THE RECEPTION OF LGBTIQ+ REFUGEES IN EUROPE

RainboW Refugees Welcome

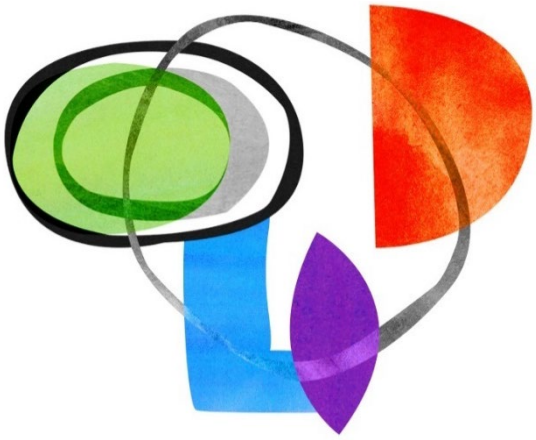
This project is co-funded by the Programme Rights, Equality and Citizenship of the European Union (2014-2020)

RainboW Refugees Welcome

Around the world, many people face persecution because of their sexual orientation, gender identity or expression (SOGI)

Leaving their country of origin becomes their only means of survival. Fleeing persecution, therefore, to find refuge in a host country where "new labels" are added to those of the LGBTQI+ communities gathering people whose SOGI is different from the heterosexual and cisgender norm): refugee, foreigner, or migrant.

It is to improve the reception of these people facing intersectional discrimination that **POUR LA SOLIDARITÉ-PLS** (Belgium), **Le Refuge Bruxelles/Het Opvanghuis Brussel** (Belgium), **ACATHI** (Spain), **Le Refuge** (France) and **Croce Rossa Italiana** (Italy) have created the **Rainbow Welcome!** project.



Coordinated by:

POUR LA SOLIDARITÉ
European think & do tank

With the European partners:

OPVANGHUIS REFUGE

ACATHI
MIGRATION, REFUGE AND DIVERSITY LGBTI+

LE REFUGE
FONDATION
PROTÉGER LES JEUNES LGBT+

CONVENZIONE DI GINEVRA 22 AGOSTO 1864
Croce Rossa Italiana

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THE RAINBOW WELCOME! PROJECT

Rainbow Welcome! is a European project implemented to better know and to improve how LGBTIQ+ refugees are received in Europe. These people can be particularly vulnerable as they are at the intersection of several factors of discrimination: being on the LGBTIQ+ spectrum, belonging to a national or religious minority, for instance.

Co-funded by the European Program Right, Equality and Citizenship (2014-2020), this project aims to:

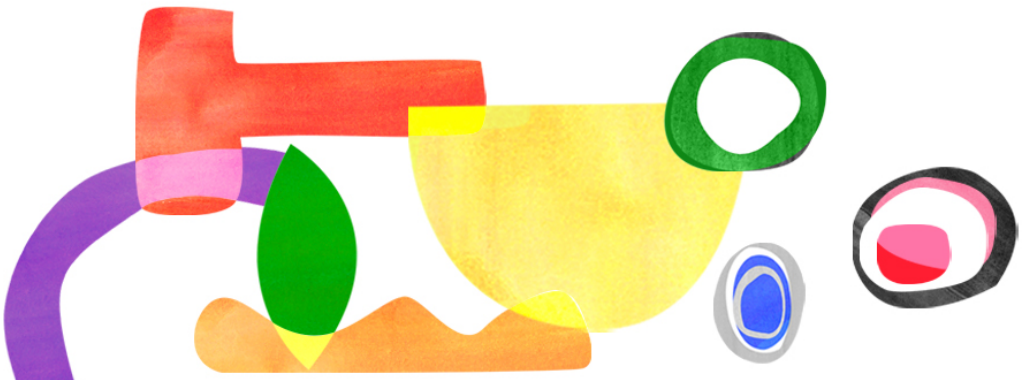
1. Identify the regulatory frameworks and procedures applicable to LGBTIQ+ refugees;
2. Identify strengths and weaknesses in their reception;
3. Equip LGBTIQ+ shelters and associations as well as refugees' reception centres on how to welcome, orientate and answer the needs of LGBTIQ+ refugees;
4. Raise awareness about the situation of LGBTIQ+ refugees through large scale photo and video;
5. Advocate for LGBTIQ+ refugees rights and needs towards the EU.

This study is the results of the work carried out by the five partners of the project, from four European countries - *Pour la Solidarité-PLS* and *Le Refuge Bruxelles-Het Opvanhuis Brussel* (Belgium), Acathi (Spain), *Fondation Le Refuge* (France) *and Associazone della Croce Rosa Italiana* (Italy) – in order to achieve the first step mentioned above. It is a prerequisite to better understand how LGBTIQ+ refugees are received in these countries and is part of a broader analysis of their needs and of the existing practices put in place in this regard. It is addressed to anyone who is willing to improve her/his knowledge on the regulatory frameworks and the procedures applicable to SOGI-based applicants in the EU and, more specially, in Belgium, France, Italy and Spain.

Why do we engage in such a project?

Because LGBTIQ+phobia – intolerance towards people with SOGI (sexual orientation, gender identity and expression) other than the norm – still exists, causing both physical and psychological violence, LGBTIQ+ people face discrimination and isolation. When these acts of violence can imply social exclusion, imprisonment or (sometimes legally) death in countries around the world, LGBTIQ+ people might have to leave their home country and ask for asylum elsewhere, where they think life could be better for them. A status that often implies other discriminations and prejudices.

Rainbow Welcome! is a project rooted in today's realities: it is essential to understand the phenomena of intersectionality that lead to the increased vulnerability of some people. Rainbow Welcome! is the ambition to work together to build a more welcoming and inclusive society.



ACRONYMS

CADA	Reception Centre for Asylum Seekers
CCE	The Council of Alien Law Litigation
CEAS	The Common European Asylum System
CESEDA	The Code of the entry and residence regulation, and asylum right
CETI	Temporary Stay Centres
CGRA	General Commissioner for Refugees and Stateless Persons
CIAR	The Inter-Ministerial Commission on Asylum
CNDA	The National Asylum Court
EASO	The European Asylum Support Office
EC	European Commission
ECHR	The European Convention on Human Rights of 1950
ERF	The European Refugee Fund
EU	European Union
EUCJ	Court of Justice of the European Union
EURODAC	The European Dactyloscopy
FEDASIL	The Federal Agency for the Reception of Asylum Seekers
FRONTEX	The European Border and Coast Guards Agency
GUDA	One-stop-shop for asylum seekers
ICJ	International Commission of Jurists
LGBTIQ+	Lesbian, Gay, Bisexual, Trans, Intersexual, Queer +
OAR	The Office of Asylum and Refuge
OE	The Office of Foreigners
OFII	The French Office for Immigration and Integration
OFPRA	The Office for the Protection of Refugees and Stateless Persons
PADA	First Reception Platform for Asylum Seekers
SIPROIMI	The System of Protection for Beneficiaries of International Protection and Unaccompanied Foreign Minors
SOGI	Sexual Orientation and Gender Identity

SPF Justice	Guardianship Service
SPRAR	The System of Protection for Refugees and Asylum Seekers
TFUE	European Union Treaty for functioning
TUI	Consolidated Act on Immigration
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nationals Human Rights Council

INTRODUCTION

Vulnerability comes in various forms and is often intersectional. Migration as a result of violence is an expression of that vulnerability, creating, in turn, others in the host country. The request for international protection through asylum is one of the ways to protect and guarantee the rights of people, when they are being persecuted or their rights are affected. Over the years, asylum has become a more recurrent figure of international protection. SOGI-based asylum has been progressively formally recognized in International, European and national standards, although gaps and problems still exist.

The main objective of this study is to show an **overview of the current regulatory frameworks and procedures linked to SOGI-based applications (i.e.: applications for asylum based on persecutions or risks of persecutions for a person because of her/his sexual orientation or gender identity)** at the international, European and national levels in four EU member states (Belgium, France, Italy and Spain), identifying relevant rules and basic characteristics of the procedures applicable. It also addresses some criticisms to existing regulations.

The study has been prepared using various sources: i) the information collected in each country-partner, ii) official reports, bulletins and databases of legal instruments, iii) reports and websites of international organizations dedicated to the LGBTIQ+ issue, and iv) results of academic researches on the subject.

In this document, we use the concept of "Sexual Orientation and Gender Identity" (hereinafter "SOGI") inspired by the Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity. Likewise, we use the acronym "LGBTIQ+ refugee" to identify lesbians, gays, bisexuals, gender nonconforming persons (trans), intersex and queer, and any other form of sexual or identity experience that differs from the hetero-cisgender norm, who are outside of their country of origin in order to protect themselves from persecution – or risk of such persecution – for said orientation or gender identity.

We use the term refugee to insist on the fact that before being a legal status under which people can benefit from international protection (e.g. protection granted by a State other than the one of origin of the person to ensure respect of her / his fundamental rights), the term "refugee" designates a reality that is recognized by the States, not a privilege they would afford arbitrarily.

Definitions of main concepts referred to in this study can also be found on our online glossary.

THE INTERNATIONAL & EUROPEAN FRAMEWORKS AND PROCEDURES REGARDING SOGI-BASED APPLICATIONS FOR ASYLUM[1]

1. THE INTERNATIONAL REGULATORY FRAMEWORK

a) What are the relevant international instruments?

In the international level, there are two key instruments regulating the asylum:

- The **Convention relating to the Status of Refugees of 28 July 1951**, and in force since 1954 (hereafter "The 1951 Refugee Convention") that defines the term refugee, enumerates the rights of refugees, and establishes the legal obligation of States to protect them, as well as it establishes the non-refoulment principle.
- Its **Protocol relating to the Status of Refugees of 31 January 1967** (hereafter "The 1967 Protocol") that extent its temporal and geographical scopes.

These two international instruments provide "*a universal code for the treatment of refugees uprooted from their countries as a result of persecution, including serious human rights violations or other forms of serious harm, as well as in the context of violence or armed conflict.*" (UNHCR, 2019, p. 9)

Those instruments have been developed in the **Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees of 1979** (original version). Neither the main international instruments nor the Handbook original version mention SOGI-based asylum. However, the updated version of the **Handbook of 1992** includes persecution based on sexual orientation.

Moreover, in 2008, the UNCHR – United Nations High Commissioner for Refugees[2] – published an Orientation Note about SOGI-based cases, which was replaced by the Guideline No. 9 of 2012 dedicated specifically to SOGI. These Guidelines No. 9 provide authoritative guidance on substance and procedure "*with a view to ensuring a proper and harmonized interpretation of the refugee definition*" (UNHCR SOGI Guidelines, para. 4) in the Geneva Refugee Convention of 1951, and "*are intended to provide legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out refugee status determination under its mandate*" (UNHCR SOGI Guidelines, cover page).

[1] This section contains an analysis of the International and European regulatory frameworks regarding the recognition of the SOGI-based right to asylum. It considers the legal instruments in force, as well as the institutional features in both levels. These regulations must be taken into consideration when producing internal regulation and implementing procedures, in order to protect, respect, promote, and guarantee human rights of refugees who claim SOGI-based asylum and international protection.

[2] "UNHCR, the UN Refugee Agency, is the global organisation dedicated to saving lives, protecting rights and building a better future for refugees, forcibly displaced communities and stateless people." https://www.unhcr.org/about-us.html

Table No. 01
GUIDELINES RELATED TO SOGI-BASED ASYLUM

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 (7 may 2002).
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 (7 may 2002).
Guidelines on International Protection No. 6:	Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (28 april 2004).
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 (23 october 2012).

Source: own elaboration

Additionally, the UN Assembly approved a set of international instruments regulating refugee status, asylum, statelessness, and migration. Nevertheless, they do not mention specifically SOGI-based asylum, they might be applied on a case according to their fields of competence.

Table No. 02
MAIN INTERNATIONAL INSTRUMENTS REGARDING REFUGEES
AND STATELESSNESS PROTECTION

Migration for Employment Convention (Rev), 1949 (No. 97),	01 July 1949 Into force 22 January 1952
The Convention relating to the Status of Refugees	28 July 1951 In force since 1954
Convention relating to the Status of Stateless Persons	28 September 1954
Convention on the Reduction of Statelessness	30 August 1961
Complemented by its Protocol relating to the Status of Refugees	31 January 1967
The United Nations Declaration on Territorial Asylum	14 December 1967
Convention to Reduce the Number of Cases of Statelessness	13 September 1973
Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143),	24 June 1975 Into force 09 December 1978
Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which	13 December 1985
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	18 December 1990
Guiding Principles on Internal Displacement	11 February 1998
Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees	of 18 December 2001
The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children	15 November 2000, that took effect in 2003
Protocol against the Smuggling of Migrants by Land, Sea and Air	Adopted and opened for signature, ratification, and accession by General Assembly resolution 55/25 of 15 November 2000 (not in force)
Domestic Workers Convention (No. 189)	16 June 2011, into force 05 September 2013.
New York Declaration for Refugees and Migrants	19 September 2016
The Global Compact on Refugees	11 December 2018

Source: own elaboration

Moreover, the asylum and refugee's standards are inserted in the International Human Rights Protection System. UN recognizes there are nine core international human rights instruments; each of them has a committee of experts to monitor implementation of the treaty provisions by its States parties. (OHCHR, n.d.1) International human rights instruments and general comments must be considered by Member States which have ratified them when regulating or implementing SOGI-based asylum procedures.

The Universal Declaration of Human Rights (10 December 1945), and both treaties the ICCPR and the ICESCR form the so-called International Bill of Human Rights. (UN, 1996)

Table No. 03
INTERNATIONAL HUMAN RIGHTS TREATIES

NAME	ABBREV.	DATE
The International Covenant on Civil and Political Rights First Optional Protocol (16 December 1966) Second Optional Protocol (15 December 1989).	ICCPR	16 December 1966
The International Covenant on Economic, Social and Cultural Rights Optional Protocol (10 December 2008)	ICESCR	16 December 1966
The International Convention on the Elimination of All Forms of Racial Discrimination	ICERD	21 December 1965
The Convention on the Elimination of All Forms of Discrimination against Women Optional Protocol (10 December 1999).	CEDAW	18 December 1979
The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment Optional Protocol (18 December 2002)	CAT	10 December 1984
The Convention on the Rights of the Child (20 November 1989) First Optional Protocol on the involvement of children in armed conflict (25 may 2000) Second Optional Protocol on the sale of children, child prostitution and child pornography (25 may 2000) Third Optional Protocol on a communications procedure (19 December 2011)	CRC	20 November 1989
The International Convention on the Protection of the Rights of All Migrant Workers and Members of their families	ICMW	18 December 1990
The Convention on the Rights of Persons with Disabilities Optional Protocol (12 December 2006)	CRPD	13 December 2006
The International Convention for the Protection of All Persons from Enforce Disappearance	CPED	20 December 2006

Source: own elaboration

Specialized UN Committees, in charge or the oversight of international treaties realization, produced a variety of General Comments and Recommendations related to refugees and human rights.

Table No. 04
GENERAL COMMENTS IN THE INTERNATIONAL HUMAN RIGHTS SYSTEM

The Human Rights Committee
General Comment No. 15, The position of aliens under the Covenant (1986)
General Comment No. 20, Article 7 (Replaces General Comment No. 7 concerning prohibition of torture and cruel treatment or punishment) (1992)
General Comment No. 27, Freedom of Movement (Article 12) (1999)
General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, (2004)
Committee against Torture
General Comment No. 1, Implementation of article 3 of the Convention in the context of article 22 (Refoulement and communications) (1997)
Committee on the Elimination of Racial Discrimination
General Recommendation No. 22, Refugees and displaced persons (1996)
General Recommendation No. 30, Discrimination against non-citizens (2004)
Committee on the Rights of the Child
General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin (2005)

Source: own elaboration

b) What do the legal instruments state?

"Asylum" describes a legal status of protection to a person with well-founded fear of persecution, and entails the enjoyment of specific rights. Such a status is granted by a State to stay in its territory and received protection. (Lysander, 2020, p. 83)

The Universal Declaration of Human Rights, proclaimed by the UN General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) mentions the right to asylum in Art. 14, par. 1: "*Everyone has the right to seek and to enjoy in other countries asylum from persecution.*" It is not an international treaty, but it can be considered as binding based on its status of customary law. Later, States have negotiated and ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, for realizing rights included in the Universal Declaration. However, none of those Covenants recognized explicitly the asylum.

After the Second World War, States approved the 1951 Refugee Convention, in force since 1955, with the purpose of regulating this issue in the international arena. Complemented by its 1967 Protocol, it became the foundation for asylum laws. This is the principal international instrument for the protection of refugees, providing for a definition of the term "refugee", including criteria, and stating obligations for States linked to the protection of people seeking protection from another State.

This Convention defines refugees as persons that have left their countries of origin due to the:

> "*well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion´ and who are ´unable or, owing to such fear* (…) *unwilling to avail (themselves) of the protection of that country; or who, not having a nationality and being outside the country of their former habitual residence as a result of such events, (are) unable or, owing to such fear, (are) unwilling to return o it*" (Art. 1 A (2))

In the international arena, there is an understanding that there is not a right to be *granted* asylum (indeed, the 1951 Refugee Convention and its 1967 Protocol do not grant a right to enter and stay in territories, and it does not oblige the State to accept or permit that situation), but there is a right to *seek* and to *enjoy* it once it has been granted (Lysander, 2020, p. 85). Granting asylum is regarded as a decision derived from State´s sovereignty. The Declaration on Territorial Asylum of 1967 explicitly emphasizes this in the Articles 1 (1) and 3 (1). However, "*[t]he High Commissioner has always pleaded for a generous asylum policy in the spirit of the Universal Declaration of Human Rights and the Declaration on Territorial Asylum."* (UNCHR, 2019, p. 16) The Convention forbids imposing criminal sanctions when there are good causes for being in the country illegally (Art. 31).

Besides, States are forbidden to expel or return a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (1951 Refugee Convention, art. 33 (1)). This is known as the principle of non-refoulement.

c) How to interpret these instruments regarding SOGI-based situations?

Notwithstanding there is not an explicit mention on SOGI-based situations in the international human rights treaties, the General Comments, Final Comments, and other documents dictated by the UN Committees have issued important interpretations, decisions, and recommendations to States members about sexual rights, and the general application of the non-discrimination principle, as well as other human rights.

UNHCR has emphasizes that the definition of refugee must be interpreted and applied regarding fundamental rights including the non-discrimination prohibition related to SOGI (OHCR, 1967, Parr. 6), particularly because they are members of a particular social group mentioned in the 1951 Refugee Convention. The 1967 Protocol opens the scope of the Convention to "new refugee situations". This is, actually, the phrase used to derive the protection of people SOGI-based persecuted.

It is important to mention, that some authors consider that it is possible to interpret the 1951 Convention and understand that the right to asylum exists. They consider that the Yogyakarta Principles of 2006 recognizes the right to asylum, as well as the non-refoulement principle. Despite it is not a treaty, this instrument has become a universal guide to LGBTIQ+ human rights protection and promotion. Some authors consider it is possible to derive the right to asylum from there.[3]

> *"…the right to asylum can be understood as presumed by the Convention, for several reasons. First, the 1951 Convention prohibits refoulement (Article 33). As a result of this prohibition, the international community agrees that refugees have the right to temporary residence in the host country until a final decision regarding their claims has been made (Coleman 2003). Secondly, according to Article 1(A)(2), refugee status is an ipso jure status. Thirdly, the 1951 Convention cites in its preamble the 1948 Universal Declaration of Human Rights, whose Article 14 establishes the right to asylum."* (Ktos, et al., 2020, p.62)

d) Membership of a particular social group & SOGI-based situations

The 1951 Refugee Convention stands that "claims well-founded in fear of persecution" must be "for reasons of" one of the five grounds set out: race, religion, nationality, membership of a particular social group or political opinion. This is commonly known as the "nexus" requirement. Therefore, a type of persecution could happen when someone is member of a *particular social group*. This is a residual notion applied to grant refugee protection to SOGI-based claims (Ktos, et al., 2020, p.63).

[3] "Principle 23. The Right to seek Asylum. Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity. States shall: a) Review, amend and enact legislation to ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum; b) Ensure that no policy or practice discriminates against asylum seekers on the basis of sexual orientation or gender identity; c) Ensure that no person is removed, expelled or extradited to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of that person's sexual orientation or gender identity."

In 1992, UNHCR published the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol. However, persecution motivated by sexual orientation has only been included in a revised version of 2011.

This Handbook includes the Guidelines approved by UNHCR. These are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers, and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field. These Guidelines complement the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and replace a UNHCR´s Position Paper on Gender-Related Persecution of January 2000. (UNHCR, 2002)

The Guidelines No. 1 on Gender-based persecution has an explicit recognition of SOGI-based cases:

> *"Persecution on account of one's sexual orientation*
> *16. Refugee claims based on differing sexual orientation contain a gender element. A claimant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex. The most common claims involve homosexuals, transsexuals or transvestites, who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination.*
> *17. Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalised, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm."*

The Guidelines No. 2 elaborated on the "membership of a particular social group". In the introduction, these guidelines say that "There is no "closed list" of what groups may constitute a "particular social group" within the meaning of Article 1A(2)". Also, it says that "the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups…" (Underlining added).

Also there is an explanation about the approach to understand and interpret the concept of "particular social group" with an explicit mention to homosexuality. According with the Guidelines No. 2, this membership to a particular social group has been interpreted, at least, in two ways, that may frequently converge:

a) *"6. The first, the "protected characteristics" approach (sometimes referred to as an "immutability" 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 (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status)."* (UNHCR, 2019, p. 94).

b) *"7. The second approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large. This has been referred to as the "social perception" approach. Again, women, families and homosexuals have been recognized under this analysis as particular social groups, depending on the circumstances of the society in which they exist."* (UNHCR, 2019, p. 95)

The Guidelines No. 6 is intended to provide orientations about religion-based refugee claims. These guidelines consider that policies or acts that force compliance against identity or way of life of persons or groups could constitute persecutory actions if it becomes an intolerable interference with the individual´s own identity or way of life. (§21)

Moreover, the Guidelines No. 9 is the most relevant, intended to provide orientation about claims to refugee status based, precisely, on sexual orientation and/or gender identity. It should be read all together with Guidelines No. 1, 2 and 6. They have recognized that the five motivations for persecution (race, religion, nationality, membership of a particular social group and political opinions) have not to be exclusive, they may overlap. Hence, a person persecuted because of her SOGI condition, may seek international protection also based in other causes. (UNHCR, 2019)

It is important to say that there is not a specific definition of persecution. Some authors and the UNHCR, in Guidelines No. 9, consider that even less explicit abuses, depending on its nature and severity, as well as on its repetitiveness, must be enough for being considered as a persecution (§ 41) (Goodwin-Gill, 2007, p. 92; UNHCR, 2001, par. 15, 17).

Diaz Lafuente (2017, p. 232-239) has derived some behaviours, measures and activities that can be considered as radical elements in the concept of persecution:

- Measures for changing or alter SOGI conditions, which in turn may be considered tortures or cruel, inhuman, or degrading treatments, as well as violations to liberty and security of persons (UNHCR, 2019, p. 13).
  - Force institutionalization, force sex-reassignment surgery, force electroshock therapy, and forced drugs injection or hormonal therapy (UNCHR Guidelines No. 9, par. 21).
  - Nobody will be force without consent to medical or scientific experiments (The International Covenant on Civil and Political Rights Art. 7 considers this as tortures). The UN Committee against Torture and the Special Rapporteur for Tortures has said that persecution includes the prohibition to "*force men suspicious of being gay to non-consent anal exams to prove their homosexuality*" (UNHRC, 2016, par. 37).
  - Actions oriented to obligate intersex persons to have surgery without consent.

- Prison or reclusion in psychological or medical institutions based in SOGI. This is also a violation of liberty. Including also administrative segregation and isolation based on SOGI reasons.

- Honour crimes in order to denied or correct no conformity. (UNHRC, 2016, parr. 66)

- When there are high probabilities that after being fired from a job based on SOGI, the person will have hard difficulties to get a new paid activity. (Report par. 25)

- Another relevant element is the absence of protection (non-available and/or ineffective. (UNHCR, 2019, parr. 23) States may be agents of persecution or agents incapable to protect a person from persecution. Hathaway, J.C. and Pobjoy, J. (2011-2012) Criminalization of sexual intercourse among same-sex persons are still high and has been considered a way of persecution, including some generic forms like "public order and good morals". (UNHCR, 2019, p.29) [4]

e) Human rights for applicants and asylees based on SOGI

As mentioned before, UNHCR has emphasizes that the definition of refugee must be interpreted and applied regarding fundamental rights including the non-discrimination prohibition related to SOGI. (UNHCR, 2019)

The non-discrimination principle derives from a set of international human rights instruments as we can see in the table below. It constitutes an entry-right to recognize LGBTIQ+ rights, including asylum and international protection.

[4] In fact, the Court of Justice of the European Union has ruled in a recent Judgment of November 2013 presenting the necessary elements so that the criminalization of homosexual acts is considered to constitute persecution.

Table No. 05
INTERNATIONAL INSTRUMENTS AND NON-DISCRIMINATION PRINCIPLE

International instrument	Article
The **Charter of the United Nations** of 26 June 1945 into force on 24 October 1945	Its Preamble stands: "We the people of the United Nations determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small…"
The **Universal Declaration of Human Rights**	Articles 1, 2 and 7
The **Civil and Political Rights Covenant of 1966**	Articles 2, 12 and 13
The **Economic, Social, and Cultural Rights Covenant**	Article 2
The **Elimination of all ways of Discrimination against Women Covenant of 1979**	It does not include any specification about refugees; however, the CEDAW has mentioned several times the vulnerability of women refugees and the obligation of States members before their rights. (General Comment No. 24, 20th sessions, 1999. Par. 16).
The **Children Rights Covenant of 1989**	Article 22 (a specific rule about children refugees who must receive protection and humanitarian assistance to enjoy all rights included in the Convention and other international instruments)
The **Convention relating to the Status of Stateless Persons**, of 1954	Article 3

Source: own elaboration

In that sense, during the proceedings, human rights must be realized and guaranteed for all asylum seekers; and once granted the international protection, as well. The 1951 Refugee Convention recognises a broad rank of social and economic rights: property, housing, education, work, rationing, medical assistance, and social security. Some authors also add the right to mobility because it is needed to realize the others.

2. THE EUROPEAN REGULATORY FRAMEWORK

The Council of Europe is a regional organisation gathering 47 Member States, including all European Union (EU) Member States (Council of Europe, n.d.). The European Union is a different organisation. The European Convention on Human Rights (ECHR) of 1950 is the international treaty where there are the core fundamental rights. The European Court of Human Rights, in Strasburg, controls the respect of the ECHR.

Moreover, the European Union (EU) is an international organization ruled by the International Law. It is formed by a variety of institutions like the European Parliament, the Council of the European Union, the European Council, the European Commission, the Court of Justice of the European Union (EUCJ), in Luxembourg, the European Ombudsman, among others.

Its legal system is formed by both the primary and the secondary law. The former is composed by: i) the EU Treaties, binding agreements among EU countries; ii) the Charter of Fundamental Rights of the European Union (ECHR); and iii) the general principles established by the Court of Justice of the European Union.

The secondary law is formed by all decisions adopted by the EU institutions. According to the Article 288 of the EU Treaty for functioning (TFUE), these decisions may be: rules, directives, decisions, recommendations and opinions.

The TFUE establishes a hierarchy among secondary laws: (EUR-lex web) legislative acts (art. 289), delegated acts (art. 290), and executive acts (art. 291).

a) The SOGI-based right to asylum in Europe

At the Council of Europe level, the Article 1 of the ECHR stands that States Parties have the obligation to secure to *everyone within their jurisdiction* the rights and freedoms defined in the Convention. This includes not only their citizens but also people on their territory or under the control of States' agents (art. 1) (ECHR, 2020). Therefore, this can include, for instance, migrants, asylum seekers or refugees who are in the conditions required to be considered as "within a State's jurisdiction".

The ECHR guarantees to ensure non-nationals are not sent back to a country where they would face or risk to face ill or inhumane treatment (e.g. a country where homosexuality is punished and where, therefore, homosexual people could be sent into prison for being who they are) (art. 3). This is known as the principle of non-refoulement, also established under international and European law. However, there is not a right to asylum in EU as long as Member States have the sovereignty to control the entry, residence and expulsion of non-nationals.

The European court of Human Rights' case-law[5] have produce decisions imposing limitations on the right of States to turn someone away from their borders, based on Article 2 (right to life) and Article 3

[5] More information on the European Court of Human Right case-law related to asylum: (ECHR, 2016)

(*absolute*[6] prohibition of torture, inhuman or degrading treatment or punishment). The Court has also condemned **indirect refoulement** when, for instance, the "*expulsion to a State from where migrants may face further* (sic) *deportation without assessment of their situation*"[7].

The ECHR is a strong legal instrument that can be used to ensure that LGBTIQ+ refugees, both as LGBTQI+ people and as non-nationals, with special attention accorded to asylum-seekers, are entitled to human rights. This is also in accordance with the **prohibition of discrimination** on the ground of "*sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*" (Article 14),

At the European Union level, this international organisation was founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of person belonging to minorities (**Article 2 of the Consolidated version of the Treaty on European Union**). Also includes the principle of equality between women and men, as well as the value of non-discrimination.

The **Charter of Fundamental Rights of the European Union** (ECHR) anchored fundamental human rights that must respected by the 27 Members States of the EU and its institution. It has the same legal value as the Treaties (art. 6, §1 TUE). It must be considered by EU countries when implementing their laws.

The Charter incorporates, for the first time at European level, the right to asylum (Article 18) and it prohibits the return of a person to a State where there is a serious risk that he/she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment (Article 19).

Moreover, the Charter also recognizes the right to human dignity, which is being used to interpret laws and other dispositions (Article 1). This is the case, for instance, of the Article 4 of the Qualification Directive (a legislative instrument providing for minimum standards to recognise the refugee status that will be presented below) oriented to ensure respect of applicants' human dignity; in this case, and in accordance with the Charter, Member States cannot accept proof elements such as the accomplishment of homosexual acts, submission to tests, or the production or video records.

The non-discrimination principle is included as part of the core fundamental rights recognized in the Charter (Article 2). Sexual orientation is explicitly mentioned as a prohibited ground of discrimination; however, gender identity or sexual characteristics are not explicitly mentioned. Regarding this absence, the EUCJ interprets this provision and the "sex" criteria extensively.

Based on this provision, all EU legislation must comply with the prohibition to discriminate (i.e. to treat differently people who are in a similar situation) on any ground. This means that the ground explicitly mentioned are not an exhaustive list. It is however worth underlining that almost all those criteria are relevant while considering the situation of LGBTIQ+ people and of refugees. LGBTIQ+ refugees, combining several of those characteristics are in this way likely to be discriminated on the basis of several grounds and, in addition, a combination of them (this is called the intersectionality of discriminations).

[6] The term "absolute" is of particular importance because it means that no derogations of any kind can never be made.
[7] M.S.S. v. Belgium and Greece [GC], 96/09, ECHR 2011.

When the EUCJ controls the correct implementation of the EU law, it often refers to those fundamental rights to interpret other provisions. For instance, it interpreted the Qualification Directive in the light of the right to human dignity. The EUCJ also adopts a broad interpretation of the "sex" criterion, including considerations linked to sexual characteristics and gender. It is worth noting at this point that, since the adoption of the Treaty of Lisbon in 2009, the EUCJ's jurisdiction on asylum has been improved. Therefore, it has developed a broader case law related to this matter.

However, the scope of application of the Charter is limited: this instrument only applies to the EU institutions and bodies and to Member States when they are implementing the right of the EU. This means that Member States still have to adopt national laws to ensure the protection of those fundamental rights in any situation arising on their territory. Due to their sexual orientation and/or gender specificities, LGBTIQ+ refugees may be forced to run away from treatments that are so bad that they can be qualified of "persecutions" in the sense of Geneva Convention.

Furthermore, the consolidated version of the Treaty of the Functioning of the European Union recognizes the general rule of non-discrimination (Art. 10) as well as a common policy on asylum, immigration, and external border control, based on solidarity between Member States, which is fair towards third-country nationals (Art. 67 §2). This Treaty also sets out the development of a common policy on asylum, as well as subsidiary and temporary protection (Art. 78 §1) establishing the Common European Asylum System (hereinafter CEAS) in harmony with the 1951 Refugee Convention and the 1967 Protocol.

The Protocol No. 24 on asylum for nationals of member states of the European Union was approved in accordance with both the Article 6(1) of the Treaty on EU and the 1951 Refugee Convention. This Protocol aims to prevent institutions of asylum being resorted to for purposes different than those for which it is intended. According this Protocol, EU member states are considered as safe States in the context of asylum procedures, therefore, strict conditions must be met to declare admissible an application for asylum from a national coming from a member state.

In September 2020, the Commission proposed a New Pact on Migration and Asylum, containing a number of solutions through new legislative proposals and amendments to pending proposals to put in place a system that is both humane and effective, representing an important step forward in the way the Union manages migration." (EC, n.d.b) The Council and the European Parliament will examine the draft pact presented by the Commission.

This ambitious Pact aims at reforming deeply the CEAS in all its aspects using different tools, including legislation.[8] The current procedure to *adopt* rules for the CEAS is the ordinary legislative procedure (TFUE, art. 78, §2), then, it follows the same legislative role played by the European Parliament and the Council. The Commission proposes a legislative text (*in casu*, Directives or Regulations), the Parliament adopts or amends the text before forwarding it to the Council for adoption or amendment. If the text is

[8] Based on article 78 of the TFUE, the EU's Institutions adopted several legislations to frame the CEAS. Among those, some aim at going further than what's provided for at the international level. It is the case of the temporary protection directive that has never been applied in practice "due to the unanimity requirement for a decision in Council, the vagueness of its terms, and tensions between the Member States in Council over burden-sharing". The EC intends to repeal it by adopting a new Regulation, addressing situations of crisis and force majeure in the field of migration and asylum.

not adopted after two readings of one of the two co-legislators (the Parliament and the Council), the legislation is not adopted. Such a procedure has the advantage of giving equal power to both Parliament and Council. However, as it gathers representatives of all Member States, the Council remains an intergovernmental body, dependent on the political conjectures.

b) SOGI as persecution grounds

As its regulatory framework derives from the International one, the European Union anchored a consistent conception of the status of refugee into its secondary law. In this sense, the EU adopted a common definition of refugee.

The Qualification Directive, adopted by the EU in 2003 and revised in 2011, recognises the right to the refugee status instead of accord it. According the Preamble 21, the recognition of the refugee status is a declaratory act. And the Article 2(d) of the Qualification Directive defines refugee as:

> *"a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom article 12 [exclusion] does not apply"*

Any person with the following characteristics will be recognised[9] as beneficiary of the refugee status and the resulting protection:

- Being outside of his/her State of origin (objective element);

- Owing to a well-founded fear of being persecuted (subjective element):
  - "persecution": there is no definition of this term, but it aims at designating acts seriously infringing fundamental rights (in particular but not exclusively the right to life, the prohibition of torture and inhumane and ill-treatments, the prohibition of slavery and the legality of any condemnation);
  - "fear": there must be a risk of persecution of a certain gravity;
  - "well-founded": the asylum applicants must prove his/her allegations and the Member State must assess the relevant elements of the application in cooperation with the applicant.

The acts considered as persecutions may be of different natures such as violence, psychological and sexual; discriminatory legal, administrative, law enforcement and/or judicial measures, disproportionate or discriminatory sanctions or prosecutions, acts towards the persons because of her/his sex or against her/his children. The persecutions can be based on various grounds. Of particular relevance for LGBTIQ+ refugees is the one of "membership of a particular social group".

[9] The status of refugee is *recognised*. Being granted this status is a declaratory act and not a favour from the authorities (see Qualification Directive, Preamble, rec. 21).

The EU recognised the necessity to introduce a **common concept of the persecution ground consisting in the membership of a particular social group**. This regulation recognized explicitly SOGI based cases. In the Preamble, it has been specified that:

> *"[f]or the purposes of defining a particular social group, issues arising from an applicant's **gender, including gender identity and sexual orientation**, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilization or forced abortion, should be given due consideration in so far as they are related to the applicant's well-founded fear of persecution"* (rec. 30).

The Article 10 of the Qualification Directive, which lists the various persecution grounds, provides specific conditions for being considered as forming a particular group (internal and external aspects). Sexual orientation can be considered as a common characteristic (which is one of those conditions). With the 2011 recast, it has been specified that this includes also gender identity.

> *"Article 10. Reasons for persecution.*
> *1. Member States shall take the following elements into account when assessing the reasons for persecution:* […] *(d) a group shall be considered to form a particular social group where in particular:*
> *— members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it* [which includes sexual orientation] *, and*
> *— that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society. Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group;* […]
>
> *2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution."*

It is also worth noting that the Directive specifies that the assessment of the reason for persecution must not be limited to characteristics *actually possessed* by the applicants, as far as they are *attributed* to this person.

This explicit mention of considerations linked to sexual orientation (SO) and gender identity (GI) is the main reason why we use the term SOGI-based applicants in this document to designate LGBTIQ+ refugees who may seek asylum in EU Member States.

The Qualification Directive sets out some examples of acts of persecution, including acts of a gender-specific nature. The Article 15 defines serious harm for the recognition of the subsidiary protection

status including those situations where states criminalizes or punishes with dead penalties homosexual relationships.

As mentioned above, there is an obligation of reciprocal cooperation between the Member State and the SOGI-applicant. While the second must "*submit as soon as possible all the elements needed to substantiate the application for international protection*" (art. 4, §1), including evidence relating to his/her life; the first one must assess these elements in the light of the general situation in the country of origin and the specific circumstances of the person concerned. In this regard, lack of understanding and knowledge of the specific situation of LGBTIQ+ persons can lead to abuses (e.g.: assessment based on stereotyped notions, questions concerning details of the applicant's sexual practices, among others). The extended powers devoted to the EUCJ are, therefore, really useful as it enables this judicial body to condemn abusive and illegal national measures in this matter (Vid. FRA website Current migration situation in the EU).

In this sense, the EC proposed in 2016 to include in the Regulation that would replace this Directive the case-law of the EUCJ, by stipulating in the Preamble that assessing applications for international protection, the competent national authorities should use methods that respect fundamental rights (including the right to human dignity and the right to private life, as clarified by the EUCJ[10]). There is insistence on the necessity to respect this especially regarding homosexuality: "[s]*pecifically as regards homosexuality, the individual assessment of the applicant's credibility should not be based on stereotyped notions concerning homosexuals and the applicant should not be submitted to detailed questioning or tests as to his or her sexual practices*." (rec. 29).

The element mentioned here above does not appear in the existing Qualification Directive. It is added based on EUCJ case law. Nevertheless, it is only mentioned in the Preamble and not reiterated into a concrete legal obligation or prohibition on Member States within Regulation´s provisions.

c) The European Commission´s position on equality

The EC shows a strong commitment in favour of equality and non-discrimination. This results in the adoption of various proposals and communications. The following are of particular relevance here:

- Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation: the scope of this Directive would be broader than existing legal instruments as it goes beyond the sphere of the workplace (the actual EU legal framework under which prohibition of discrimination on ground of sexual orientation applies only to employment, occupation and vocational training). It mentions only sexual orientation but there is no mention about gender identity, expression or intersexuality. Being uphold for years, it is not possible to know when and how it would actually foster equality for LGBTIQ+ people within the EU.

- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: this Communication presents

[10] EUCJ, Joined cases C 148-150/13, A, B and C v. Staatssecretaris van Veileigheid en Justitie, 2 December 2014, para. 53.

the EC's Strategy in favour of equality of treatment for LGBTIQ people. It is built upon 4 pillars: i) tackling discrimination against LGBTIQ people; ii) ensuring their safety; iii) building inclusive society; and iv) leading the call for LGBTIQ equality around the world. Within the first pillar, the CE announces the intention to uphold the rights of LGBTIQ applicants for international protection (§1.4).

The European Commission ambitions to foster good practice exchanges between Member States on addressing the needs of LGBTIQ applicants for international protection, "focusing on how to guarantee safe and suitable reception conditions, including accommodation, for LGBTIQ applicants for international protection; protection standards that apply in relation to their detention (where applicable); and how to prevent the examination of their applications from being influenced by anti-LGBTIQ discrimination and/or stereotypes." Trainings for protection officers and interpreters will be improved by EASO in order to avoid stereotypes in the examination of the applications.

Regarding the situation of SOGI-based applicants, it reminds:

> *"In many parts of the world,* ***individuals experience serious human rights abuses and other forms of persecution due to their actual or perceived sexual orientation and/or gender identity****. While persecution of* [LGBTI] *individuals and those perceived to be LGBTI is not a new phenomenon, there* ***is greater awareness in many countries of asylum that people fleeing persecution for reasons of their sexual orientation and/or gender identity can qualify as refugees*** *under Article 1A(2) of the* [Geneva Convention] *and/or its 1967 Protocol* (…) *Nevertheless, the application of the refugee definition remains inconsistent in this area".* (UNHCR, 2019) (Underlining added)

Therefore, the Commission announces that it "*will ensure synergy in the implementation of the LGBTIQ equality strategy and the EU action plan on integration and inclusion.*" The principle of "*inclusion for all*" will be included in a new action plan, taking care about linkages between migration and other factors of discrimination such as sexual orientation and gender identity.[11]

[11] See COM(2020) 698 final, p.12, presenting the EC key actions in this matter.

d) Authorities

Table No. 06
AUTHORITIES FOR ASYLUM IN EUROPE

The European Asylum Support Office (EASO)	It supports the implementation of CEAS by Member States. This body facilitates, develops, and coordinates practical cooperation among EU countries on asylum and provides trainings, capacity building, emergency assistance, and information and analysis. It acts as an independent centre of expertise on asylum and draws up an annual report on the asylum situation in the EU and its country members
The European Border and Coast Guards Agency (FRONTEX)	Promotes, coordinates and develops European border management in line with the EU fundamental rights charter and the concept of Integrated Border Management
The European Dactiloscopy (Eurodac)	It is the EU asylum fingerprint database enabling Member States to compare fingerprints of asylum applicants.
The European Refugee Fun (ERF)	To enable solidarity between States.

e) Procedures

The Common European Asylum System (CEAS)

Since 1999, the European Council, at the European Union level, established a Common European Asylum System (CEAS), with the aim of develop a *"common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals*" (TFUE, art. 67, §2). A delicate balance has to be found between States' sovereignty (border's protection) and solidarity for the protection of human rights (protection of persons). It is under reform, notably caused by the migration crisis from 2015-2016. The new legislation must be adopted in accordance with the ordinary legislative procedure, then, the texts proposed by the European Commission have, to date, still not been adopted by the European Council.

> "*EU countries have a shared responsibility to welcome asylum seekers in a dignified manner, ensuring that they are treated fairly, and their case is examined following uniform standards. This ensures that, no matter where an applicant applies, the outcome will be similar. Procedures must be fair, effective throughout the EU, and impervious to abuse.*" (EU website. Migration and Home Affairs)

The CEAS works based on three main pillars: i) efficient asylum and return procedures; ii) solidarity and fair share of responsibility and iii) strengthened partnerships with third countries.

The European Commission has a key role to play in the asylum policy to the extent to which it initiates the legislative process to adopt new legislations or to reform the existing instruments.

The CEAS' implementation depends on the Member States, acting according to the obligations imposed at the EU level. In this process, they can benefit from the support of decentralised agencies of the EU.

The rules of this system determine the Member State as responsible for international protection applicants (including an asylum fingerprint database). The ambition in this regard is to have a clear and functional process to determine which country is responsible for examining an application for protection. Also it sets common standards for asylum procedures; it sets common minimum conditions for receiving applicants for protection; and the system enacts rules fostering the convergence on the criteria for granting protection statuses and for the content of the protection associated with those statuses.

The CEAS sets out common standards and cooperation to ensure that asylum seekers receive an equal treatment in an open and fair system.

The European Union has six regulatory instruments:

- The Asylum Procedures Directive
- The Reception Conditions Directive
- The Qualification Directive
- The Dublin Regulation
- The EURODAC Regulation
- The Return Directive

Directives are a type of European legislations that impose obligations on States to adopt national legislation implementing the rights and duties encompassed in these instruments. Contrary to Regulations, they have not, in principle, any direct effect on citizens. States Members keep a relative margin of appreciation in the implementation of these legislations, which explains why national legislations and procedures may differ.

EASO developed guidance for Member States that go beyond the legal texts. In these documents, it invites States to pay special attention to the sex of the applicant –even though there is not explicit mention of gender– providing them with an interpret of their sex if requested, for instance. Regarding the housing, it is specified that:

> *"[s]eparate bedrooms exist for single male and female applicants and no access is possible for applicants of the opposite sex. […] The restriction of access could be ensured via separate facilities and/or via a lock, without prejudice to security considerations of the reception facility. In particular, cupboards should be lockable if a facility hosts applicants with special needs, s. a. female applicants who might be at risk of gender-based violence*."

There is still no consideration for applicants who do not belong to any of the extremes of the spectrum (i.e. the binary distinction between male and female, with the associated binary genders).

Based on Member States solidarity, the CEAS encompasses rules on how to determine which Member State will be responsible for examining an application for international protection (see Regulation Dublin III[12]).

The Asylum Procedures Directive

The Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) sets out common guidance for the Member States procedures for granting and withdrawing international protection for refugees.

The Preamble Recital (29) stands that certain applicants may be in need of special procedures guarantees due, inter alia, to their gender, sexual orientation, gender identity, among other situations. The Member States have the obligation to identify applicants in need of special procedural guarantees before a first instance decision is taken. However, the Recital (32) stands that Member States are encouraged but obligated to put in place examination procedures that are gender sensitive (in terms of equality between female and male applicants).

The Articles 10 and 15 of this Directive requires Member States to ensure that the personnel in charge of application examination and decision making have the possibility to seek advice from experts on particular issues such as gender issues, and to take appropriate steps to ensure that the person who conducts the interview is competent to take account of the personal an general circumstances surrounding the application, including the applicant´s gender, sexual orientation, gender identity or vulnerability.[13]

This Directive let a relative margin of appreciation to Member States, implementing it in different manners, with different organisational structures, and modalities applied to asylum proceedings. To face this issue, EASO adopted practical guidance with operational standards and indicators (non-binding) and the European Commission has submitted to the Parliament and the Council a Proposal14 aiming at replacing the existing Directive by a Regulation.

The Reception Conditions Directive

The Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), so-called the Reception Directive, has not specific conditions regarding SOGI-based applicants detention. In this directive,

[12] Regulation (EU) Nº 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0604&from=EN

[13] There is currently a Proposal from the Commission (COM/2020/611 final) aiming to replacing this Directive by a Regulation. The Parliament and the Council are invited (recommendations; "should") to adopt it by Q2 2021.

[14] Vid. COM/2020/611 final.

gender is considered only focusing on cisgender women and men (Article 11 §5) without specification about transgender people.[15]

This Directive explicitly recognizes the fact that "*certain applicants may be in need of special procedural guarantees due, inter alia, to their* […] ***gender, sexual orientation, gender identity*** […]" (Preamble, rec. 29). Considering the States' obligation to identify applicants in need of special procedural guarantees before a first instance decision, this indication, even if mentioned in the Preamble, could be used to better protect SOGI-based applicants.

The Article 10, stating the requirements for the examination of application, establishes that Members States have the obligation to ensure that the personnel examining applications and taking the decisions have the possibility to seek advice from experts on particular issues **such as gender issues**. Article 15, setting requirements for a personal interview, imposes on States the obligation to take appropriate steps to ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the **applicant's gender, sexual orientation, gender identity or vulnerability**.

The specific needs of SOGI-based applicants can be considered as taken into account only to the extent that these same applicants would be considered as vulnerable persons, (e.g.: minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, **victims of human trafficking**, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, see art. 21).

Finally, because it encompasses **a chapter devoted to Migration and Asylum** while being devoted to the elimination of violences against women and domestic violence, the **Istanbul Convention**[16] is worthy of attention. Articles 60 and 61 are especially interesting regarding **gender-based applications for asylum**. The first one imposes the obligation to take the necessary measures to ensure that gender-based violence against women may be recognized as a form of persecution within the meaning of Geneva Convention (§1) and to develop gender-sensitive reception procedures and support services for asylum-seekers (§3). It also mentions the obligation to ensure that a gender sensitive interpretation is given to the ground of the Convention (§2). Article 61 reiterates the principle of non-refoulement, with special attention given to the situation of women: "*Parties shall take the necessary legislative or other measures to ensure that victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment.*" (§2)

[15] There is currently a Proposal from the Commission (COM/2020/611 final) aiming to revising this Directive. The Parliament and the Council are invited (recommendations; "should") to ensure quick adoption of this text by Q2 2021.

[16] Council of Europe Convention on preventing and combating violence against women and domestic violence, 2011. This Convention has been signed by the European Union but is not yet ratified.

The Qualification Directive[17]

The 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 (recast), usually so-called The Qualification Directive, has been adopted in 2003 (during the first phase of the CEAS, under the Tampere Programme, when the main objective was to provide the Member States with common minimum standards). It has been revised in 2011. To date, a Commission's proposal aiming at replacing it by a Regulation, which would reinforce the harmonisation among States, is pending.

The Article 78 of the TFUE establishes that the EU´s institutions adopted several legislations to frame the CEAS. Among those, some consist in interpreting and apply the 1951 Convention. In that sense, the qualification directive[18] establishes common standards i) for the qualification of third-country nationals or stateless persons (i.e. people who are not European citizens) as beneficiaries of international protection; ii) for a uniform status of refugees or for persons eligible for subsidiary protection; iii) for the content of the protection granted.

The Dublin Regulation

The Dublin regime was originally established by the Dublin Convention, signed in Dublin, Ireland, on 15 June 1990. In 2003, the Dublin Convention was replaced by the Dublin II Regulation. In 2013, the Dublin III Regulation was adopted, replacing the Dublin II Regulation. The Dublin III Regulation (EU Regulation No. 604/2013) has been in force since 1 January 2014.

The Dublin III Regulation is the cornerstone of the Dublin System. It sets out the rules for determining which Member State is responsible for examining an application for international protection under the 1951 Refugee Convention and the Qualification Directive, within the EU. One of the main aims of this regulation is to prevent an applicant from submitting applications in multiple Member States, as well as reducing the number of "orbiting" asylum seekers moving from a member state to another and another. Once a person requests asylum in a country, that one is responsible for either accepting or rejecting the claim. The claimer cannot restart the process in another jurisdiction. This Regulation also recognizes the non-refoulement principle in the Preamble (3).

Additionally, the Article 32 prescribes that the transferring Member State shall transmit to the Member State responsible information on any special need of the person to be transferred. Despite there is not an explicit reference to SOGI applicants nor to anti-discrimination rules, there is a reference to the

[17] We have explained above ("*SOGI as persecution grounds*" section) its content and implications regarding SOGI-based cases.
[18] 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 (recast). Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0095&from=FR

Charter of Fundamental Rights of the EU. Therefore, it can be applied to SOGI cases, for instance, to cases of transgender people under medication special needs.[19]

The Return Directive

The Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals says that it is recognized that it is legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement.

The Article 21 stands that Member States should implement the Directive without discrimination, mentioning explicitly sexual orientation but neither gender identity nor expression.

[19] *The Commission proposed an Asylum and Migration Management Regulation (COM/2020/610 final), aiming at replacing this Regulation. The European Parliament and the Council are invited to adopt it by Q2 2021. Also, there is* a Proposal for a Regulation of the EU Parliament and of the council establishing the criteria and mechanisms for determining the Member State responsible for examining and application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). COM (2016) 270 final. In turn, it will be withdrawn by the Commission via the New Pact on Migration and Asylum. Moreover, the Commission Regulation (EC) No. 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. However, Regulation (EC) NO. 1560/2003 has not an explicit relation with SOGI based cases.

THE SOGI-BASED RIGHT TO ASYLUM IN THE NATIONAL REGULATORY FRAMEWORKS[20]

BELGIUM

Belgium is federal constitutional monarchy with a parliamentary system. Its structured on both regional and linguistic grounds, and divided into three highly autonomous regions: the Flemish Region (Flanders) in the north, the Walloon Region (Wallonia) in the south, and the Brussels-Capital Region.

The Constitution is the supreme law in the Belgian legal system.[21] Below there is a variety of norms: i) the special acts (*lois spéciales*), passed by special majority which determine the division of powers and the key operational rules of public institutions; ii) acts (*lois*), decrees (*décrets*) and ordinances (*ordonnances*); iii) royal orders (*arrêtes royaux*) and government orders (*arrêtes du gouvernement*) implementing acts or decrees; and iv) ministerial orders (*arrêtes ministériels*).

EU Regulations are directly applicable. Internal legislation is needed to approve and ratify international treaties. In certain areas, all legislative bodies in Belgium must approve and ratify treaties.

a) The SOGI-based right to asylum

The Belgian Constitution does not regulate asylum applications or international protection; however, it creates an essential basis for non-discrimination, incorporating, in Article 11, a principle which is a keystone for fundamental rights in Belgium. Although the Article 11 mentions only ideological and philosophical minorities, the Constitutional Court has extended the scope of the provision to all rights and freedoms granted to Belgians[22]. Hence, this article, consistent with the Article 18 of the Universal Declaration of Human Rights, sets out a general principle prohibiting direct or indirect discrimination of persons on the basis of sex, age, ethnic or national origin, religious or philosophical conviction, sexual orientation, disability, among others.

[20] This section is devoted to the analysis of the internal regulation of SOGI-based asylum in four countries (Belgium, France, Italy and Spain) members of the RainboWelcome project. Starting with a brief reference to the institutional and legal frameworks of each country, it reviews the regulation of asylum at the Constitutional, legal and regulatory level, as well as the application of international treaties. The main authorities involved in the asylum process are also identified, as well as an overview of the asylum reception, registration and granting.

[21] In a judgement given on 27 May 1971, the Court of Cassation held that all international and supranational instruments take precedence over national instruments, including the Constitution. If an EU Regulation conflicted with the Constitution, the Regulation would prevail. (European Justice Website. Belgium).

[22] Cour Constitutionnelle : arrêt 23/89 du 13 octobre 1989.

"Article 11. The enjoyment of the rights and freedoms recognized by Belgians must be ensured without discrimination. To this end, the law and decree guarantee, among other things, the rights and freedoms of ideological and philosophical minorities."

Moreover, the Article 2 of the Law of 22 may, 2014 amending the law of 10th may, 2007 regarding fighting against discrimination between women et men with a view to extend it to gender identity and gender expression, is relevant for LGBTIQ+ refugees. It stands that "sexism means any gesture or behaviour which (…) is clearly intended to express contempt for a person, because of his gender, or to consider him, for the same reason, as inferior or as reduced essentially to his sexual dimension and which involves a serious attack on his dignity". Even thought, this Article mentions only gender identity, it must be interpreted including sexual orientation. Moreover, both the Decree of the Flemish Community of 10 July 2008 and the Decree of the French Community of 12 December 2008 establish the framework for equal opportunities and treatment. Also, the Decree of the Walloon Region of 6 November 2008, regarding the fight against certain forms of discrimination represents an enhanced protection framework for protecting most vulnerable people, including foreign-born.

Under the Constitution, the Law of 15 December 1980 regarding the entry, residence, settlement and removal of aliens is the most important regulation about this topic. It is well known as the Aliens Act.[23] Its Article 48/3 stands that the status of refugee is given to the foreigner who satisfied the conditions considered in the Article 1A of the 1951 Refugee Convention and its 1967 Protocol; and the §4 (d) requests that SOGI must be considered when analysing the grounds for persecution.

This Act also includes provisions for subsidiary protection. The status of subsidiary protection is granted if an asylum applicant does not meet the criteria of the Refugee Convention but when there is a real risk of serious harm if returned to his country of origin. There are not specific provisions on resettlement in Belgium legislation. There is no difference between refugee status criteria for asylum-seekers, and that for resettled refugees.

Belgian asylum authorities are inclined to accept claims invoking fear of persecution based on SOGI reasons. According to Dhoest (2019), the European Directive of 2011 was adopted into Belgian law in 2013, however, SOGI applications were already accepted well before that time (p. 1080); and the key element in the assessment of SOGI claims is the credibility of sexual orientation or gender identity on the one hand and persecution on the other (p. 1081).

In Belgium, refugee candidates can apply for social assistance in application of the Article 1 of the Organic Law of Public Welfare Centres of 8 July 1976. No one disputes that this Article is applicable to candidate refugees. Open reception centres must provide social assistance to refugee applicants during the admissibility phase.

[23] It was amended twice by the Law of 21 November 2017 and the Law of 17 December 2017.

b) Authorities

Table No. 07
AUTHORITIES FOR ASYLUM IN BELGIUM

General Commissioner for Refugees and Stateless Persons (CGRA)	Commissariat général aux réfugiés et aux apatrides (CGRA); Commissariaat-generaal voor Vluchtelingen en Staatlozen (CGVS)	Independent federal agency designed for providing protection to people at risk of persecution or serious harm if they return to their home-country
The Office of Foreigners (OE)	Office des Étrangeres (OE); Dienst Vreemdelingenzaken (DVZ)	It is responsible for registering all asylum applications made on the Belgian territory or at borders.
The Council of Alien Law Litigation (CCE)	Conseil du contentieux des étrangers (CCE); Raad voor Vreemdelingenbetwistingen (RvV)	It is an independent administrative court, competent for the handling of appeals against decisions taken by the OE (decisions in matters relating to foreigners) or the CGRA (in "asylum" cases) and against all other individual decisions taken under the law of 15 December 1980 on access to the territory, residence, settlement and removal of foreigners (Foreigners Act).
The Federal Agency for the Reception of Asylum Seekers (FEDASIL)	L'Agence fédérale pour l'accueil des demandeurs d'asile (FEDASIL); Federaal agentschap voor de opvang van asielzoekers (FEDASIL)	It is in charge of organizing a quality reception and support in open centres, the reception and supervision of unaccompanied minors, and, also, coordinates the voluntary return program.
The Guardianship Service (SPF Justice)	Service public fédéral Justice (SPF); Overheidsdienst Justitie	It identifies unaccompanied minor foreigners and appoints a guardian. Through the Minors Coordinator, the CGRA works closely with the tutors and the SPF Justice. This is attached to the Federal Public Service Justice to ensure its independence from other institutions such as the OE (Office of Foreigners) which is attached to the SPF (Federal Public Service).
The United Nations High Commissioner for Refugees (UNHCR) in Belgium		It is able to provide an opinion at all stages of the asylum procedure before the OE, the CGRA or the CEC.

Source: own elaboration

c) Procedures

The asylum procedure is regulated by the Law of 15 December 1980 regarding the entry, residence, settlement and removal of aliens, so called the Aliens Act of 1980 amended by both Laws of 21 November 2017 and of 17 December 2017; as well as by the Law of 12 January 2007 regarding the reception of asylum seekers and other categories of aliens, also so-called the Reception Act, amended by Law of 21 November 2017. There is also a Law on Foreign Workers (Law of 30 April 1999) and a variety of decrees, administrative guidelines and regulations on asylum procedures, reception conditions, detention and protection for refugees. Articles 4-bis (1) and 51/5(3) of the Aliens Act use the term "European regulation" as a reference to the Dublin III Regulation criteria for determining the responsible Member State.

The application may be made a) on the territory before the OE; b) at the border before the Federal Police, and c) from a detention centre, in case the person is already detained. The vast majority of applicants for international protection in Belgium do not enter the territory through the official Schengen borders such as the airports, instead, they moved from the country in Europe in which they first arrived, to Belgium to seek protection (*secondary movements)*.

In the regular procedure, when the person is on the territory, he/she has to submit (*présente)* an application to the Immigration Office, within 8 working days after arrival. The applicant receives a "certificate of declaration" (*attestation de declaration*). The OE registers the application within 3 to 10 working days of the notification.

The applicant has to lodge *(introduit)* the application immediately and no later than 30 days after the application has been made. The Asylum seeker receives a "proof of asylum application". The OE informs the Office of the CGRA, the central asylum instance in Belgium in charge of the examination of the asylum application and of granting the international protection. The OE needs to determine whether Belgium or another Member State is responsible for examining an application for international protection under the Dublin III Regulation. If Belgium is the responsible country, the file is sent to the CGRA. (EMN, 2019, p. 25)

In case, the asylum seeker knowledge of Dutch or French is not sufficient, he/she must indicate irrevocably, and in writing whether he/she requests the assistance of an interpreter. The examination will be carried out in one of the two languages without any preference or opinion of the applicant. There is always an interpreter present who speaks the mother tongue of the asylum seeker.

The Article 23 of the Belgian Constitution stands that the right to a life in dignity implies for every person the right to legal assistance. The Article 39/56 and 90 of the Aliens Act guarantees free legal assistance by a lawyer to every asylum seeker at every stage of the procedure. The Reception Act also guarantees asylum seekers efficient access to legal aid during the first and the second instance procedure (Article 33 of the Reception Act).

The admissibility procedure must be done within 15 working days, even though this time limit has not been respected.

"The CGRS can declare an asylum application inadmissible where the asylum seeker:

a) enjoys protection in a First Country of Asylum;
b) comes from a Safe Third Country;
c) enjoys protection in another EU Member State;
d) is a national of an EU Member State or a country with an accession treaty with the EU;
e) has made a Subsequent Application with no new elements; or;
f) *is a minor dependant who, after a final decision on the application lodged on his or her behalf, lodges a separate application without justification."* (AIDA, 2020a)

If there is an inadmissibility decision, the applicant can submit an appeal within 10 days, or 5 days in the case of a subsequent application in detention. The appeal has suspensive effect, apart from the Subsequent Applications cases. The CCE shall decide within 2 months under "full judicial review" (*plein contentieux*). (Art. 39/57(1)(3) Aliens Act)

Staff members of CGRS are in charge of processing the asylum applications summiting a decision´s proposal, granting international protection or not, to the CGRS. This can take around 3 to 6 months; even sometimes it may be prolonged by another 9 to 12 months. Reasons given by the asylum seeker must be included and the keyword that matches with one of the possible grounds for asylum in Belgium. The list of keyword is in the electronic database. There is one keyword link to "sexual orientation and gender identity". This step is compulsory, then, it is easy to find all asylum applications based on a fear related to fear linked to one specific ground SOGI based.

According the Article 57/6 of Aliens Act, the CGRS may prioritise the examination of an asylum application where:

a. the applicant is detained or is subject to a security measure;
b. the applicant is serving a sentence in a penitentiary facility;
c. the Immigration Office or the Secretary of State for Asylum and Migration so requests; or
d. the asylum application is manifestly well-founded.

The CGRS has specific internal directives and there are regulations concerning the way to assess the credibility of the sexual orientation of the asylum applicant that invokes this motif.

> *"The directive presents the theoretical aspects necessary to better understand this issue as well as practical and concrete instructions for the hearing of the asylum applicant and the decision making. The appendix for the credibility assessment helps the protection officers to explore four variables that can help them to form their opinion on whether the asylum applicant is really homo(bi)-sexual or not. These variables include, among others, the way the asylum seeker has become aware of his homosexuality, his/her personal life course –regarding this sexual orientation- since childhood, any homosexual experiences s/he has had, etc."* (EMN, 2016, p.7)

Asylum seekers will have to go through an interview where they explain their reasons behind the asylum application, if their case fits with the Geneva Convention and its definition of a refugee, there is a chance they may receive asylum (Art. 57/6(2) of Aliens Act). According to the Aliens Act, the interview may be omitted where: i) the CGRA can grant refugee status on the basis of the elements in the file; ii) the CGRA deems that the applicant is not able to be interviews due to permanent circumstances beyond his or

her control; or iii) where the CGRS deems it can take a decision on a subsequent application based on the elements in the file (Article 57/5-ter(2) of Aliens Act).

If there is a positive decision, asylum lasts for an unlimited time. If the asylum case is rejected, a judicial appeal can be made before the CCE against the decision within 30 days, and the deadline is reduced to 10 days when the applicant is in detention (Article 39/57(1) of Aliens Act). The CCE has not investigative powers; its procedures are based on written files and documents and it is a "full judicial review" (*plein contentieux*) which allows it to reassess the facts. According the Article 39/2 of the Alien Act, the CCE can take one of three possible decisions:

a) Confirm the negative decision of the CGRA;
b) Overturn it by granting refugee or subsidiary protection status; or
c) Annul the decision and refer the case back to the CGRA for further investigation.

The CCE has three months to take a decision, even though, usually takes longer (*Article 39/76(3) of Aliens Act)*. In the meanwhile, the asylum seeker may receive subsidiary protection, which only grants residence in the country for a limited amount of time. After the deadline, they will have to leave the country and may be encouraged to leave via "voluntary return" where they will be given some money to return home. (INFOMIGRANTS website, 2017)

The asylum seeker may stay in a reception centre for up to two months after asylum is granted. Refugees also get meals, accommodation, and medical and psychological support.

Within 30 calendar days after the appeal decision, it is possible to submit a "cassation appeal", that is to say, an onward appeal against decisions of the Court before the Council of State, which is the Belgian Supreme Administrative Court (Article 39/67 of Aliens Act). After an admissibility test, the Council of State takes a decision. If it is annulled ("quashed"), then, the case is sent back to the CEE for a new decision of the CGRA.

At the borders and transits areas, The Federal Police is in charge of the immigration control, in close cooperation with the Border Control Section at the OE. Belgium has not a border guard authority. If the person who intends to enter in the territory has not a required travel document is refused and subject to "refoulement". The latter is suspended if the person applies to asylum.

The asylum application will be examined by the CGRA while the applicant is kept in detention in a closed centre located at the border. This application follows the regular procedure. However, if the CGRA has not taken a decision within four weeks, the applicant is admitted to the territory. If a ground for detention is still present, the applicant can be detained "on the territory" under another detention title. If there is a rejection, then, the person has to be returned by the airline company that brought them to Belgium, according the Chicago Convention on International Civil Aviation of 1994.

Furthermore, according the Article 57/6/1(1) of the Aliens Act, there is an "accelerated procedure" in cases where the applicant:

- "*Only raises issues irrelevant to international protection*;
- Comes from a Safe Country of Origin;
- Has misled the authorities by presenting false information or documents or by withholding relevant information or documents relating to his or her identity and/or nationality which could have a negative impact on the decision;
- Has likely in bad faith destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality;
- Has made clearly inconsistent, contradictory, clearly false or obviously improbably representations which contradict sufficiently verified country of origin information, thereby making his or her claim clearly unconvincing;
- Has made an admissible Subsequent Application;
- Has made an application merely in order to delay or frustrate the enforcement of an earlier or imminent removal decision;
- Entered the territory irregularly or prolonged his or her stay irregularly and without good reasons has failed to present him or herself or apply as soon as possible;
- Refuses to comply with the obligation to have his or her fingerprints taken; or
- May for serious reasons be considered a danger to the national security or public order, or has been forcibly removed for serious reasons of national security or public order." (AIDA, n.d.a)

The CGRA shall decide on the application within 15 working days. If it considers the application "manifestly unfounded", the order to leave the territory is valid between 0 to 7 days instead of 30 days (Article 57/6/1(2) Aliens Act). The Appeal must be decided within 10 days and it has suspensive effects. (Article 39/57(1)(2) of Aliens Act)

France is governed by the Constitution of the Fifth Republic, passed on 4 October 1958 with recent reforms in 2008. The French legal system follows a *Civil Law* tradition, largely based on statutes, codes, as well as written and codified regulations. It has two branches: the public (*Droit public)* and the private law (*Droit privé*).

There is a hierarchy of norms with the Constitution at the top as a supreme law.

- Organic Law (*loi organique*, approving institutional acts akin to the Constitution)
- Ordinary Law (*loi ordinaire*, voted on by the Parliament regarding its specific mandate)
- Orders (*Ordonnance*, measures taken by the government for operating the country)
- Regulations (*Règlements*; issued by the executive power through *décrets* and *arrêtes*)

The EU treaties and laws are superior to domestic laws, but they are under the Constitution according Courts decisions. The Article 55 of the Constitution specifies the place of treaties in the hierarchy of norms, moving from a legislative to a supra-legislative value.

The French jurisdiction is divided into two orders: an administrative and a judicial one. They are based on a set of principles, including impartiality and the right of appeal, which guarantee fundamental freedoms.

The administrative courts are competent applying the Public Law. In the judicial order, the Courts are competent to settle disputes between private individuals and to punish the perpetrators of criminal laws violations. Processes start in the administrative courts (*Tribunaux administratifs)* as a first level; there are Administrative Courts of Appeals (*Cour de casation*) as a second level, and it is possible to appeal before the Council of State (*Conseil d´Etat*).

The Constitutional Council (C*onseil constitutionnel*) oversees the constitutionality of laws before they are enacted as well as the national elections and responding citizens´ questions about the constitutionality of laws. The constitutionality review is mainly carried out a priori, with several possibilities for appeal. However, since the 2008 constitutional reform, it has been possible to conduct an ex-post review of the constitutionality of laws through a "Priority Constitutionality Question".

a) The SOGI-based right to asylum

The right to asylum is recognised by the so-called Constitutional Block, that is to say, the main norms in the constitutional level: the Constitution of 1958, the Declaration of Human and Citizen´s rights of 1789, the Preamble to the Constitution of 1946, and the Charter for the Environment of 2004. This was decided by a landmark decision taken by the Constitutional Council in 1971 (71-44DC).

This right was incorporated for the first time in the Constitution of 1793: "the French people give asylum to foreigners banished from their homeland for the cause of Freedom" *("le people francais donne asile aux étrangers bannis de leur Patrie pour la causa de la Liberté")*. The article 53-1 of the Constitution of October 4th 1958, currently in vigour, recognized the competence of the Republic to examine and

concede asylum as well as to sign agreements with other countries on this topic. There is no an explicit mention to SOGI-based cases.

> "*Article 53-1*
> *The Republic may enter into agreements with European States which are bound by undertakings identical with its own in matters of asylum and the protection of human rights and fundamental freedoms, for the purpose of determining their respective jurisdiction as regards requests for asylum submitted to them. However, even if the request does not fall within their jurisdiction under the terms of such agreements, the authorities of the Republic shall remain empowered to grant asylum to any foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France on other grounds.*" (Conseil Constitutionnel, n.d.a, p. 23)

Moreover, the Article 4 of the Preamble to the Constitution of October 27th 1946 stands that *"every man persecuted for his action in favour of freedom shall have the right to asylum in the territories of the Republic"*. This article establishes the "non-conventional protection" in France, that is to say, constitutional asylum has a separate basis from international refugee law, so France can grant it on a discretionary basis. However, to date, no concrete cases of demand have been reported.

The Constitutional Block does not mention sexual orientation or gender identity explicitly. However, the Constitution guarantees the non-discrimination principle in article 1. "*France (…) shall ensure the equality of all citizens before the law, without distinction of origin, race or religion…".* The SOGI-based right to asylum may be derived from the claims from there.

This Article is in full accordance with the Article 1 of the Declaration of Human and Citizen´s Rights of 1789 that has constitutional value in France: "Men are born and remain free and equal in rights. Social distinctions may be based only on considerations of the common good" (Conseil Constitutionnel, n.d.b)

The 1951 Refugee Convention was ratified by France on September 11th 1952, and its Protocols were also ratified subsequently. Its Article 3 establishes the principle of non-discrimination. Despite this Convention does not explicitly provide SOGI-based discrimination, French jurisprudence has made possible to protect SOGI-based claims on the ground of "membership of a certain social group". At first, it recognizes protection for "transsexual" persons, and, it was extended to homosexuals (CE, Ourbih, June 23, 1997 and CRR, SR, May 15, 1998, 269875, M. O).

The CESEDA recognises in its Article L711-1 the refugee status in the same terms of the 1951 Refugee Convention; and the Article L711-2 mentions explicitly that "*with regard to the reasons for persecution, aspects of sex, gender identity and sexual orientation shall be given due consideration for the purpose of recognizing membership in a particular social group or identifying a characteristic of such a group*". In this case, the identification of a social group occurs when two cumulative conditions are met. The members of the group must share a fundamental characteristic. The group must be socially visible in the applicant´s country of origin. On this point, the National Asylum Court (hereinafter CNDA) has specified that homosexuality constitutes an objective characteristic. Since 2014, persecution must now only take place on a "sufficiently significant scale". [24]

[24] CNDA, 29 November 2013, No. 13018952, M.M.

When a person does not meet the conditions for refugee status but there are serious and proven reasons to believe that he would run a real risk of suffering, in his country, harm of being executed or subject to a death sentence; ii) torture or inhuman or degrading treatment or punishment; iii) in the case of a civilian a grave and individual threat to his or her life or person by reason of violence that may extended to persons regardless of their personal circumstances and resulting from a situation of internal or international armed conflict.

In the context of SOGI-based asylum applications, "*subsidiary protection appears useful in three distinct hypotheses, when the conditions for being recognized as a refugee are not met:*

1. *It is relevant when the authorities recognize the risk of serious violations of the applicant's rights due to his or her sexual orientation if he or she returns to his or her country of origin, but there are no grounds for persecution available to apprehend his or her situation.*

2. *The authorities grant subsidiary protection when sexual orientation is not clearly established, but there is evidence of violence against the claimants.*

3. *The authorities recognize subsidiary protection for applicants who are indeed homosexual or bisexual and who face serious violations of their rights upon return to their country of origin, but for whom the link between them and sexual orientation is not established.*" (CERSA RAPPORT, 2020, p.59)

b) Authorities

Table No. 08
AUTHORITIES FOR ASYLUM IN FRANCE

The Office for the Protection of Refugees and Stateless Persons (OFPRA)	Office Français de Protection des Réfugiés et Apatrides (OFPRA)	It is the main authority for asylum procedures. Its Border Division (*Division de l´asile á la frontière*) is in charge of receiving and deciding the application at the country border. It is responsible for determining the refugee status and of the accelerated procedure. It is under the authority of the Minister responsible for asylum.
The Prefecture	The Préfecture	It represents the State on the territories. It is responsible for the local implementation of the national plan, of the application on the territory as well as of the Dublin procedure.
The French Office for Immigration and Integration (OFII)	Office Français de l'Immigration et l'Intégration (OFII)	It is the competent authority for receiving the applications on the territory.
The French Office for Immigration and Integration	Office Français de l'Immigration et l'Intégration (OFII)	It is the competent authority for receiving the applications on the territory.
The National Asylum Court	Cour Nationale du Droit d´Asile (CNDA)	As special administrative jurisdiction, it is the competent authority for asylum appeals, with the possibility to appeal onward to the Council of State (Conseil d´Etat).

Source: own elaboration

c) Procedure

The procedures for asylum are regulated by the Code of the entry and residence regulation, and asylum right (*Code de l´entrée et du séjour des étrangers et du droit d´asile*), so called CESEDA, in vigour since the 1 March 2005. There are, also, a set of decisions, orders and circulars implementing asylum.

The procedure for filing and monitoring asylum applications is national. It follows several stages. The asylum application may be made a) at the border, b) on the territory, or c) from and administrative detention centre.

On the territory, the asylum seeker must contact a First Reception Platform for Asylum Seekers - PADA (*Plateforme de premier accueil des demandeurs d'asile*), an independent organization (usually an association) that is the local competent orientation platform for centralizing asylum applications. The PADA does not take any decision, only it informs applicants about procedures and accompany them.

The application is registered at the One-stop-shop for aslyum seekers - GUDA (*Guichet unique pour demandeur d'asile*) of the Prefecture, and the applicant receives an asylum claim certification,

equivalent to a temporary resident permit. The completed file must be sent to OFPRA in French within 21 days of the issuance of the asylum application certificate.

In connection with the so-called Dublin procedure, special modalities apply for asylum seekers who have made a first application in another EU country. The applicant will receive an asylum claim certification but they are not allowed to lodge their application with OFPRA if another state accepts responsibility for their asylum claim. The applicant cannot travel to other Member States. If France is the first country of application, asylum seekers receive an asylum claim certification with that specification. In any case, they are allowed to travel to any other Member State country.

When a claim is submitted at the border or from a detention centre, the asylum claim certification is not delivered.

OFPRA conducts a confidential interview to the applicant for identifying any special reception needs. The interview is confidential and cannot concern the reasons for the asylum application. A list of questions will be drawn up in order to direct the applicant to an appropriate place of accommodation. The asylum seeker can be accompanied by a third person who cannot intervene during the interview apart from formulate questions at the end. These questions stem from the vulnerabilities identified by the CESEDA. It is often difficult to prove the sexual orientation or gender identity of the applicant. In general, support from LGBTIQ+ organizations can be important and decisive. The life story is extremely important and the applicant will be questioned about it.

> *"In practice, the assessment usually covers the verification of the credibility of the account; interview reports contain comments on stereotypical, imprecise or incoherent accounts on matters such as the sexual orientation of the applicant, with a lack of written proof. This practice of de facto examining the request on the merits is extremely problematic"* (AIDA, 2020b, p. 62)

When OFPRA will take a positive decision or when there is a medical situation, the interviews are not made. The Article L723-5 allows the office to ask the person seeking asylum to undergo a medical examination. The fact that the person refuses to undergo this medical examination does not prevent the office from deciding on his or her application. The medical certificates are considered by the Office together with the other elements of the application. The medical certificate can provide quick proof of the violence suffered, particularly when the violence may have been sexual, for example in the context of forced prostitution.

Frequently, an official from OFPRA travels to departments to make the individual interview after which the application for asylum will be decided. A positive or negative decision is then rendered. The decision is sent to the asylum seeker. When a negative decision happens, the applicant has two possibilities: i) to appeal to the CNDA; or ii) to request a reconsideration providing new information.

Within one month after the notification of OFPRA´s decision to the applicant, this is able to lodge an appeal to the CNDA with automatic suspensive effect. When the decision is about a claim introduced from detention, or it is about an inadmissibility decision, appeals have no suspensive effect. The CNDA can annul the first instance decision and grant subsidiary protection status or refugee status. In other cases, the CNDA confirm the first instance decision of OFPRA.

It is possible an onward appeal before the Council of State within 2 months after the notification of the CNDA decision. The analysis is based only in legal issues as the correct procedure and laws application. The Council can annul the decision of the CNDA and requires a new procedure, or may also decide to rule itself.

When the application is submitted at the border, the Border Unit of OFPRA interviews the asylum seekers and formulates a binding opinion. The Ministry of Interior must authorize the entry with the only exception of threat to national security. When the interview shows that the claim is "manifestly unfounded" because it is irrelevant or lacking of credibility, the Border Unit denies the entry. This refusal may be appeal before the Administrative Court within the next 48 hours. If this appeal is not conceded, the asylum seeker can be expelled from the country.

The asylum seeker authorized to enter in the territory is granted with an 8 day temporary visa. During this time, he/she has to request an appointment to PADA and the Prefecture is in charge of grant the person an asylum claim certification in order to continue with the regular procedure before OFPRA.

The Article L. 723-2 of CESEDA stands the possibility of an accelerated procedure in a variety of cases. (AIDA, n.d.b)

It is automatic when the applicant originates from a Safe Country of Origin (Article L722-1) or the applicant´s Subsequent Application is not inadmissible. Homosexuality may not be penalized in the country of origin but the state, whether failing or not, is not in a position to protect the LGBTIQ+ people. The accelerated procedure may be followed when the Prefecture reports that the asylum seeker refuses to be fingerprinted; the asylum seeker has falsified his/her identity, the claim has not been registered within 90 days after the foreign national has entered the French territory; the claim has only been made to prevent a notified or imminent removal order; or because public order, public safety or national security reasons.

According the Article L722-1, a variety of institutions and civil society organisations may submit to the Board of Directors a request for the inclusion or deletion of a State on the list of countries considered as safe countries of origin. The concept of "sexual orientation" was introduced in the 2018 reform, but the list of safe countries of origin has not yet been revised to include this new rule and some so-called safe countries penalize homosexuality. However, some associations are explicitly mentioned but no association for the protection of LGBTIQ+ rights is mentioned.

OFPRA is allowed to shift to an accelerated procedure when i) the asylum seeker has falsified his/her identity or travel documents; ii) irrelevant information when given support information; or the asylum seeker has been manifestly contradictory and incoherent.

According to the Article L744-6, following the submission of an asylum application, the OFPRA is responsible for carrying out, "*within a reasonable time and after a personal interview with the asylum seeker, an assessment of the vulnerability of the asylum seeker in order to determine, where appropriate, his/her special reception needs*." Also it stands that "*In the implementation of the rights of asylum seekers and throughout the period of examination of their application, account shall be taken of the specific situation of vulnerable persons*." The law does not refer to vulnerability on account of sexual

orientation of gender identity, therefore this is not taken into account by OFII either. "As the Ceseda does not refer to vulnerability on account of sexual orientation of gender identity, therefore this is not taken into account by OFII. In practice, LGBTI persons face strong difficulties when OFII does not provide them with housing, as most of the time they cannot find support in their national communities". (AIDA, 2020b, p.112-113)

An asylum seeker has the right to benefit from material reception conditions, which include accommodation in an asylum seeker reception centre (CADA) or an emergency accommodation centre, for him/her, if applicable, his/her family members; a monthly allowance for asylum seekers (ADA), the amount of which will be adapted to the composition of the family; and medical coverage by presenting the receipt of your asylum application and proof of residence in France for more than three months.

The places of accommodation are the reception centres for asylum seekers (*Centre d´accueil de demandeurs d´asile - CADA)* and all emergency accommodations for asylum seekers (Hébergement d´Urgence des Demandeurs d´Asile - HUDA, *Accueil temporaire – Service de l´Asile* - AT-SA, PRAHDA, *Centres d´accueil et d´orientation - C*AO). Accommodation places are financed and coordinated by the State. They are most often managed by associations. (Asylum seeker's guide, 2020)

ITALY

The Constitution of 1948 (*La Costituzion della Repubblica Italiana*) is the supreme law of the Italian legal system which takes the form of continental civil law.

Laws (*leggi*) enacted by the Parliament, Codes (*codici*) and Regional laws (*leggi regionali*) are under the Constitution level and must follow it. Parliamentary laws result from the Low Chamber (*Camara dei Deputati*) and the high chamber (*Il Senato*) and must be enforced all over the territory. Regionals laws must be obey in the specific territory according regional competency.

There are two exceptions to the normal legislative procedure: i) legislative decrees (decretos leggislativos), when the Parliament delegates the exercise of the legislative function to the government for a limited period; and ii) law decrees (Decreto legge) given by the Executive Power in extraordinary cases of necessity and urgency, adopting provisional measures having the force of law. These law decrees lose their force unless they are converted into law by Parliament within 60 days.

The Executive power is in charge of the regulations (*regolamenti*) and customary law (*usi e consuetudin)* is also recognised.

According the hierarchy of sources, a law should not contradict the Constitution and any sub-legislative Act should not contradict a norm above. International treaties are recognised as internal law and the status of aliens is regulated by law according the international legal framework.

The protection of human rights is guaranteed by the direct application, constitutionally recognised, of international conventions and treaties. The Italian law in conflict with fundamental rights recognised by the Constitution or by an international treaty is considered unconstitutional.

a) The SOGI-based right to asylum

The Italian Constitution provides the basis of human rights protection and the prohibition of discrimination (Articles 2 and 3). It not explicitly includes SOGI, however, the Constitutional Court, which has jurisdiction on all questions of breach of the Constitution, clarified that the notion of "*social groups within which human personality is developed*" includes the "*homosexual union, as a stable coexistence between two people of the same sex, to whom the fundamental right to freely live a couple´s condition*"[25].

The Article 10 (3) of the Italian Constitution states that "*the foreigner who is not granted in his/her country the democratic freedom guaranteed by the Italian Constitution, has the right of asylum in the Republic territory according to the conditions established by law.*"

[25] Judgement of 14 April 2010 no. 138.

The main regulations about citizenship and immigration are the Italian Citizenship Act of 5 February 1992, no. 91 (Citizenship Act) and the Legislative Decree No. 286/1998 of 25 July Consolidated Act on provisions concerning the immigration regulations and foreign national conditions norms (Consolidated Act - TUI). The legislative Decree 251/2007 of 19 November, so called the Qualification Decree, implements the EU Directive 83/2004/EC.

In 2018, the Italian government approved the Public Security Decree (*The Decreto Sicurezza*) of 4 October 2018 no. 113, amending several laws in Italy. Because the decrees were promoted by the former interior minister Matteo Salvini, they are also well known as "the Salvini Decree". It was converted into Law No. 132 on 1 December 2018. The latter defines that administrative, legislative and judiciary measures discriminating against LGBT people constitute a form of persecution, which is one of the fundamental provisions to obtain refugee status (Article 17).

The Security Decree deleted the word "humanitarian" from the Citizenship Law, and introduced the "special protection", an alternative lame which, at the express wish of the legislator, could not be converted into a work permit and lasted just one year. "*Prior to the Decree, humanitarian protection permits were granted in cases where individuals were eligible for neither refugee status nor subsidiary protection but could not be removed from the country because of objective and serious personal situation."* (EC, n.d.a) This was abolished by the Salvini Decrees.

On October 2020, the Council of Ministers approved the modification of the Security Decrees through what is called the Immigration Decree, Law Decree 130/2020, published on 21 October and entering into force on 22 October. The reception process has been radically changed, restoring humanitarian protection. A resident permit for humanitarian reasons that was provided for by the 1998 Consolidated Act on immigration is reinstated. The Article 1 of the decree also introduces a new principle of non-refoulement or repatriation to a state in which human rights are systematically violated and prevents repatriation of those who have a consolidated life in Italy. (Camilli, 2020)

Moreover, in the last years, a set of judicial decisions in the national and international courts has recognised the right to asylum based on SOGI.[26] Domestic judges have been interpreting the legislation in accordance to the international treaties, particularly regarding the refugee definition when SOGI-base applications are submitted. For instance, the Italian Court of Cassation stands that the only existence of a criminal law punishing sexual conducts among same sex persons hampers one´s "*fundamental right to live freely their sexual and emotional life*", becoming a serious interference in their private life[27] (SOGICA, n.d.b)

In Italy, there are three forms of protection consisting of: i) refugee status, ii) subsidiary protection and iii) the right to a humanitarian residence permit.

[26] For instance: Pakistani Gay man v. Italy. The Court of Rome, January 2021; Ivory Coast Gay Men v. Italy. The Italian Supreme Court of Cassation on April 2019; Oliari and Others v. Italy. European Court of Human Rights, 21 July 2015; The Italian Supreme Court of Cassation decision 18 April 2012, n. 11586; Gambian Man v. Minister of Interior, Venice Tribunal, 4 march 2016; Pakistani Man v. Minister of Interior, Bari Tribunal, 4 December 2014; Nigerian Man v. Italy Minister of Interior, Napoli Court, 25 October 2013; and Egyptian Man v. Italy Police Headquarters Milan, Rome Court, 18 November 2011. (Refugee Legal Aid Information for Lawyers Representing Refugees Globally, s/f; ANSA, 2019; Burdeau, 2021).

[27] Court of Cassation, 20 September 2012, no. 15981.

b) Authorities

Table No. 09
AUTHORITIES FOR ASYLUM IN ITALY

The Immigration Office	Ufficio Immigratzione	It receives application on the territory
Border Police	Polizia di Frontiera.	It receives application at the border
Dublin Unit	Unitá Dublino, Ministero dell´Interno	In charge of deciding about applications under the Dublin rules
The Territorial Commission for the Recognition of International Protection	Commissioni Territoriali per il Riconoscimento della Protezione Internazionale.	It has decision-making powers regarding the revocation and termination of international protection status; it also has tasks of guiding and coordinating the territorial commissions, training and updating the members of the same commissions, collecting statistical data, setting up and updating information on the countries of origin of asylum seekers.
Civil Court	Tribunale civile	Decides appeals
Court of Cassation	Corte di Cassazione	Decides onward appeals

Source: own elaboration

c) Procedures

In Italy, there is a variety of procedures, mainly regulated by the Legislative Decree No. 25 of 28 January 2008 "Implementation of Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status", so-called "Procedure Decree".

The asylum application can be made either at the border police office (*Polizia di Frontiera*) or on the territory at the provincial immigration office (*Ufficio immigrazione*) of the Police (*Questura*). The Legislative Decree No. 142 of 2015 so called the "Reception Decree" implements the Directive 2013/33/EU on standards for the reception of asylum applicants and the Directive 2013/32/EU on common procedures for the recognition and revocation of the status of international protection.

At the border or in transit areas, the application must be submitted orally and, after, formally (*verbalizzazione)* to the Border Police (Questura). The Police cannot examine the merits of the asylum apart. After reforms of 2018, the Police can declare the Subsequent Application automatically inadmissible. If during the registration the Police contacts the Dublin Unit of the Ministry of Interior to verify if Italy is responsible for the its examination. In Friuli-Venezia Giulia region, the Police do not proceed to the lodging of the application if the Dublin Regulation is applicable. Once the application has been received, the Police send the formal registration and documentation to the Territorial Commissions or Sub-Commissions for International Protection. The asylum seeker is notified of the interview date in front of the Territorial Commission. (AIDA, n.d.c)

The border procedure also applies to asylum seekers who come from a designated Safe Country of Origin (Article 28-bis(1-ter) Procedure Decree, as amended by Article 9(1) Decree Law 113/2018.). Albania, Algeria, Bosnia and Herzegovina, Cape Verde, Ghana, Kosovo, North Macedonia, Morocco, Montenegro, Senegal, Serbia, Tunisia, and Ukraine are in the list of countries approved by the Ministry of Foreign Affairs (Decree on 4 October 2019).

According the Consolidated Act on Immigration (TUI), amended by Law 46/2017, foreigners apprehended for irregular crossing of the internal or external border or arrived in Italy after rescue at sea are directed to appropriate "crisis points" and at first reception centres. If it is not possible to identify the nationality of persons in detention, they are introduced in hotspots facilities for identification. The Standard Operating Procedures (SOPs) of February 2016 stands that the use of force will full respect for the physical integrity and dignity of the person.

On the territory, the regular procedure starts when the asylum seeker submits an application to the Territorial Commission. The asylum seeker should make his/her application within 8 days from arrival at the border police office or within the territory at the Immigration Office.

Within 30 days after the application, the Territorial Commission makes an interview, takes photography (*fotosegnalamento*) and decides in the following 3 working days. Some extensions can be done if it needs to collect more information, because the complexion of the situation or the number of applications. As an exception, the Territorial Commission may take up to 18 months to complete the procedure.

If the applicant leaves the reception centre without any justification or absconds from CPR or from hotspots, the Territorial Commission suspends the examination of the application on the basis that the applicant is not reachable (*irreperibile*) (Article 23-bis Procedure Decree, inserted by Article 25 Reception Decree).The applicant may request a reopening within 12 months from the decision.

An accelerated procedure is possible in some cases identifies by the President of the Territorial Commission. (Article 28(1)(c) and (1-bis) Procedure Decree).Furthermore, the Decree Law 113/2018 amended the Procedure Decree introducing the "inmediate procedure" (procedimiento immediate): a) when the applicant is subject to investigation for crimes which may trigger exclusion from international protection, and the Grounds for Detention in a CPR apply; and b) when the applicant has been convicted, including by a non-definitive judgement, of crimes which may trigger exclusion from international protection.

The Territorial Commission may decide to grant refugee status, subsidiary protection, or recommend to the Police (*Questura*) to issue a one-year "special protection" residence permit.

Asylum seekers can appeal a negative decision within 30 days before the specialized Civil Court (Decree Law 13/2017). When the applicant is in detention or under the accelerated procedure (28-bis(2) of the Procedure Decree), the Territorial Commission has only 15 days to lodge an appeal (Article 19(3) LD 150/2011.). The negative decision of the Civil Court can be appeal before the Court of Cassation as a final stage (Decree Law 13/2017).

The System of Protection for Beneficiaries of Protection and Unaccompanied Minors (*Sistema di protezione per titolari di protezione internazionale e minori stranieri non accompagnati, SIPROIMI*) was implemente in 2018, replacing the System of Protection for Refugees and Asylum Seekers (*Sistema di protezione per richiedetnti asilo e rifugiati, SPRAR*). There is no difference between an asylum seeker and the person beneficiary of international protection. Unaccompanied children have immediate access to SIPROIMI, and victims of trafficking, domestic violence and particular exploitation, persons with medical treatment, or natural calamity in the country origin, or for acts of particular civil value can be accommodate by local authorities (Decree Law 416/1989, implemented by Law 39/1990, and Decree Law113/2018).

SPAIN

Spain is both a Unitarian and decentralised State with autonomous territorial governments (*Comunidades Autónomas* y *Administraciones Locales*).

The Spanish legal system is based on the *Civil Law* tradition. The Constitution of 1978 is the supreme law. According the hierarchy of norms, any rule below the Constitution must follow its principles otherwise it is not valid (Article 1.2. of the Civil Code). The International treaties are part of the internal legal system, including the EU ones.

Below the Constitution, there is a variety of legal devices: the International treaties, the Organic Law, the Ordinary Law and others with the same level (Royal Law Decree and the Royal Legislative Decree), and after, there are regulations from the Executive Power (the Royal Decree, the Ministerial Order and so on).

In terms of the territorial mandate Principle, the Autonomous Communities are able to enact their own Autonomic Decrees, Autonomic Orders, and so on. These regulations are valid inside the correspondent territory.

a) The SOGI-based right to asylum

Principles and State obligations derived from the Constitution of 1978. Equality and non-discrimination principles appear in the Article 14 when stands that "*Spaniards are equal before the law, without any discrimination based on birth, race, sex, religion, opinion or any other personal or social condition or circumstance*".

Although there is not an explicit mention to SOGI, many decisions in Courts have understood that the phrase "of any other condition or personal or social circumstances" (*de cualquier otra condición o circunstancia personal o social*) includes SOGI.

Moreover, the Article 13 of the Constitution is devoted to the rights of foreigners. The Article 13.4 recognises the right to asylum in Spain. "The law will establish the terms in which citizens of other countries and stateless persons may enjoy the right of asylum in Spain".

In 1978, Spain had signed the 1951 Refugee Convention and its 1967 Protocol. After the approval of the Law 5/1984, regulating the right to asylum and the refugee condition, successive laws and decrees have been enacted. Laws and their regulations did not include any explicit mention to SOGI.

The Law 12/2009, so called the Asylum Act, is currently in force since 20 November 2009.[28] It includes for the first time in the Spanish legal system the idea of "subsidiary protection"[29], incorporates new regulations about family reunification, vulnerable groups, and specifies state obligations about reception conditions. It is the legal framework to all regulations approved by the government and autonomies. Moreover, it prescribes that people from other countries who requested international protection must be hosted by the specific Centres. These are subsidized by the government and NGOs. Few rights and public services are recognized for them. Its Preamble makes an explicit mention that pretends incorporate the "First phase of the Common European Asylum System" (CEAS), as well as the new interpretations and criteria developed by Spanish and international bodies and courts. (Defensor del Pueblo de España, 2016, p. 25)

Moreover, the second final arrangement of this law adopts EU regulation applicable to people who request the right to asylum in Spain, without distinctions. This law defines the refugee status as a person who, due to well-founded fears of being persecuted for a variety of reasons is outside the country of their nationality and requires protection in other territory. Gender and sexual orientation are explicitly included in the reasons of persecution. (Article 3)

The Article 7 recognises that "particular social group" (*grupo social determinado*) may refer to sexual orientation and sexual identity. This article takes this concept set out in international instruments. It has been recognized also in the Directive 2004/83/CE (art. 10.1.d), revised by the Directive 2011/95/EU. Applicants of a particular social group must share an innate characteristic or a common background that cannot be change; and that group must have a different identity (*identidad diferenciada*) in the country because it is perceived as different by the society that surrounds them. These are two alternatives (non-simultaneous) characteristics, in accordance with the Guidelines No. 9 of UNHCR.

According to the Article 7, there are two restrictions to SOGI conditions in asylum:

- The SOGI situations may be included in the category "particular social group" according the circumstances in the country of origin.
- In any situation, sexual orientation may be understood as the performance of conducts considered as crimes in the Spanish legal system.

These restrictions are unnecessary because two reasons: i) the article 8 of the Law contains crimes as an exception to causes of persecution; and ii) sex between two same-sex adults is not a crime in Spain. According some authors (Díaz LaFuente, 2014, p. 352) this is a discriminatory regulation for SOGI situations, because it is not relevant as a consideration if the person has committed prostitution, sexual abuse or exhibition, or harassment.

[28] On 30 October 2009, the Law 12/2009 was enacted regulating the right to asylum and subsidiary protection. It includes the Directives 2004/86/CE of 22 September, 2004/83/CE of 29 April, and 2005/85/CE of 01 December. It was modified by the Law 2/2014 of 25 march, adding a paragraph to the article 40.1 in order to incorporate the complete version of the article 2.j) of the Directive 2011/95/UE of 13 December.

[29] The subsidiary protection works when there are persons from a third country or stateless persons that, even though do not accomplish all needed requirements to obtain the refugee status, there are enough reasons to think that if they return to their country of origin or, in the case of stateless persons, to the prior country where they used to live, they might have real risk to suffer critical damages. When a person have subsidiary protection, a set of fundamental rights must me guaranteed by the host country: non-refoulement, information, residence, mobility, family unity continuity, and also social rights like employment, health system, housing, education, social protection and social integration for immigrants. (Diaz LaFuente, 2014, p. 355)

Furthermore, the Asylum Act considers the elements that are useful to define the persecution. Those must be as critical in their nature or as repetitive that might harm fundamental rights, in particular, those that cannot be part of exceptions according Article 15 of the European Convention for Human Rights and Fundamental Liberties Protection (life, torture, slavery, and the rule of law). Also, there is persecution when there are a set of measures that affect a person in a similar manner than in the mentioned rights. (Art. 6) A contested issue is whether discrimination affecting basic social rights as labour, health system, and so on, may be consider a persecution.

Following the Directive 2004/83/CE, the Asylum Act considers extending some rights to the family of refugees, particularly some social rights as employment, housing and health services. The notion of "family members" is developed in the Directive 2011/95/EU that must be applied in SOGI cases as well. One particular and relevant issue is the recognition of same-sex relationships. This is regulated by internal country legislation. In this case, considering Spain has recognised same-sex marriage, as well as unmarried partners (*parejas de hecho*). The Article 40 of the Asylum Act establishes that the right to asylum or subsidiary protection may be applied to married partners or persons with analogous forms of emotional and cohabitation relations. Therefore, it applies to same-sex marriage.

Another relevant law is the Organic Law 4/2000 (Aliens Act) of 11 January 2000, amended by the Organic Law 4/2015 of 30 March (Citizen Security Act) and regulated by the Royal Decree 557/2011 (Aliens Regulation) of 20 April. The Aliens Act regulates rights and liberties of aliens in Spain and their social integration (LOEX). SOGI-based rights derive from the application of equality and non-discrimination principles.

The Article 2 bis of the Aliens Act related to migration policy stands that all public administrations will perform their functions and competencies on the non-discrimination principle. The most important is that, in the letter f) of the Article 2, it stands that the realization of rights is recognized to every person, based on the Constitution international treaties, and laws. They must be guaranteed by the State. The Citizen Security Act mentions explicitly that the national identity card must not affect intimacy and that includes sexual orientation.

The Temporary Protection Regime in case of mass influx of displaced persons from non-EU third countries is regulated by the Royal Decree 1325/2003 of 24 October. It considers "a displaced person" refers to a people who were or still are in danger of a systematic or generalized violation of their human rights. (Art. 2) Even there is not an explicit mention of SOGI-based applicants, their rights and the right to asylum must be guaranteed in accordance to laws, Constitution and international treaties.

b) Authorities

Table No. 10
AUTHORITIES FOR ASYLUM IN SPAIN

The Border Police	Policía Fronteriza	It is competent to receive applications at the border, as well as on the territory.
The Office of Asylum and Refuge	*Oficina de Asilo y Refugio (OAR)*	It is the authority competent for examining asylum applications at the border and on the territory. It is responsible of the subsequent application as well.
The Aliens´ Office	*Oficina de Extranjeros*	It is competent to see cases of asylum at the border and on the territory.
The Inter-Ministerial Commission on Asylum	*Comisión Interministerial de Asilo y Refugio* (CIAR)	It has the mandate of determining the refugee status.
The National Court	*Audiencia Nacional*	It is responsible for deciding the appeals.
The Supreme Court	*Tribunal Supremo*	It is responsible for deciding the onwards appeals.

Source: own elaboration

c) Procedures

Administrative procedures for asylum are regulated by the **Law 39/2015 of 1st October**, so called **Administrative Procedure Act**. It establishes a complete and systematic regulation about citizens and public administration relationships.

SOGI cases are included because there is a constitutional recognition that rights must be read according human rights treaties and covenants, as well as in accordance to the Aliens Act. This is particularly relevant considering procedures must have all the guarantees to protect rights to asylum based in SOGI.

This regulation may be applied in the case of absent specific rules on migration and asylum. Therefore, if we do have an asylum request based on SOGI, specialized organic laws on migration and asylum must be applied; however, if there is something which has not been regulated by them, then, this regulation can be applied using the supplementary principle.

According this regulation, we must consider due process of law, simplification, and other principles from administrative procedures regulation. Considering this regulation applies to everybody, SOGI situations are, also, included as we must applied same principles in any procedure.

The asylum procedure may start at the border or on the territory. It is not possible; despite de Asylum Act foresees that possibility, to do this through embassies or consular representations.

At the borders, the application should be submitted before the competent authority: the Office of Asylum and Refuge (OAR), any Alien´s Office (*Oficina de Extranjeros*); or in any Detention Centre for Foreigners (CIE) or police station.

The OAR has 4 days to declare the application admissible, inadmissible or unfounded. If the deadline is not met, the applicant will be admitted to the territory to undergo the regular procedure (Art. 21 and 25 of Asylum Act). It is possible to request a re-examination (*re-examen*) before the OAR. If there is a negative decision then decisions are subject to appeal before one of the Central Administrative Judges (*Juzgados Contencioso-Administrativos*) within the National Court, and this can be appealed before the National Court, and the Supreme Court as a maximum level.

On the territory, applications should be submitted to the OAR during their first month of stay in Spain (Article 17(2) of the Asylum Act). After this month, it is possible to apply to the urgent procedure. The procedure starts making (*presentación*) the application. The asylum seeker will receive a "certificate of intention to apply for asylum" (*Manifestación de voluntad de presentar solicitud de protección internacional*). After this, the asylum seeker has to "lodge" (registrar) the application. In the appointment, he/she is subject to an interview and the completion of a form. The person receives a "receipt of application for international protection" (*Resguardo de solicitud de protección internacional*) also known as the white card (*tarjeta blanca*).

This office will have one month to examine the admissibility. If there is no decision after the deadline, the person will be admitted (Article 20(2) of the Asylum Act). The non-admissible decision may be ground on the following situations: a) lack of jurisdiction for the examination of the application; or b) failure to comply with admissibility requirements. Decisions declared inadmissible are subject to appeal before one of the Central Administrative Judges (*Juzgados Contencioso-Administrativos*) within the National Court, and this can be appealed before the National Court, and the Supreme Court as a maximum level.

Once the application is declared admissible by OAR, there is a six months period to examine the application. The applicant receives the red card (*Tarjeta roja*) which authorizes him/her to reside in Spain and access to employment. The OAR writes a draft of the decision and the CIAR decides on the application.

If there is a rejection based on the merits, the asylum seeker can appeal before the National Court (*Audiencia Nacional*) within two months, and to submit an onward appeal before the Supreme Court (*Tribunal Supremo*).

There is an urgent procedure when the application is made at the border or from a CIE. Requested by the applicant or applied *ex officio*, the OAR must decide in three months at last (Article 25 of the Asylum Act).

Decisions will have different results:

a. Granting the status of refugee;
b. Granting subsidiary protection;
c. Denying the status of refugee or subsidiary protection and granting a residence permit based on humanitarian grounds;
d. Refusing protection.

It is possible to appeal to the National Court (*Audiencia Nacional*) within two months. Also, it is possible to submit and onward appeal before the Supreme Court (*Tribunal Supremo*).

According the Article 30(1) of the Asylum Act, applicants for international protection will be provided a shelter and social services to ensure the satisfaction of their basic needs in dignified conditions. It does not matter the type of asylum procedure, all asylum seeker receives these benefits for 18 month period of accommodation, assistance and financial support. In the case of "Special Reception Needs" (vulnerable cases), there is a maximum of 24 months. People who applied in the Moroccan border are obliged to stay in the Ceuta and Melilla´s Migrant Temporary Stay Centres (CETI); they will have benefits only when they are transferred to the territory.

The AIDA Report on Spain, reception conditions for asylum seekers in Spain "*include the coverage of personal expenses for basic necessities and items for personal use, transportation, clothing for adults and children, educational activities, training in social and cultural skills, learning of hosting country language, vocational training and long life training, leisure and free time, child care and other complementary educational type, as well as aid to facilitate the autonomy of the beneficiaries and others of extraordinary nature*." (AIDA, n.d.d)

CRITICAL REGULATORY ISSUES[30]

The SOGI-based asylum procedure poses some problems mainly related to i) the lack of explicit recognition of SOGI-based cases in the regulation; ii) the evaluation of situations of risk and vulnerability from which the asylum seekers are escaping; iii) the proof of homosexuality during the interview and the whole process; and iv) the lack of capacity to shelter all applicants with comfort and welfare, among other problems.

1. THE LACK OF EXPLICIT RECOGNITION

In the International Human Rights System, there is still a lack of explicit recognition of SOGI rights in treaties. Nevertheless, in the last 15 years, the Human Rights institutions in the international level have begun a more active decision-making process and political statements on SOGI. (ARC International website. SOGI Statements; Asia Pacific Forum of National Human Rights Institutions website. Recognition of SOGISC rights at the international level; International Commission of Jurists [ICJ] website. SOGI UN Database). The Guidelines for refugee's rights and asylum procedures recognise explicitly SOGI, and the UN system has recognised that SOGI-based persecution or risk are cases for granting asylum.

The reliance on binary categories ("male" and "female") which appear deeply embedded in human right discourse may present critical issues. (Correa et al., 2015) The Western categories "LGBT" are forms that do not match with alien experiences. According to MacArthur (2015), "even the seemingly inclusive terms of "sexual orientation" and "gender identity" appear to ignore those whose behaviour does not necessarily succeed their identity, such as "men who have sex with men" but do not identify as "gay" (p.28). At the moment, SOGI rights are open to interpretation and do not yet appear fully formed.

At the European level, despite of the recognition of sexual orientation and gender identity as common characteristic among people forming a social group under the Qualification Directive, some issues need to be pointed out.

- There is not an explicit mention about gender expression.

- There are not specific legislative instruments dedicated to the particular situation of SOGI-based applicants:
    - Their vulnerability is only addressed in so far as gender-sensitive approach is adopted. However, as underlined, this approach seems to be limited to the binary vision of genders. Moreover, it does not enable particular considerations for people's sexual orientation or characteristics.
    - However, LGBTIQ+ refugees' special vulnerabilities are considered in the Istanbul Convention from the Council of Europe. This could have inspired the EC in the elaboration of its LGBTIQ Equality Strategy for 2020-2025 (non-binding), using its

[30] This section presents the challenges at national and local levels and key elements to be promoted or encouraged. Critical comments are based on the partners' expertise, experience, and existing literature about SOGI-based asylum claims and procedures.

powers to transpose the same considerations within the EU framework, "one way or another". Nevertheless, despite the EU signed the Istanbul Convention, its ratification generated delicate issues.

- There is a lack of explicit consideration for gender identity and expression in most of the non-discrimination instruments. For instance, the Reception Conditions Directive focuses only in cis-gender women and men, without any specification about gender non-conforming people; and the Return Directive does not mention gender identity nor expression.

- There is still a lack of elements related to queer people and in the overall to gender expression. Some persons with a particular gender expression such as those different from the cis-norm, (the androgynous people, for instance) could be considered as forming a social group. As long as there is not an explicit recognition, there is a margin for interpretations far from human rights protection. It is expected that authorities must consider the fact that the EU legislation specifies that the characteristic on the basis of which a person is (or risks to be) persecuted can be attributed and not especially possessed could ensure that gender expressions are considered in gender-based application's assessment.

- The proposals and communications elaborated by the Commission in order to reform the CEAS do not include the elements mentioned above. Therefore, the reform mainly targets the nature of the legislative instruments used (Directives would be replaced by Regulations, which is a good step towards better harmonisation). No significant improvement regarding consideration of SOGI-based application has been noticed apart from the inclusion of EUCJ case-law in the Preamble of a revised Directive.

- In general, the length of the legislative procedure at EU level and political deadlocks (mainly in the Council) jeopardize the effective adaptation of the CEAS to the realities on the ground.

Furthermore, the Courts, both the European Court of Human Rights and the European Union Court of Justice, make interpretations of laws in a favourable manner to the recognition and the protection of SOGI-based applicants. Such a progressive case-law should be included in new legal instruments (e.g: a clear definition of the "sex" criteria in the non-discrimination legislation, including sexual characteristics and genders or the direct inclusion of new criteria).

In the overall, the European Commission must use its power of initiative to keep raising awareness on the realities and special needs of SOGI-based applicants, as it already does in matter of equality and non-discrimination for LGBTIQ+ people. Likewise, other European institutions should collaborate to adopt comprehensive, consistent and progressive legislative instruments to foster their protection and inclusion. This would serve as a common frame for all Member States whose regulations would be better harmonised; this, in turn, would avoid unfair differences of treatment between LGBTIQ+ people (between different European or national citizens but also between non-nationals).

The evolution of the CEAS has been marked by the migration crisis from 2015-2016. The EU has not been able to face it with a humanitarian approach despite both the temporary protection Directive and the EC attempts to propose urgent solutions towards the adoption of European Agendas on Migration. The temporary protection Directive has never been applied in practice, partially due to political tensions within the Council arising from inadequate burden-sharing. The existing gaps and issues of the CEAS hinder that it should properly ensure protection to all the asylum applicants. The EC, as attested by the objectives and content of the New Pact on Migration (EESC website. The New Migration Pact: EESC frustrated with "the devil in the detail"). The New Migration Pact: EESC frustrated with "the devil in the detail"), initiated a deep reform of the System through the adoption of various proposals in 2016.

Additionally, the CEAS encompasses rules on how to determine which member state will be responsible for examining applications for international protection (see Regulation DUBLIN III). Despite the revisions, Dublin regulation is still strongly criticised, notably because it imposes a heavy burden on some Member States (e.g. Italy and Greece because they are at the EU borders, only access to the EU territory when arrivals by planes are not allowed). Indeed, this Regulation identifies the EU Member State that will be responsible for examining an asylum application, using various criteria such as family unit, possession of residence documents or visas, visa-waived entry and irregular entry or stay. In practice, it is mainly this last criterion that is used to "assign responsibility" for processing an asylum application to a single Member State. Concretely, this implies that the Member State through which the applicant first entered the EU is responsible for examining her/his claim.

> "*The* […] *migration and refugee crisis has revealed significant structural weaknesses in the design and implementation of the CEAS and of the Dublin regime. This has been confirmed by recent external studies on the Dublin system and acknowledged by the Commission in its communication of 6 April 2016.*" (Radjenovic, 2019)

As part of the 2016 CEAS reform, launched, but blocked, the 2016 Commission's proposal aiming at revising the Regulation[31] is still pending because of strong disagreements among States, and thus, within the Council that has to adopt the text, accordingly with the ordinary legislative procedure.

[31] COM(2016) 270 final.

Table No. 11
NON-DISCRIMINATION AND SOGI RECOGNITION IN ALL LEVELS AND COUNTRIES

	UN	EU	Belgium	France	Italy	Spain
Non-discrimination Principle	Human Rights Treaties	Human Rights Treaties	Constitution & Law 22 May 2014	Constitution	Constitution	Constitution
Sexual orientation	Guidelines No. 1, 2. 6 and 9	ECHR Asylum Procedures Directive Reception Directive Qualification Directive	Aliens Act	Ceseda French Jurisprudence	Legislative Decree 251/2007 Italian Jurisprudence	Asylum Act Spanish Jurisprudence
Gender Identity	Guidelines No. 1, 2. 6 and 9	Asylum Procedures Directive Reception Directive Qualification Directive	Aliens Act	Ceseda French Jurisprudence	Legislative Decree 251/2007 Italian Jurisprudence	Asylum Act Spanish Jurisprudence

Source: own elaboration

2. THE "PROOF OF SEXUAL ORIENTATION AND GENDER IDENTITY" DURING THE INTERVIEWS

During the procedure, the interview is a key policy instrument. In fact, it is "*the means through which the State agents can implement a politics of LGBTI asylum*" (Prearo, 2020, p.3) It constitutes a technical and social instrument that organizes specific social relation between the state and persons, producing specific effects (Lascoumes and Legales, 2007, p. 3-4), in this case, through the narrative of a story.

In all countries, the main difficulty for LGBT+ asylum seekers is the "proof" of sexual orientation in the asylum application. In France, the OFPRA officer has to be convinced, through the life story, and then the individual interview. In Spain, like in other countries, the idea of credibility implies coherence, plausibility and no- contradiction, criteria that does not take into account the consequences of fear, difficulties in self-identification, and internal homolesbotransphobia, all product of mainly the permanent repression and criminalization of conducts in their countries. There is a kind of "culture of mistrust" in immigration authorities before SOGI-based cases. (Guell, 2020)

According to Giametta (2016), asylum and social protection are, very often, granted on the basis of stereotypical understandings of victimhood, gender relations and sexuality (p. 57). This means that the narratives of life experiences of LGBTI migrants do not situate themselves in an administrative vacuum, limited to their registration and authentication, where appropriate. "*On the contrary, the stories that the LGBTI asylum applicants tell during the interview encounter and clash with a number of representations, values, judgements, and finally, categories, which are pre-existent and pre-defined by rules, laws, directives, and conventions, but also by cultural basis*." (Carnassale, 2014,2019 cited by Prearo, 2020, p. 2)

In Italy, once the asylum application has been submitted the applicant is allocated in a reception structure for months (sometimes a year), and, then, the Territorial Commission, formed by four people, must judge his case. However, only one member conducts the interview. The applicant has to show a "homosexual career". This supposed

> "*to follow a certain script: feeling and erotic and emotional desire for people of the same sex, discovery of one´s own homosexuality, awareness and acceptance of one´s identity, but, most importantly, presence of negative feelings or interiorized homophobia and eventually self-affirmation, given the homophobic and transphobic context of the home country*". (Prearo, 2020, p.12)

In other cases, there is a lack of credibility if the person discovers his/her homosexuality at an advance age. This contradicts what the Guidelines No. 9 says about different routes for self-recognition. (Prearo, 2020, p.13) Regulations and administrative practices have been done considering the LGBTIQ+ population as a homogeneous group.

According to Prearo (2020), based on the results of asylum seekers´ interviews research in Italy, there is an impossibility to document the emotional experience due to the lack of proofs. Interviewers ask and try to understand the "membership of a particular social group" as a need of a proof of homosexuality, which implies for them, more than a "declaration of homosexuality". Sometimes, it is request an "emotional development" and an "experience of discovering" his /her homosexuality. They need to confirm those experiences, which, at the end, become moral issues.

Moreover, in Belgium, the idea of "well-founded fear" of being persecuted is hard to document, as is sexual orientation. Then, "these claims are assessed based on certain presuppositions about what it means to be homosexual, as well as the coherence and sense for detail of the narrative, which are not necessarily good indicators of the soundness of claims." (Dohest, 2019, p. 1081). Qualification of identities and orientations with western categories might be still problematic when assessing SOGI-based cases of asylum claims.

In Spain, Italy and other European countries, authorities have been applying the "discreet principle" (Jansen & Spijkerbor, 2011), that is to say, if the applicant is "discreet" in the country origin, then they will not suffer risk. In other words, these countries are requesting a "stay in the closet" way of living, criteria which was deeply contested by UNHCR (2008). The EUCJ has ruled in its decision of 7 November 2013 that authorities when examining an application cannot expect that, for avoiding persecution, the SOGI-

based applicant hides his/her homosexuality in the country origin or shows a "discreet" way of living his sexual orientation" (Sánchez Tomás, 2019, p. 6)

3. ARE REALLY SAFE-COUNTRIES?

Claims from some European countries designated as ´safe´ will be assumed to be unfounded or less likely to be successful. A country designated as "safe" "implies that the human rights situation there is considered satisfactory, governed by the rule of law, and that individuals do not suffer persecution there" (AEDH, FIDH & Euromed Rights, 2016, p. 2). The notion of country considered as "safe" for SOGI people because they are legally protected is problematic.

The UNHCR, in 1991, issued a warning on this situation.

> *"Application of the safe-country concept in relation to countries of origin leads to nationals of countries designated as safe being either automatically precluded from obtaining asylum/refugee status in receiving countries or, at least, having raised against their claim a presumption of non-refugee status which they must, with difficulty, rebut*" (UNHCR, 1991)

"*The notion of "safety" impacts on the manner in which applications are examined by limiting the procedural safeguards to which any person in need of international protection is entitled*". (AEDH, FIDH & Euromed Rights, 2016, p. 8) Actually, no country can be considered to be completely "safe" for everyone.

AEDH, FIDH & Euromed Rights (2016, p. 14) have firmly opposed to the use of the notion of "safety" to process certain asylum applications differently. Consistent with SOGICA´s recommendation (SOGICA, s/f), this situation "*is not only in conflict with the need to carry out an individual assessment of each asylum claim, but is particularly problematic for SOGI claims, as SOGI rights and protection may be denied in countries with otherwise acceptable standards. Asylum authorities should no longer designate some countries as 'safe'.*" (SOGICA, n.d.a) In countries like Italy or Spain, this category allows to have an immediate or an accelerated procedure in detriment to SOGI applicants.

4. TIME AND RIGHTS CONSTRAINTS

In France, the asylum application procedure is long with the impossibility to work well beyond the six months. There is a possibility to work, after the six months after the application has been filed. This measure is in fact extremely difficult to implement and concerns only an extreme minority of asylum seekers.

In Spain, in 2019, the average waiting time for an appointment was 6 months. In certain provinces, waiting time may take from 8to 12 months. (AIDA, 2020d, p. 40) In 2020, the National Ombudsman has made recommendations to the Ministry of Interior to adopt urgently measures for facilitating the access to appointments to the police and the migration authorities, as well as for reducing the excess in time

of procedures. These problems are affecting the right of aliens to receive international protection. (Martin, 2020)

Also in Spain, there are some mobility constraints to applicants in Melilla & Ceuta. They cannot move to other areas of the peninsula until a final decision is done. The Spanish Government has justified this saying that the Schengen system allows to control borders and connexions with those two cities. This practice of non-voluntary immobilization in CETIs (Temporary Stay Centres for immigrants) has been considered by some legal experts, UNHCR and the National Ombudsman, as discriminatory and against the principles of laws and the Constitution. (López-Sala, 2020, p. 2017) This situation might increase vulnerability and reinforce forms of violence and harassment against SOGI-bases applicants (UNHCR, 2015).

Moreover, regulations allow authorities to reject at borders third-country nationals that are found crossing the border illegally. There is a special regulation for Ceuta and Melilla stating clearly that rejections will be realised respecting the international law on human rights and international protection in vigour. What is happening in fact is that persons are pushed back (devoluciones en caliente) what might imply violations of human rights. The Constitutional Court has ruled on 19 November 2020, that the special regime for the rejection at the borders in Ceuta and Melilla is constitutional. However, the Court stated that a rejection should be issued in light of all the guarantees provided by national and international treaties, paying particular attention to vulnerable groups.

So many people is also arriving through Canary Islands, where there is a need for an enhanced provision of legal assistance to migrants. (El Día, 2020)

In Italy, the government need to invest further in building their capacity to shorten the time of procedures. Usually, the length of time –sometimes years- an asylum seeker must wait for a decision when starting the procedure or during the appeal, increases vulnerability and uncertainty. Moreover, authorities and judges should not discriminate against "late disclousure". They must not use this circumstance to undermine the credibility assessment, as confirmed by European jurisprudence and the Supreme Court. (SOGICA, n.d.a)

Furthermore, in Spain, the reception systems need to consider that applicants usually come from difficult situations. These procedures take so long, and officials may not identify physical or mental medical needs, HIV treatments, or any other vulnerability. Seems that the reception regulation must be reformed to include that through the first appointment, when they are applying for asylum, applicants can have access to health service without the prerequisite of registration in the local government. Also, it is still needed a legislation that allow authorities to incorporate in the identification card of a gender nonconforming person the preferred name instead of the legal one; and to provide the work permission since they have the interview instead of months after.

5. ACCOMMODATION PROBLEMS

Asylum authorities in all countries need to pay particular attention to the safety of SOGI-based asylum applicants. Many of them are hosted in general accommodation or reception centres where suffer discrimination and their needs are unrecognised. The case of gender nonconforming people is particularly relevant, as long as they suffer more homophobia, transphobia, racism and xenophobia. (SOGICA, n.d.a)

In France, accommodation is still a problem. Beyond the lack of space, there is the problem of stigmatization of LGBTIQ+ people by members of their community of origin. However, legislation does not refer to these vulnerabilities. The Ceseda does not refer to vulnerability on account of sexual orientation of gender identity, therefore, in terms of AIDA (2020b, p.97), those situations are not considered by the authorities; LGBTIQ+ persons face strong difficulties when authorities do not provide them with housing, as most of the time they cannot find support in their national communities.

Regulation in France must consider LGBTIQ+ vulnerability in order to avoid the violation of human rights. Many LGBTIQ+ asylum seekers cite waiting, misunderstandings, discrimination, violence and insecurity as the main obstacles. These hinder the integration process. Difficulty in accessing housing leads to a difficulty in obtaining a compulsory domiciliation in order to be able to open rights (e.g. social Security, bank accounts, and others). It is possible to obtain a postal domiciliation for the opening of rights from an association that carries out these procedures. However, these procedures are often saturated.

CONCLUSIONS AND REMARKS

1. There is a right to asylum recognised by the main instruments in the International Human Rights System. This implies the capacity of a person, facing a well-founded fear of persecution, to request and enjoy international protection, staying in the territory of the country. The non-refoulement principle implies the prohibition of expelling or extraditing a refuge to the frontiers of territories where his life or freedom would be threatened on account of, among other reasons, his membership of a particular social group.

2. The International Human Rights System regarding refuges rights, asylum and international protection recognises SOGI as common characteristic among people sharing a membership to a special social group.

3. The European legal system also recognises SOGI but expression under the Qualification Directive. However, gender expression is hardly included explicitly in regulations. Despite that, in the European Regulatory Framework, the main challenges in matter of SOGI-based applications for asylum are:

    3.1. There is still an absence of specific legislative instruments dedicated to the particular situation of SOGI-based applicants. Their vulnerability is only addressed in so far as gender-sensitive approach is adopted. However, as underlined, this approach seems to be limited to the binary vision of genders. Moreover, it does not enable particular considerations for people's sexual orientation or characteristics. However, LGBTIQ+ refugees' special vulnerabilities are considered in the Istanbul Convention from the Council of Europe. This could have inspired the EC in the elaboration of its LGBTIQ Equality Strategy for 2020-2025 (non-binding), using its powers to transpose the same considerations within the EU framework, "one way or another" (reminder: the EU signed the Istanbul Convention but its ratification generates delicate issues).

    3.2. There is a lack of explicit consideration for gender identity and expression in most of the non-discrimination legal instruments. There is a lack of elements related to queer people and in the overall, to gender expression, therefore, people with a no-conforming gender or expression have problems to be consider part of a specific social group. One may hope that the fact that the EU legislation specifies that the characteristic on the basis of which a person is (or risks to be) persecuted can be attributed and not especially possessed could ensure that gender expressions are considered in GE-based-application's assessment.

    3.3. The absence of these missing elements in the proposals and communications elaborated by the Commission in order to reform the CEAS generates that the reform mainly targets the nature of the legislative instruments used (Directives would be replaced by Regulations, which is a good step towards better harmonisation). No significant improvement regarding consideration of SOGI-based application has been noticed apart from the inclusion of EUCJ case-law in the Preamble of a revised Directive.

    3.4. In the overall, the length of the legislative procedure at the EU level and the political blockades (mainly in the Council) jeopardises the efficient adaption of the CEAS to the ground realities.

3.5. The Courts (both the European Court of Human Rights and the European Union Court of Justice), when exercising their respective jurisdiction, interpret the law in a sense that is favourable to the recognition and the protection of SOGI-based applicants. One example can be found in the EUCJ decision attesting that "[s]*pecifically as regards homosexuality, the individual assessment of the applicant's credibility should not be based on stereotyped notions concerning homosexuals and the applicant should not be submitted to detailed questioning or tests as to his or her sexual practices*." Such progressive case-law should be included in new legal instruments (e.g: a clear definition of the "sex" criteria in the non-discrimination legislation, including sexual characteristics and genders or the direct inclusion of new criteria).

3.6. In the overall, the European Commission should use/keep on using its power of initiative to keep raising awareness on the realities and special needs of SOGI-based applicants, as it already does in matter of equality and non-discrimination for LGBTIQ+ people. The same way, other European Institutions should collaborate to adopt comprehensive, consistent and progressive legislative instruments to foster their protection and inclusion. This would serve a common frame for all Member States; their national regulations would be better harmonised, which would avoid unfair differences of treatment between LGBTIQ+ people (between different European or national citizens but also between non-nationals).

4. The four States should expand and consolidate humanitarian admission programmes and visas to help asylum seekers arrive safely to claim protection. It is still extremely costly and risky to reach Europe. SOGI-based asylum applicants are often exposed to physical, psychologic and sexual abuses in countries of transit.

5. Some countries have still to reconsider their overall approach when implementing Dublin III regulation. That is the case of Italy, where the specific needs of applicants are not addressed at arrival in the country. (SOGICA, n.d.a)

6. There is still a lack of clear information about asylum procedures when people are arriving about asylum rights and procedures. About Italy, SOGICA (2020) has recommended: "that all relevant Italian authorities, as well as non-State actors involved in the management of asylum claimants arrival, provide information about asylum and the right to make a SOGI-based claim, including in easy-read formats and different languages, at a minimum at ports of entry, at registration in Questura and at asylum interview, reception and accommodation centres. At the start of the screening or initial interview, the interviewer should confirm that the claimant is aware of the different reasons for claiming asylum, including SOGI persecution, and that confidentiality would be ensured at all stages of the process. However, none of these measures should mean that failure to declare SOGI as the basis for claiming asylum is subsequently held against claimants." (SOGICA, n.d.a)

7. States should promote among public officials, authorities, judges and members of Parliaments the use of UNHCR Guidelines, particularly the No. 9, when implementing, interpreting, applying, or deciding about SOGI-based asylum applications. In some cases, like Italy, there is still the necessity to produce internal protocols and guidelines for these kinds of cases, preparing material and training programmes. (SOGICA, n.d.a)

8. In all countries, there is a need for training and capacity building. For instance, in France, today one of the major challenges will be the training and sensitization of OFRA agents to questions relating to SOGI persons in order to facilitate the proof of homosexuality. Training for social workers in CADA centres and other shelters must include issues relating to SOGI persons. In Italy, SOGICA (2020) has identified that there is "*some degree of inconsistency in decision-making, and officials failing to apply existing law and policy correctly*." Then, the project proposes an expansion of effective training to the newly employed administrative officials for all parties, including all decision-makers. The main aim of this mandatory training should be to improve the quality of their work overcoming situations like stereotypes, biases and interview techniques. (SOGICA, n.d.a). In Spain and Belgium, there is still a necessity of enhancing knowledge and capacity of officials, advisers, civil society and all persons related to the procedure or working with LGBTIQ+ refugees.

9. States should improve rules and procedures related to interviews and appeal hearings of SOGI applicants. Guidelines and rules about how to conduct a correct interview, avoiding violations of rights and double-victimization must be enacted. It is necessary to avoid specific and awkward questions that imply to seek the evolution or discovery of SOGI experiences; to implement protocols for privacy protection and confidentiality, and the guarantee of having no-homophobic interpreters.

10. States must pay attention to the safety of SOGI-based asylum applicants in accommodation and reception centres. Usually are vulnerable to homolesbotransphobic attitudes, racism, xenophobia, violence and hatred. It is important to give SOGI-based applicants the possibility of choosing a general or a specialized accommodation.

11. National regulation must take into consideration the vulnerability of applicants. In that sense, it is needed to incorporate an intercultural approach, as well as make visible the reality of gender nonconforming persons. The latter implies allow authorities to include preferred names in Identification Cards.

12. Country regulations shall consider developing strategies for guarantee work permissions and access to health services since the application moment.

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CONTACT US

info@rainbowelcome.eu

POUR LA SOLIDARITÉ
Rue Coenraets 66
1060 Brussels, Belgium

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