Relating to ‘Membership of a Particular Social Group’”, *UNHCR Legal and Protection Policy Research Series*, PPLA/2012/02, 2012.

<sup>99</sup> See above footnote 92.

“social visibility” and “particularity” recently arisen mostly in the US case law “is likely to develop into a significant barrier to MPSG claims for women and lesbians, gay men and bisexuals”.<sup>100</sup> This does not seem to have been the case, though, for trans claimants. An analysis of the development of trans claims as MPSG claims might explain why.

Tracing down a coherent and complete history of the development of trans claims on account of MPSG is complicated because of the impossibility to find a consistent jurisprudential basis one could rely upon. Yet, with the few cases at hand it is easy to sketch how the recognition of transgender individuals as MPSG simply followed the steps of the recognition of sexual orientation for the same reason. In 1994 a Court in the US confirmed that a gay applicant did form part of a particular social group and ordered for that case<sup>101</sup> to be considered precedent, but a year later, in France, a “transsexual” was still denied the status because it was said that transsexuals fell outside the social group scope of the Convention.<sup>102</sup> Five years later though, after sexual orientation had become more and more an established ground to claim MPSG, gender identity started to follow the same steps: in the year 2000, a US appellate court determined that a *gay man with a female sexual identity and who dressed in a feminine manner* was a member of a particular social group. The immigration judge had found that the claimant’s gender identity was not immutable because [s]he<sup>103</sup> could decide not to dress as a woman, but the Appeal Court rejected this argument as irrelevant because, among other characteristics, members of a particular social group were those “united by an innate characteristic so fundamental to the identities or consciences of its member that members either *cannot or should not be required to change*”, which was that woman’s case.<sup>104</sup> Few successful cases followed,<sup>105</sup> together with the wider and wider recognition of transgender asylum-seekers as MPSG from, for instance, the UNHCR,<sup>106</sup> the EU,<sup>107</sup> many jurisdictions,<sup>108</sup>

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<sup>100</sup> See above footnote 98.

<sup>101</sup> US Board of Immigration Appeals, *Matter of Toboso-Alfonso*, No. A-23220644, [1990].

<sup>102</sup> Commission des recours des réfugiés, *Ourbhi Mohandarezki* [1995, reversed in 1997]. Of course the fact that we are talking about two different jurisdictions is very relevant. Still, both cases are among the earliest that deal with the question of MPSG when it comes to SO or GI respectively.

<sup>103</sup> The judge disrespectfully refers to the claimant using her legal gender (male) instead of her real gender (female), that is why the parenthesis.

<sup>104</sup> US Court of Appeals for the 9th Circuit, *Geovanni Hernandez-Montiel v. INS*, No. 225 F.3d 1084 [2000], emphasis added.

<sup>105</sup> See for example Federal Court, *Hernandez v. Canada (Minister of Citizenship and Immigration)*, No. IMM-2148–02, [2003], where it was additionally confirmed that PSG needs not be the sole Convention ground. In this case, it was found that the well-founded fear of persecution that a homosexual transvestite man who was an LGBTI+ human rights activist had to be returned to Mexico would have been credible both if assessed as MPSG or as political opinion. For an overview of the case-law on the topic, see ICJ, *A Comparative Law Casebook*, 286.

<sup>106</sup> See above footnote 16, at 46.

<sup>107</sup> EU Qualification Directive; which nonetheless unfortunately contains a cumulative requirement of both approaches when it comes to MPSG.

<sup>108</sup> See for Europe S. Jansen, *Good Practices Related to LGBTI Asylum Applicants in Europe*, ILGA Europe Report, May 2014, available at <https://www.ilga-europe.org/resources/ilga-europe-reports-and-other-materials/good-practices-related-lgbti-asylum-applicants> (last visited 15 May 2018), together with other main non-European asylum countries (Canada, Australia) with the notable exception of the US (see above footnote 1).

the academia<sup>109</sup> and civil society.<sup>110</sup> Yet, one of the most detailed and comprehensive studies on the subject to date “indicated that, while trans claims appeared relatively successful (although we state this tentatively given our small sample), the PSG jurisprudence in this area is fundamentally incoherent”.<sup>111</sup> Trans cases are seen as confusing, their claims often misunderstood or the complexity of their experience disregarded, which in turn misdirects the analysis of the other elements of refugee status determination, such as persecution and state protection. They represent an enormous challenge, because they compel adjudicators to commit “to understand applicants’ identities both as they are internally felt and externally perceived”<sup>112</sup>, which does not always happen, or for which adjudicators do not always have the means. I will dedicate a lot of space in the next chapter into trying to understand the reasons behind this incoherency. Here, I will only sketch the main elements.

As a starting point, the most common “mistake” found by the study, and which we already hinted at several times, is that “trans [is] simply treated as a subset or ‘kind’ of sexual orientation leading to erroneous comparisons between social groups and inappropriate application of country of origin information in the assessment of risk of persecution”.<sup>113</sup> We already saw that transgender identity made its way towards PSG through a sort of assimilation with the category of sexual orientation, as it has also happened in many different aspects of asylum law and of law in general. There is nothing intrinsically problematic with this fact, gender identity has had a later development in the realm of (asylum) law and is also considered as less relevant because of political pressures and of sheer numbers. It becomes problematic, nonetheless, when one of the two categories, together with its peculiarities and specific needs, is taken as the only valid or reliable one, whereas the other is not given any credit. Through this process trans identities disappear, become identified with homosexual identities, if they do not become a “manifestation” of them. This happened for example in the famous *Reyes-Reyes* case, in which the connection between the claimant’s sexual *orientation* and “his” transsexual *behaviour* are highlighted no less than by her lawyer despite the claimant, “Luis” Reyes-Reyes, being “a homosexual male with a female sexual identity”<sup>114</sup>, who “dresses and looks like a woman, wearing makeup and a woman’s hairstyle”<sup>115</sup> and who, although not having undergone any sex reassignment surgery, “has had a characteristically female appearance, mannerisms,

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<sup>109</sup> J. C. Hathaway, *The Law of Refugee Status*, Toronto, Butterworths, 1991, 157-161, 163-164; A. L. Wayne, “Unique Identities and Vulnerabilities’: The Case for Transgender Identity as a Basis for Asylum”, *Cornell Law Review*, 102(1), 2016, 241–70; J. Landau, “Soft Immutability and Imputed Gay Identity: Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law”, *Fordham Urban Law Journal*, 32, (2005), 237.

<sup>110</sup> See above footnote 6, Chapter 5.

<sup>111</sup> See above footnote 1, at 123.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> US Court of Appeals, *Luis REYES-REYES, Petitioner, v. John ASHCROFT, Attorney General*, Respondent, No. 03-72100 [2004], para. 2.

<sup>115</sup> *Ibid.*

and gestures for the past 16 [*sic.*] years”.<sup>116</sup> This was, in fact, not even due to a lack of professionalism of the lawyer: it was a concerted technique between the two so that it would be easier for the claimant to be recognised as a member of the uncontested PSG of sexual minority instead of the yet unsure PSG of gender minority,<sup>117</sup> thus having to undergo an entire process of being misnamed, misgendered<sup>118</sup> and deeply misunderstood.

It is true though that transgender asylum-seekers are, most of the time, persecuted as homosexuals, as we saw beforehand. In many places in the world even the concept of gender identity is unknown, there are no words for transgender identity or for transphobic insults. Lacking the language to frame it, discrimination and persecution employ the language of homophobia, which is then the language that the claimants are likely to refer to their adjudicators when recounting about their experiences. All in all, in most of the cases transgender asylum-seekers belong to a “transgender individuals” particular social group and are persecuted for the imputed reason of belonging to a “homosexual individuals” particular social group. The two approaches analysed above lead to two different results, and the suggested reconciliation is not as intuitive. Furthermore, in practice, to require that a claimant who comes from a place where the narrative of gender identity is poorly developed or absent would express something they might be uncomfortable with into a language they are not familiar with, and perhaps into (Western) concepts which are very far from theirs, is a quite heavy burden to place on an individual. Yet, “not acknowledging trans claimants as trans in refugee claims contributes to the erasure of trans identities”.<sup>119</sup> Anticipating a bit what will be discussed later in Chapter Three, it is to stress here that it is a duty of the asylum officer (and of the asylum system as a whole) to frame and assess this “particular social group” by respecting its distinctive and fluid characteristics. In these cases, the burden of formulating a PSG cannot rest on the applicants alone, and adjudicators should interpret what they hear in a proactive way, drawing from hints and transforming them into testimonies and, later, evidences, if they really wish to respect their duty to protect those in need. One of the moments in which this duty is sometimes overseen is when it comes to assessing the “credibility” of the claimants’ self-identification(s).

#### **2.4.1 Credibility**

The test of credibility is another of the stressing moments that most SOGI claimants have to go through during the asylum process. In general, during the hearings, applicants’ statements are the main source of evidence and adjudicators have to base themselves on them (in addition

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<sup>116</sup> *Ibid.*

<sup>117</sup> J. Landau, “Soft Immutability”.

<sup>118</sup> “Refer to (someone, especially a transgender person) using a word, especially a pronoun or form of address, that does not correctly reflect the gender with which they identify”. Oxford Dictionaries online, “misgender”, <https://en.oxforddictionaries.com/definition/misgender>, (last accessed 16 May 2018).

<sup>119</sup> See above footnote 1, at 133.

to other kind of submissions) in order to establish if the claim is truthful, or credible. In the case of SOGI claimants, one of the issues to establish is precisely the credibility of the claimants' identification with the sexual orientation/gender identity they say they identify with. Put in simpler terms, asylum-seekers have to demonstrate that they actually *are* who they claim to be (transgender, gay and so on), or that they are *believed* to be so by persecutors. As Jansen and Spijkerboer already pointed out, this assessment is inherently problematic because it is "based on the assumptions about how a 'true' LGBTI person behaves".<sup>120</sup> There is of course no general or uniform "LGBTI behaviour", and thus the task of assessing whether somebody *really* belongs to a certain sexual or gender minority becomes extremely challenging and risky, because it might end up simply being based on the adjudicators' assumptions and stereotypes of what people belonging "to that category" look like, how they behave and how they feel. This is problematic under many aspects, which is why I will dedicate an entire subsection of the next chapter to the question of stereotyping. Here I will sketch few recurrent elements of the issue and see how they apply to transgender individuals specifically.

Credibility assessments are undertaken in all sorts of ways across the different asylum countries and there is no consistent practice. The strictness of the "test" and the width of its application to asylum claims is sadly likely to grow, at least if asylum countries follow the examples of few European countries in which significant strategic shifts towards the acceptance of SOGI claimants (for instance, the abolition of the discretion requirement) have led to the countertendency of a growing number of claims being rejected because the applicants' identity stories resulted not credible.<sup>121</sup> While not arguing for the abolition of the credibility assessment *tout court*, since it is in line with refugee claims to assess the truthfulness of what is stated, it is out of doubt that the way these "tests" are conducted nowadays is problematic and invasive at best. In Europe, for instance, there are examples of SO applicants' claims being rejected because "the claimant was not familiar with the local gay scene", "it is suspicious that somebody would be married if really gay", "the forensic 'expert' stated that the claimant is heterosexual", "the claimant did not participate in Pride parades", because "the recounted homosexual sexual practice dated many years back", "because a conduct such as the described one would be too risky to engage in in the country of origin" and countless similar narratives.<sup>122</sup> Among the most criticised systems of assessing credibility are invasive medical examinations;<sup>123</sup> uncomfortable and embarrassing questions; heavy reliance on witness statements, all often accompanied by inappropriate language and misconceptions from the adjudicators side. Medical examinations are especially seen as a worrying practice when too

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<sup>120</sup> See above footnote 29, at 47.

<sup>121</sup> For example, the Czech Republic, the United Kingdom, the Netherlands; *ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> Such as the very criticised practice of phallometric testing, now abandoned.

extensively relied upon, i.e. in the case that the establishment of a person's sexual orientation or gender identity relies on a psychologist's or psychiatrist's assessment. A person's sexual or gender identity is a matter of self-identification, not a medical issue.<sup>124</sup> Experts can very well serve the purpose of assessing the psychological or psychiatric issues (fear, anxiety, depression) that claimants feel because of the way their SOGI is seen and dealt with from the society around them, but they cannot assess their *identity*. This is important to stress since this kind of examinations are intrusive and often given without real consent (when a claimant is asked to consent to an examination the lack of consent to which would likely negatively affect the asylum claim, how can that be considered consent?). There are, of course, also cases of good practice, in line with UNHCR's recommendations about relying on self-identification as main indication of the applicant's SOGI, giving the applicant the benefit of the doubt if there is no additional documentation available and so on.<sup>125, 126</sup>

When it comes to trans claimants, nonetheless, credibility assessments do not seem to constitute an obstacle at all. The Hungarian's Office of Immigration and Nationality, known for its practice of requiring medical "expert opinions" from forensic experts with no particular background or interest in SOGI issues, "seems to only refrain from this practice in case of trans persons or gay men who look or behave in a very effeminate manner".<sup>127</sup> In the recorded history of European countries' credibility assessments, only one case is recorded about a trans claimant whose transgender identity was doubted.<sup>128</sup> Probably the main reason to explain this is that, in fact, most of the trans claimants do submit medical evidence which, especially in the case of claimants who have undergone any kind of transition surgery, substantially tilt the balance towards the credibility of their assessment. It has been argued that trans claims tend to be "accepted as credible when the bodies corresponded to a visual typology *and* their narratives to accepted western stereotypes of gender dysphoria".<sup>129</sup> A trans claimant whose

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<sup>124</sup> See additionally principle 18 of the Yogyakarta Principles: "No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed".

<sup>125</sup> See for example Advocate General Sharpston's Opinion in the *A, B and C* case in which she endorses the UNHCR's view that, in the context of assessing asylum claims based on a fear of persecution on grounds of sexual orientation, the applicants' *own definition of their sexual orientation* should form a starting point, thus creating a strong precedent of self-identification as a starting point, as per UNHCR guidelines: ECJ, Opinion of Advocate General Sharpston, *A, B and C*, No. Joined Cases C-148/13, C-149/13 and C-150/13 [2014].

<sup>126</sup> A model which is being more and more used during credibility assessments and has recently been endorsed by UNHCR and IOM is the Difference, Stigma, Shame and Harm model (DSSH) created by Barrister S. Chelvan, who proposed that the questions asked during the interviews should focus on the asylum-seeker's perception of these four elements when in the country of origin. The author himself states that "[i]t is the self-identification of difference with the consequent recognition of stigma, which attaches shame and fears harm which are the core four triggers in the majority (but not all) LGBTI asylum claims". Asylum Aid, *Women's Asylum News 105*, Oct. 2011, available at: <https://www.asylumaid.org.uk>, (last accessed 13 May 2018).

<sup>127</sup> See above footnote 29, at 50.

<sup>128</sup> UK Administrative Court, *AB (Pakistan)*, Application No. unreported [2009], the applicant submitted the claim as lesbian and only later made a fresh claim as a trans man, which was initially disbelieved but eventually lead to refugee status after more careful examination.

<sup>129</sup> See above footnote 1, at 128.

gender expression would substantially correspond with the common, stereotypical one of the gender they “claim to identify with”, and whose narrative of past and present experiences reflect the ones of “feeling trapped in a wrong body” and of “desire to receive first or further surgery soon”, will easily result credible.<sup>130</sup> There is clearly no problem and, on the contrary, it needs to be cherished that these transgender individuals’ account of their gender identity is believed without any major effort. The issue clearly arises with those trans individuals whose narratives do not correspond to the ones we just outlined. The risk for trans asylum-seekers not conforming to stereotypes or expectations to slip through the system and not being properly assessed and understood is real, and it is one of the main issues that this research is trying to highlight. In most of the few cases we analysed, claimants were assessed basing on their visible bodily alterations. Yet, medical evidence for trans people can help, but it is very important to stress that it is not required. It is fundamental for adjudicators to be aware of the fact that

some transgender people identify with their chosen identity without medical treatment as part of their transition, while others do not have access to such treatment. In addition, for those with access to medical treatment, there can be many reasons why a transgender applicant does not wish to seek sex-reassignment/sex-affirming surgery, not least because of the likelihood of sterility and the need to take long-term medication, as well as the costs involved. Thus, while it may be appropriate to ask questions about any steps that a transgender applicant has taken in his or her transition, the fact that a transgender applicant has not undergone any medical treatment or other steps to help his or her outward appearance match the preferred identity should not be taken as evidence that the person is not transgender.<sup>131</sup>

Sadly, I could find no official case-law where the claim of a transgender individual who had not undergone any surgery or similar measures and whose gender expression was not explicit of their gender identity was being assessed, but this might reflect more to the already mentioned lack of public decisions and generally of resources, than a proper understanding of transgender identity throughout the asylum countries’ network.<sup>132</sup>

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<sup>130</sup> See for example what a Canadian tribunal stated in relation to a successful MtF applicant from Venezuela: “The claimant presented herself as a woman. She was dressed as a woman and displayed the characteristics, gestures and behaviour of a woman. Dr. Xxxxxx, in his report, states that the claimant has had breast implant surgery and hormone treatments but also has normal male genitalia. The panel accepts that the claimant is a transsexual”, Canada, Application No. T94- 07129, [1995], cited in *ibid.* at 129.

<sup>131</sup> See above footnote 6, at 50.

<sup>132</sup> A confirmation of the fact that these cases are not inexistent but rather unreported could be found in reliable media and NGOs reports. See for example here the case of a trans woman from Lebanon who was denied asylum in Germany on the basis that she had crossed the Turkish-Greek border as a man and thus her gender identity could not be believed: M. Meaker, “German Deportations Ignore Risks LGBT Asylum Seekers Face at Home,”



## 2.5 State protection

Last but not least, as per art.1(2), refugees are those who are unable or, owing to the well-founded fear of persecution, unwilling to avail themselves of the protection of their country of nationality, or of habitual residence in case of stateless people. As every constitutive requirement, this as well presents many different aspects which are constantly object of debate and it is interpreted and applied differently in different asylum countries, even though there are few widely accepted elements. To start, it is important to stress that only states can provide state protection.<sup>133</sup> It is obvious that, if the state is the persecutor itself, then protection is unavailable, both if the persecution comes from the state directly (in the form of discriminatory laws and policies or similar) or from regional or local representative of a state. Additionally, there lacks protection also in the case of “non-conforming behaviour by official agents which is not subject to a timely and effective rectification by the state”,<sup>134</sup> many examples of which come from police abuses being tolerated and having no consequences. In SOGI cases, this means that where SOGI practices or identities are criminalised, then state protection cannot be said to exist, the contrary being absurd if one thinks that somebody would turn to the police in look for protection in such a case.

The State’s inability to protect is also to be considered. A State is unable to effectively protect its citizens in case of wars, conflicts, major environmental disasters or similar, but also simply when the protection mechanisms are there but for some reason are not implemented. A State effectively protects its citizens when it is able to prevent or discourage possible forms of persecution, not just if it punishes them after they happened. Seen through a SOGI lens, it means that even any lack of anti-discrimination legislation, for example, may be indicative of the state’s inability to protect. Additionally, protection mechanisms could be present but not implemented because of the authorities’ refusal to do so or because of corruption. It is not sufficient for a State to establish for instance a legal protection framework for queer individuals and expect it to guarantee protection from the first moment in cases in which the authorities themselves are homo/transphobic or corrupted. In sum, protection cannot be only *de jure*, it needs to be also *de facto*. This all applies also when persecution emanates from non-State actors: a State can be said to be effectively protecting its citizens when *de facto* protection is available.

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*POLITICO*, 7 Aug. 2017, available at: <https://www.politico.eu/article/gay-refugees-syria-lgbt-german-deportations-ignore-risks-asylum-seekers-face-at-home/> (last visited 20 May 2018). The decision is not public.

<sup>133</sup> See the debate around the EU Recast Qualification Directive’s understanding of this point, i.e. that also “parties or organisations” could ensure State protection in certain case: above footnote 6, at 208.

<sup>134</sup> United Kingdom Court of Appeal (England and Wales), *Svazas v. Secretary of State for the Home Department*, Application No. EWCA Civ 74 [2002], paras. 15-16.

### 2.5.1 Internal relocation alternative

One of the obstacles that SOGI claimants face when having to demonstrate lack of state protection is the so called “internal relocation alternative”. What that means is that claimants can still be denied refugee status if there is another place in their country of origin where they would not face persecution. This alternative is not mentioned in the refugee definition but has been inferred through interpretation. It is nonetheless fundamental to clarify that

international law does not require threatened individuals to exhaust all options within their own country first before seeking asylum; that is, it does not consider asylum the last resort. The concept of internal flight or relocation alternative should therefore not be invoked in a manner that would undermine important human rights tenets underlying the international protection regime, namely the right to leave one’s country, the right to seek asylum and protection against *refoulement*. Moreover, since the concept can only arise in the context of an assessment of the refugee claim on its merits, it cannot be used to deny access to refugee status determination procedures.<sup>135</sup>

The UNHCR SOGI guidelines state that in the majority of cases, intolerance towards LGBTI individuals would exist throughout the whole country, and an internal relocation alternative is thus not to be considered a possibility, since it would expose the claimant to the same kind of persecution or force them into concealment.<sup>136</sup> As all the other aspects we have seen, the internal relocation alternative has been extensively used as a ground to refuse refugee status and its application is at the centre of many debates. Without examining the issue extensively, it is nonetheless important to highlight the controversy of this measure when it comes to SOGI claims. It has been found that elements such as the existence of gay bars or queer rights NGOs in the major cities of certain countries would be sufficient to prove that the place would be safe for an asylum claimant, and thus to send the claimant back. There are also cases in which concealment during relocation has been thought to be a safe measure in order to avoid persecution, even in the case of criminalising countries. These options all have in common that they do not lead to a life free of persecution. “An internal protection alternative can exist only where LGBTI people can leave openly and freely, [...] and where they have effective access to the legal systems for protection against the violence they fear in another part of the country”.<sup>137</sup>

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<sup>135</sup> UNHCR, *Guidelines on International Protection No. 4: ‘Internal Flight or Relocation Alternative’ Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, UN Doc. HCR/GIP/03/04 (23 Jul. 2003), para. 4.

<sup>136</sup> See above footnote 16, para. 54.

<sup>137</sup> See above footnote 66.

### 3. ANALYSIS FROM A QUEER THEORY PERSPECTIVE

#### 3.1 Queer theories: a useful tool

To my knowledge, the exercise of reading and explaining the flaws of the RSD process of transgender asylum-seekers through a queer theoretical framework has only been partially undertaken once,<sup>1</sup> which is quite surprising given the potential that such a reading entails.<sup>2</sup> My belief is that, given queer theories' clear engagement and centrality with the topic of transgender identity, as well as, as will be shown below, with the study of the concept of borders, it is a framework worth applying to this research, both in look for the way in which queer theories can shape and inform our understanding of trans asylum-seekers RSD process, as well as how trans asylum-seekers' specific situation can provide new material for the advancement of queer theories. There will be unfortunately no space here to provide the reader with a substantial overview of queer theories' past and current developments. I will only borrow and explain few key concepts from the discipline, mostly from that branch that deals specifically with legal issues.

As a starting point, it is fundamental to highlight how the meaning of "queer" used in relation to "queer theories" differentiates from the meaning of "queer" that has been used so far throughout this research. While the latter term, as already explained, has simply been preferred when possible over the acronym "LGBTI" as a more inclusive umbrella term used to define all those individuals who do not entirely identify as cisgender and/or straight and/or sexually conforming, the conception of "queer" that will be used from now on relates to a field of critical theory, which developed in the early 1990s and is commonly associated with Judith Butler's work.<sup>3</sup> Because of the field's constant developments and shifting interests, the content of queer theories is hard to define in general, and even less so in such a limited space. It yet feels quite safe to state that their core lies in the attempt of deconstructing commonly accepted identity categories such as gender and sexuality (like "woman" or "homosexual") in order to reveal and criticise the power structures behind them, as well as in theorising "queerness" itself. This research, based indeed on the most recently theorised understandings of "queerness" in relation to gender and sexual minorities, aims at critically assessing and explaining a system, the asylum one, and one of its mechanisms, the refugee status determination, through a queer eye. "Queer" is here used as a critical tool of analysis "that

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<sup>1</sup> Berg & Millbank, "Developing a Jurisprudence".

<sup>2</sup> Of course I have found and extensively drawn from sources which read the topic of trans asylum-seekers or of LGBTI(+) asylum-seekers' RSD through a queer lens, but I could find nothing specifically on trans asylum-seekers' RSD process, or at least not in widely used academic languages such as English or French. In Spanish I found a very interesting study of asylum law generally and Spanish asylum law specifically from a *transfeminist* perspective with which I believe I share aims, methodology and findings (despite the study being a much more in depth one): S. Concha Horrillo, *El derecho estático de las personas en movimiento: derecho de asilo por motivo de género y orientación sexual*, Universidad del País Vasco / Euskal Herriko Unibertsitatea (UPV/EHU), 2017.

<sup>3</sup> J. Butler, *Gender Trouble: Feminism and the Subversion of Identity*, New York, Routledge (Routledge Classics), 1990.

offers ‘resistance to regimes of the normal’<sup>4</sup> and exposes unrecognized power dynamics. This clearly applies to a queer reading of international law as well. In the words of Diane Otto, “[t]he critical insights of queer theory can offer new insights into how international law works to reinforce unequal relations of power, resources and knowledge, and how this might be resisted”.<sup>5</sup>

It is precisely on *power structures* that this Chapter will focus. It is my understanding that queer methodology helps in recognising power hierarchies and unveiling “invisibilities, inequalities and exclusions”<sup>6</sup> not only (even if primarily) in the fields of sex and gender (and their demonisation), but in every field of study. Following this awareness, the upcoming queer analysis of the refugee status determination process of transgender asylum-seekers will try to unveil three distinct narratives of power that I believe are underlying in the way RSD is conducted.

### **3.2 The narratives of Power**

As we have seen, the RSD process of trans asylum-seekers is a multifaceted and intricate one, and its complexity leaves potential space for a wide range of different methodological and (inter)disciplinary assessments, one of which I aim to undertake in this section. I will try to unveil three narratives of Power that underlie and inform the whole RSD process: the gender binary as Power, the Western supremacy as Power and the concept of border as Power.

#### **3.2.1 The gender binary as Power**

Seeing gender as “binary” means believing that there exist only two opposite genders, the masculine and the feminine, the man and the woman, who present different characteristics while at the same time complementing each other. This idea derives from the assumption that there are only two biological sexes (which the existence of intersex persons proves as incorrect) and thus two genders which determine people’s emotions, thoughts and modes of being. Other options, which include people who identify with a “third” or other non-binary gender(s), people whose own sense of gender shifts over time, people who do not identify with any gender and so on<sup>7</sup> are rarely contemplated or talked about in the everyday life, and are rarely legally recognised. The supposed binarity of gender still shapes most of the social interactions that happen around the world and is reflected in the vast majority of national legal

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<sup>4</sup> B. Fernandez, “Queer Border Crossers”, in D. Otto (ed.), *Queering International Law*, Abingdon/New York, Routledge (Routledge Research in International Law), 2017.

<sup>5</sup> D. Otto, “Introduction: Embracing Queer Curiosity”, in D. Otto (ed.), *Queering International Law*, Abingdon/New York, Routledge (Routledge Research in International Law), 2017.

<sup>6</sup> K. Browne & C. Nash, “Queer Methods and Methodologies: An Introduction” in K. Browne & C. Nash (eds.), *Queer Methods and Methodologies: Intersecting Queer Theories and Social Science Research*, Ashgate, 2010, 1-24.

<sup>7</sup> The social media Facebook, for instance, offers a list of 71 genders one can choose from at the time of writing (June 2018), at least in its English-speaking version.

systems. International law makes no exception to the rule, being profoundly binary.<sup>8</sup> The idea that the world is divided between men and women, and that these differences are somewhat “biological” or “natural”, is still very rooted in most parts of the world, and the discrimination and harassment that transgender people face everywhere because of their “unnatural desire to change gender” is nothing but a very evident confirmation of this. Even in countries who have started to accept the idea of people “changing” their gender<sup>9</sup> and are modifying their laws accordingly, these people still have to either be(come) men or be(come) women: not fitting into one of the two categories is still not contemplated, with few countries recognising rights to people whose gender differs from one of the two “classical” ones.<sup>10</sup> Additionally, the idea of “gender” is socially constructed.<sup>11</sup> Already in 1949, Simone de Beauvoir wrote that “[o]ne is not born, but rather becomes, a woman”<sup>12</sup>, arguably laying down the foundations of what we today call feminist theories. Building on her thoughts, later conceptual developments led to the claim that one’s own gender (identity) is not natural but socially constructed through internalisation of social expectations, and that gender “is real only to the extent that it is performed”.<sup>13</sup> Without going further into the meaning and implications of the constructiveness and performativity of gender, it has to be made clear that one cannot try to disentangle the power inscribed in the narrative of the gender binary without keeping in mind that this whole binarity is constructed because so is its main element, gender (identity).<sup>14</sup> What is yet important to point out is nonetheless the fact that to say that something is socially constructed does not reduce the power the concept has in our everyday life.<sup>15</sup> To say that gender is a social construction which is not created by nature but entirely by nurture does not make its effects any less real, and transgender asylum-seekers are a very vivid example of this. Trans asylum-seekers are fleeing a persecution which is based on a social convention rather than on an “essential” characteristic

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<sup>8</sup> For an overview of which countries have recognised a third gender option so far, as well as on how and why international law can be said to be “profoundly binary”, check L. Holzer, “The Binary Gender Model: An Unrecognized Narrative Structuring International Law”, Geneva, The Graduate Institute of International and Development Studies, forthcoming.

<sup>9</sup> Note that nobody “changes” gender. A gender identity is felt and neither changed nor chosen, even if it can switch over time.

<sup>10</sup> Nepal was in 2007 the first country worldwide that legally recognized persons with a gender identity different than female or male, called *hijra* and *kothi* in the local languages. See Supreme Court Division Bench Nepal, *Pant v Nepal*, Writ No. 917 of the Year 2064 BS [2007].

<sup>11</sup> The same applies to sex: I embrace Butler’s argument that sex is also a social construct (“perhaps it was always already gender”). For the complete argumentation, see above footnote 3.

<sup>12</sup> S. de Beauvoir, *The Second Sex*, Paris, Bantam Book, 2014.

<sup>13</sup> See above footnote 3.

<sup>14</sup> Identity being here in parenthesis because I want to stress the fact that one’s own sense of gender is actually one’s own gender identity, despite inaccuracies that see gender identity as something only relevant for transgender individuals. On how this confusion is still very present in international law and is only recently being overcome, for instance by the contribution of the Yogyakarta Principles, see D. Otto, “Queering Gender [Identity] in International Law,” *Nordic Journal of Human Rights*, 33(4), 2015, 299–318.

<sup>15</sup> This becomes very clear if we take the example of money, for instance. Money has very little inherent value (think about banknotes and metal coins, not to say online transactions): it is a social construction in the sense that it does have value because individuals in the society ascribe value to it. Yet, to say money holds no power would be ridiculous. Same goes for the concept of gender.

of the human being, yet this does not make the acts they are victim of any less harmful or dramatic.

How does then this (constructed) binarity specifically harm transgender asylum-seekers? In Iran, for instance, being gay or “transgressing gender norms” (which is seen as sort of the same thing) is considered a crime.<sup>16</sup> Homosexual relationships and any kind of gender transgression are punishable by death, but sex-reassignment surgeries are permitted since 1987, when a law was passed which would allow them as a cure for “diagnosed transsexuals”.<sup>17</sup> The existence of this possibility was considered enough for Sweden to reject applications from Iranian trans asylum-seekers.<sup>18</sup> The dangerous idea behind this reasoning is that a trans person can either decide to go from M to F or from F to M, there is either one or the other. If your country allows you to do so, then there is no reason to fear persecution. If you can undergo medical treatment to conform to one of the two only existing gender options, then your place of origin is safe. There is no space for those not identifying precisely or wanting to “conform” entirely with the other gender or sex, there are only two options and you have to “choose” one.

Queer theory aims at “undoing gender” so to show which omnipresent hierarchy of power it creates everywhere in the world.<sup>19</sup> This strand of critical theory aims at highlighting how people are trapped in the inherent worth they place in masculinity over femininity (M<F) on one side,<sup>20</sup> and in the widespread violence and unacceptance against those who do not fit neither of the two on the other side (/M, /F).<sup>21</sup> Transgender people will never be seen as neatly fitting in one of the two categories, unless their appearance and their gender expression do not completely align to their self-identified gender, fact that in colloquial terms is described as “passing”.<sup>22</sup> Plus, their experiences reinforce the awareness of the constructiveness of gender and of its binarity. In a system as strict as the asylum one, where you receive protection only if you fall into certain categories, the binary conception of gender harms trans people because it harms those who do not fit in one of the two boxes and it forces those that want to be granted

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<sup>16</sup> E. Grandin & A.M. Sörberg, *Unknown People, The Vulnerability of Sexual and Gender Identity Minorities and the Swedish Migration Board's Country of Origin Information System*, Lifos, Migrationsverket, Jan. 2010, available at: <https://lifos.migrationsverket.se/dokument?documentAttachmentId=36416>, (last visited 27 May 2018).

<sup>17</sup> On the tragic account of how sometimes Iranian cisgender gay men decide to undergo a sex-reassignment surgery despite not being transgender just in order to be able to live their relationship without fear of being imprisoned or worse, see Tanaz Eshaghian, *Be Like Others*, Documentary, Sundance Film Festival, 19 Jan. 2008.

<sup>18</sup> S. Jansen, “Introduction: Fleeing Homophobia”.

<sup>19</sup> J. Butler, *Undoing Gender*, New York/London, Routledge, 2004.

<sup>20</sup> Claim which is at the heart of the feminist fight.

<sup>21</sup> On how international human rights law has made it possible to start challenging the first distinction but does not yet question the second claim, see D. Otto, “International Human Rights Law: Towards Rethinking Sex/Gender Dualism” in M- Davies and V. Munro (eds.), *The Ashgate Research Companion to Feminist Legal Theory*, Farnham/Burlington, Ashgate, 2013.

<sup>22</sup> Trans people are usually complimented when they “pass”: M. C. Hauwert, “Why The Focus On ‘Passing’ Transgender People Harms The Trans Community,” *Huffington Post*, 14 Jul. 2016, [https://www.huffingtonpost.com/entry/why-the-focus-on-passing-transgender-people-harms\\_us\\_57880b4ae4b0b107a240a80d](https://www.huffingtonpost.com/entry/why-the-focus-on-passing-transgender-people-harms_us_57880b4ae4b0b107a240a80d), (last visited 27 May 2018).

status to exaggerate their behaviours and show that they pass. In this sense it is seen as power: if it was not already society who pushed for people to conform to one of the two gender expressions, the asylum system conforms to this pressure and reinforces it, contributing to the problem. Accepting trans asylum-seekers' claims without acknowledging this underlying power narrative is very risky, because it perpetuates the same harmful system of gender oppression these people are trying to flee from, and which queer theories warn against. Constraining (LGB)T identities into a small box, subjecting them into clear-cut expectations of what it means to belong to their identity,<sup>23</sup> leaving them no choice but A or B (M or F), forcing them to try to "pass the authenticity test", thus creating a refugee who "moves towards the gift of freedom" but "stays in a fixed universal identity",<sup>24</sup> simply creates the consequence of fortifying the very system these individuals are desperately fleeing from.

### 3.2.2 The Western cultural stereotype as Power

The examples and jurisprudence used throughout this research came entirely from Western jurisdictions, the reasons being simply that Western countries are the only ones that have so far granted different forms of international protection on grounds of transgender identity, or at least the only ones who have registered (in a very limited fashion, as we have seen) such accomplishments. The downside of this, though, is that very often people will be assessed following Western concepts of what "queer" ought to look and behave like. As it was already hinted at when analysing the credibility issue that often arises when having to assess the membership of a particular social group, adjudicators tend to heavily rely, probably even unconsciously, on stereotypes of what sexual and gender minorities should *be* like, and these stereotypes will necessarily be informed by their Western cultural background. There are thus two problems intersecting in most of the cases, especially when adjudicators have not received specific training on how to deal with queer asylum-seekers: the problem of ethnocentric gender and sexuality assumptions on one side, and that of the asylum-seekers' country of origin's *culture* as source of persecution on the other side, which I argue underlies an internalised belief of Western cultural supremacy.<sup>25</sup>

We have already examined examples of how SOGI asylum-seekers are assessed following Western patterns of what it means to be queer (which necessarily stem from assumptions of what it means to be a woman and a man) when we discussed about credibility: queer people are those who "drink flavoured cocktails", go to Pride parades and hang out in the local queer places.<sup>26</sup> In addition, asylum-seekers are assessed following a Western

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<sup>23</sup> T. Spijkerboer, "Sexual Identity, Normativity and Asylum".

<sup>24</sup> S. Shakshari, "The Queer Time of Death."

<sup>25</sup> A. Shuman & C. Bohmer, "Gender and Cultural Silences in the Political Asylum Process," *Sexualities*, 17(8), 2014, 939–57.

<sup>26</sup> See examples in section 2.4.1.

stereotypical perception of how “intolerant and underdeveloped” their countries of origin are: in the case of two Pakistani boys, Kamal and Sarmed, claiming asylum in the Netherlands on account of their homosexual relationship, one of the two recounted of having called his father after having been caught in bed with his boyfriend, and of the father becoming angry at first but then very worried, thus prompting the son to leave the city. The boy’s story did not result credible to the eye of the adjudicators since the paternal advice apparently sounded too much at odds with “the way Islamic and Pakistani society thinks about homosexuality”.<sup>27</sup> The account of a father who wanted to save his son from persecution was disbelieved by some adjudicator’s arrogant and unconscious sense of cultural supremacy. The narrative of power is here evident: transgender and other queer asylum-seekers are in a position of inferiority given by their being “non-Western”,<sup>28</sup> and by having their past life and their current identity screened through an unfamiliar lens in which they do not recognise themselves. When examining trans claims following a very stereotypical, Western and limited idea of what being trans should mean, without being crossed by the thought that these ideas might indeed be stereotypical, Western and limited, adjudicators not only fail in their role of *arbiters*, but also dangerously harm the trans community. When other cultures’ versions of trans people than the erroneous Western idea of “very gay men with makeup” are disbelieved or adjudicated through a sexual orientation lens, when adjudicators do not realise that there are other non-Western forms of transgender,<sup>29</sup> when trans people’s gender identity claim is met favourably only if they have undergone surgery, adjudicators are misunderstanding the nature of trans identities and the nature of the danger faced by trans people.<sup>30</sup> As Senthoran Raj explains, “[a]djudicators disbelieve claims because they misunderstand queer lives”,<sup>31</sup> and the term “queer” disorients them.<sup>32</sup> They

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<sup>27</sup> The Hague District Court, *Second Interview with Sarmed*, No. JV 2010/20 [2009], on file with the author: L. Middelkoop, “Normativity and Credibility of Sexual Orientation in Asylum Decision Making”, in *Fleeing Homophobia*, at 166.

<sup>28</sup> The fact that all asylum-seekers seeking for international protection in the West are “non-Western” is of course a generalisation, though based current trends. In Europe, for instance, the first five countries of origin of first time asylum applicants in 2017 were: Syria, Iraq, Afghanistan, Nigeria and Pakistan: Eurostat, *First Time Asylum Applicants in the EU-28 by Citizenship*, Asylum Quarterly Report, Mar. 2018, available at: [http://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:First\\_time\\_asylum\\_applicants\\_in\\_the\\_EU-28\\_by\\_citizenship,\\_Q4\\_2016\\_%E2%80%93\\_Q4\\_2017.png](http://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:First_time_asylum_applicants_in_the_EU-28_by_citizenship,_Q4_2016_%E2%80%93_Q4_2017.png) (last visited 29 May 2018). There are of course exceptions to the “developing towards developed” rule: see for instance the recent case of a transgender asylum-seeker from the UK who got granted “residency on exceptional humanitarian grounds” in New Zealand because she was victim of persecution on the workplace: E. Ainge Roy, “British Transgender Woman given Residency in ‘safer’ New Zealand”, *The Guardian*, 12 Oct. 2017, available at: <http://www.theguardian.com/world/2017/oct/12/british-transgender-woman-given-residency-in-safer-new-zealand>, (last visited 29 May 2018). Note also the rule of the Common European Asylum System (CEAS) according to which EU nationals cannot ask for asylum in other EU countries.

<sup>29</sup> Think about the *hijras* in Southern Asia, where a third gender is legally recognised (Nepal, Pakistan, Bangladesh, India); the *two-spirits* among the indigenous populations of North America; the *Fa’afine* in Samoa; the *Māhū* in Hawaii and so on.

<sup>30</sup> Berg & Millbank, “Developing a Jurisprudence”, at 141.

<sup>31</sup> S. Raj, “A/Effective Adjudications: Queer Refugees and the Law,” *Journal of Intercultural Studies*, 38(4), 2017, 453–68, 455-456.

<sup>32</sup> *Ibid.*



indeed misunderstand queer lives, and they misunderstand (queer) cultural differences. In the words of Lord Bingham:

[a]n English judge may have, or think that he has, a shrewd idea of how a Lloyds Broker or a Bristol wholesaler, or a Norfolk farmer, might react in some situations which is canvassed in the course of a case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ships' engineer, or a Yugoslav banker [...]. No judge worth his salt could possibl[y] assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even – which may be quite different – in accordance with his concept of what a reasonable man would have done.<sup>33</sup>

Or, applying this reasoning to SOGI issues: “stereotyped notions of a gay man in San Francisco are likely to be culturally and socially so far removed from the behaviour and perception of a gay man in Kinshasa as to be of no probative value whatsoever”.<sup>34</sup> The issue is that, when framing the MPSG of trans claimants, adjudicators and the overall asylum system willingly or unwillingly participate in what is after all a highly abstract and philosophical discussion which goes much beyond the frontiers of the law: the discussion of what is gender identity and what this means for people.<sup>35</sup> In exercising their functions, adjudicators will have to be aware of the multiplicity of the gender experience and, when confronted with transgender claimants, take into account “the born and once was sex, the now-is gender identity and the in-between-ness of felt and outwardly perceived sex and gender relations”.<sup>36</sup> Adequate training is certainly important, and its need has started to be more and more appreciated.<sup>37</sup> Yet, a deeper shift has to happen, a shift from ethnocentrism to ethno-relativism, from thinking that our culture and understanding of the world and its shades is at the centre, to thinking that there is no centre. A shift to recognise other cultures’<sup>38</sup> inherent worth, applying what Charles Taylor has defined “judgments of equal value”.<sup>39</sup> According to the author, *others’* cultures and

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<sup>33</sup> Sir T. H. Bingham, “The Judge as Juror: The Judicial Determination of Factual Issues”, *The Business of Judging: Selected Essays and Speeches*, Oxford/New York, Oxford University Press, 2000, 1–27.; cited, *inter alia*, in UK Administrative Court, *MVN v London Borough of Greenwich*, Application No. [2015] EWHC 1942 [2015], para 30.

<sup>34</sup> ICJ, *Practitioners’ Guide No. 11*, at 36.

<sup>35</sup> See above footnote 27.

<sup>36</sup> See above footnote 30.

<sup>37</sup> N. LaViolette, “Overcoming Problems with Sexual Minority Refugee Claims: Is LGBT Cultural Competency Training the Solution?”, in *Fleeing Homophobia*.

<sup>38</sup> Whether “queer” constitutes a culture, a subculture or none of the two has been debated for years and will not be discussed here. For the purpose of this research I am using a connotation of “culture” which closely resembles that of a group which mostly shares customs and values, thus which potentially includes “queer” or certain manifestations of it. The point here is not of focusing too much on the world “culture”, but rather on the idea that adjudicators would need to recognise the value of groups of people that are different from the group(s) they belong to.

<sup>39</sup> C. Taylor & A. Gutmann, *Multiculturalism and “The Politics of Recognition”: An Essay with Commentary*, 1st ed., Princeton, Princeton University Press, 1992.

identities can be recognised for what they are if they are encountered with openness and with the acceptance of their equal worth, in what the author has described a “fused horizons of standards”,<sup>40</sup> which not only constitutes the context in which a comparison between the “Us” and the “They” is rendered possible, but also equips the “Us” with new criteria which enrich it by integrating the other’s identity. What Taylor thus seems to want to demonstrate is that any judgment of recognition of identities must be taken with the acceptance of fundamental cultural differences but also with the awareness that “We” do not possess universal criteria of judgment, and thus can only make relative comparisons between “Us” and “They”.<sup>41</sup> Even if the author wrote in the context of groups’ and minorities’ struggle for juridical recognition of their cultural difference(s), this concept is easily applicable to the gender majority assessing the gender minority as well. In fact, I argue that adjudicators would need to perform judgments of equal worth in relation to the cultural as well as the gender differences of the individuals they have in front of them, in an exercise of ethno-relativism *and* what we could call gender-relativism. In this sense, queer theory helps us unveiling the narrative of power that lies behind adjudications being made by the cultural and gender majority.<sup>42</sup>

### 3.2.3 The border as Power

Lastly, a constant power narrative present in the life of every (trans) asylum-seekers, and that perhaps constitutes the hardest of all to overcome, is that of the Border. What I mean with “border” here is not only the physical barrier that aims at preventing asylum-seekers from reaching the countries where they want to ask for asylum (be it a wall, kilometres of police, dogs and barbed wire, a geographical feature - sea, mountain ranges, deserts - or an airport passport check), but also the idea of separation, of “my” territory which is not “yours”, these “ideological constructs that generate particular identities, denote power relationships and the ontological boundaries of political space”,<sup>43</sup> the place where “the Third World grates against the First and bleeds”.<sup>44</sup> The narrative of power perpetuated by borders is so evident that I deem it fundamental to insert a brief queer reflection on their very existence here. The risk to be averted is in fact to focus only on the “trans” feature of the issue under examination and to forget the “asylum-seeker” part. It is obvious that trans asylum-seekers are in a condition of extreme vulnerability also for the sole fact of asking for asylum, meaning of being foreigners in

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<sup>40</sup> *Ibid.*

<sup>41</sup> R. A. Klein, *Sociality as the Human Condition: Anthropology in Economic, Philosophical and Theological Perspective*, Philosophical Studies in Science and Religion, v. 3, Leiden/Boston, Brill, 2011.

<sup>42</sup> On generally how Western decision-makers, when confronted with queer claims, need to translate their experience of sexuality and culture not only into the asylum framework they are working under but also in a manner that these experiences become *intelligible to themselves*, and how queer refugees are still trapped in the public/private divide, see J. Millbank, “Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia,” *Melbourne University Law Review*, 26, 2002, at 144.

<sup>43</sup> See above footnote 4.

<sup>44</sup> G. Anzaldúa, *Borderlands: La Frontera: The New Mestiza*, 4th ed., San Francisco, Aunt Lute Books, 2012.

look for protection, in look for that “merciful act” from a State towards the fleeing citizen of another State.<sup>45</sup> The material and immaterial borders that they necessarily have to confront put them in a position of powerlessness which is so relevant that, despite it not being strictly related to RSD, should be mentioned in this research.

Feminist and queer theories have already engaged with the concept of border, which is mostly seen as the physical representation of the state power and complementary to its systemic representation: heteronormativity.<sup>46</sup> The argument goes that “the nation-state is itself made possible by putatively natural heterosexual kinship arrangements”,<sup>47</sup> which is demonstrated by how involved the nation-state is in the regulation of family matters, reproduction and, generally, sexuality.<sup>48</sup> Conjugal, heterosexual unions are considered the “normal” mode of association, on which familial relationships are based. Family units and their offspring grant the continuation of the nation-state and controlling their (cisgender and heterosexual) familial structure while at the same time highlighting its civilisation and the naturalness of its reproductive possibilities assures loyalty and grants power to the state, prime decision-maker when it comes to private matters.<sup>49</sup> In this optic, queer theorists tend to see “LGBT victories” such as gay marriage (and adoption) as heteronormative themselves: queer expressions and communities are domesticated by being granted the faculty of resembling the heterosexual, monogamous and reproductive normality, with the additional advantage of minimising the potential of subversive and alternative modes and arrangements outside of the state control. The main queer critique to this is that, through this mechanism, LGBT advocacy increasingly aligns itself with the state’s regulatory scheme that it sought to dismantle, thus significantly deviating from the queer intent of deconstructing and rethinking about new methods.<sup>50</sup>

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<sup>45</sup> This is written in quotes as a critique to the ongoing political discourse that aims at constructing the issue of granting refugee status as an act of mercy from compassionate States and populations towards others. Granting international protection to those who fulfil the requirements is an international obligation. States who respect such an obligation should certainly be regarded as virtuous and should be applauded, but, in my view, nothing makes these States “merciful”. No theatrical demonstration of gratefulness should be expected from the asylum-seeker who is granted the refugee status, as this refugee will simply be “benefitting” (for as much as being a refugee can account as benefitting of something) from a system which is in place among states, and that states agreed to. All this leaving aside the fact that, at least nowadays, geopolitical games make it so that “merciful States” granting asylum are often those who contributed to the turbulent situations which prompted people to flee in the first place.

<sup>46</sup> See for example D. Otto (ed.), *Queering International Law: Possibilities, Alliances, Complicities, Risks*, Routledge Research in International Law, Abingdon/New York, Routledge, 2017; K. Calavita, “Gender, Migration, and Law: Crossing Borders and Bridging Disciplines”, *International Migration Review*, 40(1), 2006, 104–32; M. Autumn White, “Documenting the Undocumented: Toward a Queer Politics of No Borders”, *Sexualities*, 17(8), 2014, 976–97.

<sup>47</sup> D. Otto, “Resisting the Heteronormative Imaginary of the Nation-State”, in *Queering International Law*, 2017.

<sup>48</sup> *Ibid.*

<sup>49</sup> On how this was used in colonial times by Western countries in order to control the colonised and mark their own superiority, see A. L. Stoler, *Race and the Education of Desire: Foucault’s History of Sexuality and the Colonial Order of Things*, Durham, Duke University Press, 1995. Check also the work of Jemima Repo and her argument that Western capitalist States regulate the fertility rate of their populations by favouring a heterosexual family lifestyle, thereby ensuring that enough human power is available. She calls this the strategy of “biopolitics”: J. Repo, *The Biopolitics of Gender*, 1st ed., Oxford, Oxford University Press, 2015.

<sup>50</sup> This is sometimes referred to as “new-homonormativity”: L. Duggan, “The Sexual Politics of Neoliberalism”, in R. Castronovo & D. D. Nelson (eds.), *Materializing Democracy*, Durham, Duke University Press, 2002, 175–94.

The natural counterpart to this scheme is the protection of borders, the other key feature that the nation-state has to control who belongs and who does not. Both borders and heteronormativity fortify the power of the nation-state, leaving out the non-national and non-fitting the hetero/homo-normative scheme, of which transgender asylum-seekers are perhaps the most relevant example. By constituting the perfect representation of the unwanted, of the one that attacks the nation-state to its core by challenging its two constitutive elements, trans asylum-seekers, I argue, offer to queer theory a big pool of experiences and insights where to draw from in its No-Borders advocacy efforts.<sup>51</sup> At the same time, from the asylum-seekers perspective, the Border constitutes a clear and visible representation of an additional narrative of power, perhaps the hardest to overcome.

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<sup>51</sup> I embrace here Bina Fernandez's argument that queer theory necessarily aligns with a "no borders" politics. See above footnote 4.

## CONCLUSION: QUEERING INTERNATIONAL (REFUGEE) LAW

Diane Otto starts her collection *Queering International Law*<sup>1</sup> with a reminder that “curiosity is always transgressive, always a sign of the rejection of the known as inadequate, incorrect, even uninteresting”<sup>2</sup>. Queer curiosity, according to the author, seeks in fact to critically and in a concerned manner analyse conventions of gender and sexuality and the part they play in signifying hierarchical relations of power, not only in their attachment to material bodies, but to structures of understanding that constitute the norms and practices of international law. This is precisely what this thesis has tried to achieve: to apply queer curiosity to the analysis of the way a branch of international law, the international refugee law one, treats in the norm and in the practice a queer subject, the transgender asylum-seeker, in order to try and unveil the hierarchical relations of power present behind this interaction.

After presenting a brief introduction over the meaning of “transgender” and a numerical overview of the relevant jurisprudence, I offered a brief review of the current legal framework for protection of SOGI asylum-seekers with a focus on transgender individuals. I then concentrated on the Refugee Status Determination procedure and tried to highlight the main obstacles it presents when concretely applied to trans asylum-seekers. This was done through concentrating on each singular aspect of the Refugee Convention’s definition of refugee and analysing recurrent patterns of misapplications of the law or misunderstandings of transgender identities and experiences throughout the jurisprudence. Lastly, I applied queer theories in order to try to highlight three of the narratives of Power that shape the RSD process of trans asylum-seekers: the narrative of gender binary as Power, of Western cultural stereotypes as Power and of the concept of border as Power, in an attempt to expand the discourse beyond the limited and technical one of refugee law.

This need for a conceptual expansion of what is behind the whole asylum system is in fact what this research aimed at highlighting: the fact that other (“non-legal”) theoretical frameworks, such as the critical queer one, may be extremely useful if not fundamental in explaining the reasons behind some of the system’s chronic shortcomings. In this case, the queer critical concept of hierarchical structures of power was used to analyse which narratives are to be blamed, among others, for the malfunctioning of the system. The problem, I argue, does not lie in the refugee definition, in *the law*, itself: Goodwin-Gill was already talking about “new refugees” and innovations of the refugee definition in 1986,<sup>3</sup> and Spijkerboer reminds us nowadays how, through interpretation, the definition has expanded to include new meaning it

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<sup>1</sup> Otto, *Queering International Law*.

<sup>2</sup> *Ibid.*, at 1.

<sup>3</sup> G. S. Goodwin-Gill, “Nonrefoulement and the New Asylum Seekers”, in D. A. Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980s*, Dordrecht, Springer Netherlands, 1988, 103–21; concept which had already been mentioned during the drafting of the 1967 Protocol, see J. C. Hathaway & M. Foster, *The Law of Refugee Status*, 2nd ed., Cambridge, Cambridge University Press, 2014.

did not have beforehand, such as the inclusion of non-State agents as potential agents of persecution or of imputed political opinion as persecution ground.<sup>4</sup> It would suffice to simply think about how ground-breaking in that sense the inclusion of the persecution of women on account of their gender was, through “the door” of the membership of a particular social group ground. The law can be interpreted, it can be conceptually expanded and it can be made malleable, if the elements for this interpretation, this expansion and this malleability are there. Nonetheless, what this research meant to show is that adapting refugee law so as to be “open for asylum claims by LGBTs”<sup>5</sup> is “necessary but not sufficient”.<sup>6</sup> As we have seen, even if the elements are formally there for trans asylum-seekers to fit in the refugee definition, the same definition can and will still be applied incoherently, depending on the different views of gender identity. In this sense, asylum law is one of the arenas where debates about the very *meaning and significance* of gender identity are waged.<sup>7</sup> In addition to that, for as formally impeccable as the law aims to be, it still belongs to a system which is victim of Power hierarchies which cannot aim at dismantling, such as the ones showed in Chapter three.

The struggle highlighted here is thus that of queering international refugee law, intended as “taking a break from the accepted methods of getting things done, [...] to open new ways of seeing international legal problems and expose the limitations of international law’s normal responses to them”.<sup>8</sup> The risk to avert is to think that this means, as it has been thought so far, to render international refugee law more “inclusive”: to find avenues for queer asylum-seekers to fit in the small box that the powerholders accept to welcome them in or to move from a smaller closet to a bigger closet, where they still have to conform to certain patterns, behaviours and expectations. More inclusive ones, but still constraining. In other words, the risk to avert is to have “queer itself go normative”<sup>9</sup> and to conform in what is an inherently gender-non-conforming-minorities exclusive system. It has been shown through this research why such “inclusion” intentions, despite often well-meaning, are still not rendering justice to those they wish to include.

The person who threatens violence [against someone who does not conform to gender norms] proceeds from the anxious and rigid belief that a sense of world and a sense of

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<sup>4</sup> T. Spijkerboer, “Sexual Identity, Normativity and Asylum”, 217-219.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, at 226.

<sup>7</sup> *Ibid.*

<sup>8</sup> Otto, “Introduction: Embracing Queer Curiosity”.

<sup>9</sup> In her piece about the (im)possibility of queering international human rights law, Ratna Kapur argues that the security discourse has integrated and deradicalised the LGBTI rights advocacy efforts, pushing them back into normativity. She argues that, in the field of international human rights law, “queer appears unable to transform or destabilise the normative foundations of human rights that remain firmly embedded in dualistic gender categories and a gender hierarchy, as well as a set of racial and cultural exclusions”. She also argues that there are many ways of reimagining queer radicality outside of the liberal parameters in which it is being constrained nowadays. See R. Kapur, “The (Im)Possibility of Queering International Human Rights Law”, in *Queering International Law*.

self will be radically undermined if such a being, uncategorizable, is permitted to live within the social world. The negation, through violence, of that body is a vain and violent effort to restore order, to renew the social world on the basis of intelligible gender, and to refuse the challenge to rethink that world as something other than natural or necessary.<sup>10</sup>

The gist of the matter is perhaps right here: trans people are “uncategorisable”, at least to the eyes of contemporary society. This uncategorisability is both the reason why they are victims of violence and discrimination throughout the globe, and why they constitute such a challenge when adjudicating their claims as asylum-seekers. Transgender identities are, per definition, fluid. They can be “extremely confronting for refugee law which evinces a preference for static and concrete identity groupings, preferably with external forms of corroboration. The process of asylum claims is built on an unrealistic ideal of a definitive and revelatory self, whereas trans claims necessarily involve fluidity – of sexed status, identification and bodily expression – arising from deeply internal sense of gender and sexuality”.<sup>11</sup> Trans movements are more committed to “identity blurring” than “identity building”,<sup>12</sup> and their fluidity lies at the clash between the philosophical, abstract discussion that is the nature of gender identity on one hand and the need for precision and categorisation of international refugee law on the other. They cannot be categorised because, as inclusive as it can be, the problem does not lie within the (asylum) system’s *creations*, the problem lies within the (asylum) system’s *foundations*.

What I argue here is that instead of a complicated legal issue to solve, this is a golden opportunity for the asylum system to chase in order to reshape itself, in order to transform instead of affirm.<sup>13</sup> Applying queer methods of deconstruction of hierarchies of power to rethink the whole structure would benefit not only queer asylum-seekers, but the asylum legal system as a whole. This is I believe the utopian trajectory that international refugee law should follow: the one that “opens up possibilities of developing radical alternative associations that are not based on gender binaries or sexual hierarchies”,<sup>14</sup> not based on an imposition of the Western over the non-Western, of the citizen over the non-citizen.

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<sup>10</sup> J. Butler, “On Being Beside Oneself: On the Limits of Sexual Autonomy,” in N. Bamforth (ed.), *Sex Rights: The Oxford Amnesty Lectures 2002*, Oxford, Oxford University Press, 2005, 47.

<sup>11</sup> Berg & Millbank, “Developing a Jurisprudence”.

<sup>12</sup> K. L. Broad, “GLB + T?: Gender/Sexuality Movements and Transgender Collective Identity (De)Constructions”, *International Journal of Sexuality and Gender Studies*, 7(4), 2002, 241–64.

<sup>13</sup> Borrowing here from the enlightening proposal of Nancy Fraser that a true social justice can be achieved through transformative rather than affirmative reforms. Affirmative strategies correct inequitable outcomes of social arrangements without distributing the underlying structures that generate them, whereas transformative strategies correct unjust outcomes precisely by restructuring the underlying framework. This, applied to policies of both redistribution and recognition is, according to the author, the way out of the “dilemma of justice”: N. Fraser, “From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age,” *New Left Review*, 1(212), 1995.

<sup>14</sup> See above footnote 9.

I owe this realisation to the experience of transgender asylum-seekers, to whom also goes my utmost respect for the revolutionary act they bring forward by simply *being* and refusing *not to be*.



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