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What ‘Safe Harbours’ are There for People Seeking International Protection on Sexual Orientation and Gender Identity Grounds? A Human Rights Reading of International Law of the Sea and Refugee Law

Summary

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Abstract

Nel contesto della “crisi” del Mediterraneo con la chiusura dei porti ai migranti diretti in Europa, questo contributo si interroga su cosa sia effettivamente un “porto sicuro” per coloro che chiedono protezione internazionale sulla base dell’orientamento sessuale e/o dell’identità di genere (SOGI). A tal fine, si procede con una lettura delle norme applicabili, specie quelle relative al diritto internazionale del mare e al diritto internazionale dei rifugiati, alla luce degli sviluppi in materia di diritti umani. Inoltre, si guarda anche alla questione della possibile applicazione extraterritoriale degli obblighi assunti in tale materia sia dagli Stati europei sia dall’Ue al fine di garantire rotte sicure a tali richiedenti. Si ritiene, infatti, che garantire un “porto sicuro” ai richiedenti SOGI implichi una visione più ampia del concetto di “place of safety” a esso collegato, tanto in termini di rotte, di destinazioni dopo le operazioni di salvataggio in mare e di accoglienza. A ben vedere, se applicate in modo effettivo e con la dovuta diligenza, gli obblighi già assunti dagli Stati europei e dall’Ue potrebbero migliorare la condizione di tali richiedenti durante il loro viaggio e arrivo in Europa.

In the context of the current Mediterranean ‘crisis’, which led to close harbours to migrants headed to Europe, this paper analyses what a ‘safe harbour’ really means for people claiming asylum on SOGI grounds. To this purpose, it carries out a human rights reading of relevant rules of the international law of the sea and of refugee law, looking also at the extraterritorial application of human rights obligations. Trying to fill a gap in the literature in these fields, it argues that, in light of their migratory experience, granting a ‘safe harbour’ to SOGI claimants requires a more comprehensive reading of the connected notion of ‘place of safety’, at least in terms of routes, destinations and receptions. In particular, if implemented in an effective way and with due diligence, the relevant negative and

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positive obligations binding EU Member States and the EU may ensure an immediate improvement for this group of claimants' experience during their travel to, and arrival in, Europe.

"It wasn't about like I have to make a choice [...], it was about finding the place where you know you can be protected"¹

1. An endless journey in search of a 'place of safety'

*Acquarius*², *Sea Watch*³, *Diciotti*⁴ are no longer three of the many vessels navigating the Mediterranean Sea for human beings in need of rescue. They are the emblem of a European battle with migration in the context of the 2018 'Mediterranean crisis', driven by dominant masculine tones: Do not let migrants reach European shores⁵. This imperative stands no matter who these people are and what they have experienced before boarding a dinghy to cross the high seas. No longer considered human beings, they are treated as *numbers* to be *counted* and *allocated* somewhere, preferably outside the European Union (EU) or held as hostages on the high seas or in harbours for days or, even, weeks. Of course, their destiny could have been worse. They could have been pushed back to Libya or delivered directly to Libyan coast guards, giving rise to a cascade of human rights violations with further detention, additional ill-treatment and abuses, and more indiscriminate returns to compound what they have already suffered.

In the context of these 'closed doors', 'closed harbours' and 'closed boundaries' policies, are these people's stories of any concern? And, for example, do sexual orientation or gender identity (SOGI) as grounds for seeking international protection make any difference in deciding whether they can reach European shores safely or be blocked in transit countries and/or pushed back, directly or indirectly, to their countries of origin? Is European and international human rights law of any relevance? The answer to these questions seems obvious if we look at the political decisions adopted by the new Italian Government and, perhaps surprisingly, by the EU itself in the context of the externalisation of the management of migration flows. Neither people's reasons for fleeing, nor States' human rights commitments, appear to play a role if the ultimate aim is to prevent migrants from getting into Europe and, more specifically, into a EU Member State.

Indeed, one of the reasons for keeping them beyond European/EU borders lies in the odd belief that, in this way, their protection is not an Italian or EU responsibility. According to this view, international/EU law, the related human rights commitments, and refugee protection standards do not apply beyond Europe/EU. If and when a doubt arises in this respect, the extreme solution seems to be declaring the last country of transit before reaching European shores a 'safe' country, being it Turkey or a

- 1 Statement of X, man of 23 years old from Cameroon, who had escaped homophobia and was granted refugee status in Italy. It was collected in October 2017, during an interview carried out for the SOGICA research project, *supra*. Focusing on Germany, Italy and the UK, as well as the European Union (EU) and the Council of Europe, as case studies, this project aims to determine how European asylum systems can treat asylum claims on the basis of their sexual orientation or gender identity (SOGI) more fairly. Other than a documentary legal analysis, it includes also fieldwork research activities, i.e. individual interviews, focus groups and observations in Tribunals in all mentioned countries. The SOGICA fieldwork research has been approved by the Social Sciences & Arts Cross-Schools Research Ethics Committee (C-REC) ethical review process at the University of Sussex (Approval no. ER/NH285/1). When SOGICA findings are referred in this paper, they have to be understood as a preliminary analysis of the results of the documentary analysis and the fieldwork research, which include for Italy 41 interviews and 5 focus groups carried out during the period September 2017-September 2018. Although this contribution refers also to gender identity where relevant, it is not based on qualitative data in this respect.
- 2 Among many others, *Aquarius Migrant Rescue Ship Allowed to Dock in Malta*, 14 August 2018, at www.theguardian.com/world/2018/aug/14/aquarius-migrant-rescue-ship-to-be-allowed-dock-in-malta.
- 3 Among many others, *Migrants Drown after Mid-sea Bust-up between Libyan Coastguard and Charity Boat*, 7 November 2017, at www.dailymail.co.uk/news/article-5058803/Migrants-drown-bust-rescue-boats.html.
- 4 Among many others, *Standoff in Italian Port as Salvini Refuses to Let Refugees Disembark*, 21 August 2018, at www.theguardian.com/world/2018/aug/21/italy-refugees-salvini-refuses-coastguard-ship-docks-diciotti.
- 5 In this contribution, the term migration will be used in a broad sense. In fact, despite the distinction between 'migrants' and 'asylum seekers' possibly being outdated nowadays in light the current state of North-South mass movements of people in need of a better life, some aspects of the proposed analysis necessarily refer to both categories, especially as far as their travel towards Europe and their common experience in the countries of transit and on the high seas are concerned. Moreover, as far as possible, the term 'people who request/asking...' will be preferred to 'asylum seeker(s)' to avoid essentialising the need for international protection, being understood as only a temporary condition of their life.

North-African State, where new identified 'safe' harbours will be available for disembarking defenceless migrants⁶. It is no coincidence that these attempts are anticipated or followed by actions aimed at supporting such countries to manage migration flows, including the setting up of reception centres. In the European intentions, it seems that, in these centres, migrants should not only be held; they should also be returned to their countries of origin or third States, without any guarantee that the *non-refoulement* principle is respected⁷. At the same time, a variety of guidance and technical material is provided to reinforce a transit country's ability to control its land and/or maritime borders and ensure that European States'/EU's needs are met. The 2017 Memorandum of Understanding between Italy and Libya⁸ and the 2016 EU-Turkey Statement⁹ are only two eminent examples of this worrying trend. The less well-known and growing number of 'relocations' from Libya to sub-Saharan countries are also a case in point¹⁰. Although the involvement of international agencies, such as the International Organization for Migration (IOM) or United Nations High Commissioner for Refugees (UNHCR), seems a given fact, there are no guarantees or evidence that, in the dedicated centres set up with bilateral and EU funding, people seeking asylum are treated in line with international human rights standards, especially when people with specific needs are involved¹¹.

To put it briefly, in the context of the current 'Mediterranean crisis' and externalisation of the management of migration flows, SOGI considerations are more invisible than ever *because* of the invisibility of the stories of people that escape from persecution in search of a 'safe haven' in Europe. To make things worse, even when they a) survive their travel towards Europe, b) are not pushed back and rescued on the high seas¹² and c) are finally disembarked at what is generally identified under international law of the sea as a 'safe harbour'¹³, people seeking asylum on SOGI grounds may still not be in a *safe place*.

- 6 The designation of a country as a 'safe third country' may result in a request for international protection not being considered on its merits but declared inadmissible, or processed in an accelerated procedure with reduced procedural safeguards. For an illustrative example, see the legislative measures adopted in Greece to implement the EU-Turkey Statement, *infra*, in 2016, at www.asylumineurope.org/reports/country/greece/asylum-procedure/safe-country-concepts/safe-third-country, and the relevant judicial practice, A. Kanavos, *A Critical Approach of the Concept of Turkey as a Safe-third Country under the Scope of the EU-Turkey "Common Statement" as Interpreted by the Greek Council of State and two different Independent Appeal Committees*, in *European Database of Asylum Law*, 10 July 2018. Critically, C. Costello, *Safe Country? Says Who?*, in *International Journal of Refugee Law*, 4/2016, 601-622.
- 7 For a detailed account of this principle, as enshrined in the European Convention on Human Rights (ECHR), see European Court of Human Rights, Grand Chamber, 28 February 2008, *Saadi v. Italy*, no. 37201/06. In general, see G.S. Goodwin-Gill, *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, in *International Journal of Refugee Law*, 3, 2011, pp. 443-457.
- 8 See Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana, signed in Rome, 2 February 2017.
- 9 EU-Turkey Statement, 18 March 2016, at www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/. On the Statement, E. Cannizzaro, *Disintegration Through Law?*, in *European Papers*, 2016, 3-6; T. Spijkerboer, *Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice*, in *Journal of Refugee Studies*, 2, 2018, 216. See the General Court's decision on the Statement as a 'non-EU agreement': European Court of Justice, General Court, Orders of 27 February 2017, *NF v European Council*, T-192/16; *NG v European Council*, T-193/16; *NM v European Council*, T-257/16. For a comment, C. Danisi, *Taking the 'Union' out the 'EU': The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law*, in *European Journal of International Law Talk!*, 20 April 2017.
- 10 See the goals expressed in the *State of the Union 2017 – Commission presents next steps towards a stronger, more effective and fairer EU migration and asylum policy*, at http://europa.eu/rapid/press-release_IP-17-3406_en.htm, and the implementation process in EU Commission, *Contribution to the EU Leaders' Thematic Debate on a Way Forward on the External and the Internal Dimension of Migration Policy*, Brussels, 7 December 2017, COM(2017) 820 final.
- 11 European Council on Refugees and Exiles, *Asylum at the European Council 2018: Outsourcing or Reform?*, Policy Paper 4, August 2018, at www.ecre.org/wp-content/uploads/2018/08/Policy-Papers-04.pdf. As for the term 'specific needs', to be preferred to 'vulnerable' claimants, it is used in light of the evolution of EU law and European Court of Human Rights' case law on people claiming asylum, in particular as far as reception conditions are concerned. See discussion in Section 4, below.
- 12 See, for example, what Amnesty International denounces in its last report, *Tra il diavolo e il mare blu profondo. I fallimenti dell'Europa su rifugiati e migranti nel Mediterraneo centrale*, 2018, in relation to two boats' incidents (one occurred on 16-17 July 2018, presumably after the Libyan Coast Guard sank a ship full of migrants, and one occurred on 30 July 2018, when a ship with more than 100 migrants was pushed back).
- 13 For a general discussion, see J.M. Van Dyke, *Safe Harbour*, in *Max Planck Encyclopedia of Public International Law*, 2010; M. Ratcovich, *The Concept of 'Place of Safety': Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?*, in *Australian Year Book of International Law*, 2015.

To be more precise, according to the relevant rules, disembarkation is to occur in a 'place of safety', i.e. 'where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met'¹⁴. Significantly, if we look at the International Maritime Organization's related Guidelines¹⁵, some additional points are stressed. The 'delivery to a place of safety should take into account the particular circumstances of the case', while disembarkation should be avoided 'in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea' (para. 6.15-6.17). Both requirements are indeed essential to support a human rights reading, including on SOGI grounds, of the international obligations at stake in the 2018 Mediterranean 'crisis'.

Yet, even if such international rules are read taking into account this group of claimants' needs, a 'safe harbour' is a fitting metaphor for their continuous search for a 'safe place'. In fact, when people who base their asylum request on SOGI are involved, even relevant legal terminology seems to acquire a different/specific meaning through the lens of their life experience. As SOGICA research project's preliminary findings in Italy indicate¹⁶, in this context *safety* does not (only) mean the guarantee to be disembarked in a place where it is possible to live freely in terms of one's sexual orientation or gender identity. Taking into account also people that are not willing to express openly their SOGI for a variety of reasons, a 'safe place' might therefore be defined as an interior condition or metaphorical space reached when a person no longer lives in fear. Put this way, people claiming international protection on SOGI grounds may be said to face an endless journey towards their own *safe space* even after they have disembarked in what is legally presumed to be a 'safe harbour'.

Relying on this broader conceptualisation of 'safe space', this contribution provides the first attempt to integrate SOGI considerations in the scientific debate on the legal implications of the current Mediterranean 'crisis' through the adoption of a human rights perspective. Since these considerations have not been addressed or integrated to date in the international and/or EU law literature, this article aims to fill this gap drawing attention to the initial phase of the journey undertaken by people fleeing homophobia and transphobia and to the related international/EU law's obligations and international responsibility for all actors involved. The originality of the contribution lies also on the evidence available by this author. In fact, most participants of the SOGICA research project in Italy arrived as a result of search-and-rescue operations following their attempts to reach European shores through the Northern-Africa routes. Data collected in this context informs therefore the entire reasoning¹⁷.

Drawing from international and European human rights law, it is argued that granting a 'place of safety' for people who claim international protection on SOGI grounds means that different, negative and positive, human rights obligations need to be met. These duties may concur to avoid additional forms of 'persecution' to these claimants by ensuring the conditions of safety in three key moments of their asylum experience. For this reason, a tripartite, interconnected, analysis is here advanced. First, it is necessary to explore the duty to grant a 'safe space' during travel towards European shores, especially in the transit countries where they are forced to stay, potentially for years (section 2). Second, considering the attempts to reach Europe by sea, the notion of 'safe harbour' is re-assesses through a SOGI lens (section 3). Third, at arrival, when these claimants are eventually allowed to disembark in a European harbour, safety is scrutinised in relation to reception conditions (section 3). Provocatively, a question will finally be asked in section 4: is Europe really a 'safe harbour' for people asking for international protection on SOGI grounds?

14 See the Annex to the *International Convention on Maritime Search and Rescue (SAR)*, adopted on 27 April 1979 and entered into force on 22 June 1985, paragraph 1.3.2, and International Maritime Organisation, *Resolution MSC.167(78) on Guidelines on the Treatment of Persons Rescued at Sea*, 20 May 2004, 6.12. J. Coppens, E. Somers, *Towards New Rules on Disembarkation of Persons Rescued at Sea?*, in *The International Journal of Marine and Coastal Law*, 3, 2010, pp. 377-403; K.S. O'Brien, *Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem*, in *Goettingen Journal of International Law*, 2011, pp. 715-732.

15 These are included in *Resolution MSC.167(78)*, *ivi*.

16 See *supra* for more info on the SOGICA project. The same reference applies to all subsequent preliminary findings related to the fieldwork carried out for the SOGICA research.

17 This paper relies only on a preliminary analysis of this data. This qualitative evidence will be further explored in other in-progress contributions, to be published in the near future as part of the ongoing research carried out by the entire team in the context of SOGICA.

2. The duty to protect beyond European borders: towards *safe(r) routes*?

The entire political debate over migration in Italy, as well as at EU level, is dominated by a clear goal. It supports the strengthening of international cooperation, through a variety of bilateral or multilateral actions, to prevent migrants, including those in need of international protection, from reaching European shores and crossing European borders. The underlying premise is that Italy, as well as any other European country and the EU, has no responsibility 'beyond European borders'. If analysed from an international refugee law perspective, this general belief should be confirmed. In fact, the 1951 Geneva Convention relating to the Status of Refugee requires that, in order to ask for international protection, claimants must find themselves 'within' the country that may grant that protection¹⁸. If analysed from a human rights law perspective, this general assumption is, at least, controversial. In light of the evolution of international human rights law, it cannot be denied that, nowadays, it suffices for a person fleeing persecution to be within the 'jurisdiction' or under the 'control' of one of the States bound by international human rights treaties to receive such protection¹⁹. This protection may include the right to not be returned to a country where one may be exposed to torture (the principle of *non-refoulement*), the right to present one's individual case before an independent and impartial authority for avoiding their *refoulement*, and the right to security and personal liberty²⁰. Yet, when people claiming asylum do not find themselves under such jurisdiction or control, it seems that human rights obligations binding relevant States and the EU do not apply. Consequently, it is said that the responsibility under human rights law for the treatment of migrants headed to Europe, including people claiming asylum, rests entirely on the countries of transit.

The issue of extraterritorial obligations under international and European human rights law therefore also assumes great relevance for people seeking international protection on SOGI grounds. As many male nationals of sub-Saharan countries interviewed in Italy in the context of the SOGICA project have confirmed, the need to reach European shores through non-legal routes put them in an extremely difficult position where the risk of again experiencing abuses amounting to persecution is very high. Most reported that they were forced to travel with their fellow citizens, with the consequent need to avoid any behaviour that might raise suspicion concerning their 'masculinity'. They were easy targets for blackmailing, sexual violence and financial extortion if – simply through some spontaneous act or behaviour – their reasons for flight were discovered. To make things worse, along the route to their 'safe' place, they passed through States with high levels of social and legal homophobia and transphobia. In these circumstances, it becomes clear that SOGI claimants cannot even resort to the protection of the authorities in the countries of transit. This is particularly evident in Libya, where most interviewees reported experiences of long detention and forced labour to pay for a 'safe' (!) passage on a boat headed (ideally) to Italian shores²¹. In brief, both the travel through, and the stay in, countries of transit may bend the resilience of SOGI claimants.

This state of affairs may imply, at least in principle, a sort of extraterritorial responsibility of the receiving European countries and, possibly, the EU, for the human rights violations to which people fleeing homophobia and transphobia are (additionally) exposed. Firstly, we may refer to a kind of responsibility in terms of omission due to the lack of legal routes to the European country where asylum would be requested. Secondly, a sort of international responsibility may be raised in terms of aid or assistance in the commission of human rights violations perpetrated by the countries of transit, if specific conditions are met. To verify these implications we may resort, respectively, to EU law²², especially in

18 *Convention relating to the Status of Refugee*, opened to signature in Geneva on 28 July 1951 and entered into force on 22 April 1954, Art. 1, A(2).

19 M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford, Oxford Un. Press, 2011.

20 In relation to the European Convention on Human Rights, see European Court of Human Rights, Grand Chamber, 23 February 2012, *Hirsi and Others v. Italy*, no. 27765/09; Grand Chamber, 15 December 2016, *Khlaifia v. Italy*, no. 16483/12; 21 October 2014, *Sharifi and Others v. Italy and Greece*, no. 16643/09.

21 See also Amnesty International, *Tra il diavolo e il mare blu profondo. I fallimenti dell'Europa su rifugiati e migranti nel Mediterraneo centrale*, 2018, where a worrying trend is reported: although a minor number of people are trying to cross the Mediterranean Sea, the number of deaths has increased in recent months. Actually, bearing in mind the current level of instability of Libya, in that country no sort of protection whatsoever is possible for migrants in general: see UNHCR, *Position on Returns to Libya*, September 2018, at www.refworld.org/docid/5b8d02314.html.

22 L. Heschl, *Protecting the Rights of Refugees Beyond European Borders*, Cambridge, Intersentia, 2018.

relation to the EU Charter of Fundamental Rights (CFR or EU Charter)' obligations as these were read by the Court of Justice of the EU (CJEU), and to international law, particularly in relation to the customary rules on international responsibility of States and international organisations²³.

Generating high expectations for an evolution of EU law in favour of people fleeing persecution, in 2017 a Belgian Court asked the CJEU to establish whether EU law obliged Belgium to issue a short-term visa, on humanitarian grounds, to a Christian Syrian family who intended, once in Belgium, to apply for asylum²⁴. While the Belgian Embassy in Beirut rejected their request, a short-term visa was the only way for the applicants to avoid a risky, irregular journey to reach European borders. Implications in terms of human rights violations were clear. According to the claimants, only a humanitarian visa could prevent their right to life and the prohibition of torture as protected by the CFR from being infringed. Yet, the CJEU provided a negative answer to the Belgian Court. In its view, Belgium is not obliged to provide a visa to people planning to claim international protection such as the applicants because, at the 'current time', EU law leaves this possibility to Member States' discretion. Hence, for the CJEU, since the EU Visa Code²⁵ does not apply in such scenarios, the CFR also cannot apply to future asylum claimants such as the applicants (see Article 51 of the EU Charter). In other words, and unsurprisingly, by preventing the application of EU law, the CJEU avoided attributing evolving human rights obligations to the EU Charter. This reasoning leaves nonetheless enough room for discussion in human rights terms.

To begin with, expressing a powerful opinion based instead on human rights considerations, Advocate General (AG) Mengozzi reached the opposite conclusion. He stressed the 'positive obligations' emerging from the prohibition of torture binding the EU and Member States under the EU Charter. In contrast with the subsequent Court's judgment, the AG argued that, when the EU Visa Code is the grounds for refusing a short-term visa as in the applicants' case, Member States should be obliged to provide, under the EU Charter, a legal route to people seeking asylum. In fact, if there are substantial grounds to believe that the refusal would expose them to inhuman or degrading treatment in the country of origin as well as in countries of transit, the Charter requires avoiding this exposure by way of granting alternative routes to their 'safe place'²⁶. Significantly, because of the different conclusions reached on the application of EU law, the CJEU's judgment did not deny this interpretation *per se*, because it did not address the question of positive obligations under the EU Charter at all. As a matter of principle, this means that, if and when the issue of visas for stays longer than three months is harmonised by EU law, such positive obligations may arise for Member States under EU law.

Nevertheless, we may also argue that, at this stage, these positive obligations flow from international human rights treaties prohibiting torture, including the European Convention on Human Rights (ECHR), to which EU States are bound. In this respect, the Advocate General's reference to the *specific condition* of the applicants – a religious minority in their country of origin²⁷ – as a crucial element to raise such obligations can be fundamental to substantiate this argument from a SOGI perspective. In relation to sexual and gender minorities, there is also evidence from a variety of reliable sources to show that, being at risk of persecution in their countries of origin and transit, they may be exposed to torture and degrading or inhuman treatment as a direct consequence of the refusal of humanitarian visas. As a result, relevant international treaties may be read as imposing obligations aimed at preventing additional forms of abuse, where States are able to act to prevent their occurrence. Although similar obligations have not been raised under international treaty law to this day²⁸, SOGI asylum claimants will certainly

23 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in *Yearbook of the International Law Commission*, 2001, vol. II (Part Two); Ead., *Draft Articles on Responsibility of International Organisations for Internationally Wrongful Acts*, *ibid*.

24 European Court of Justice, Grand Chamber, 7 March 2017, *X and X*, C-638/16 PPU. In general, V. Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford, 2017; Ead., *Asylum Visas as an Obligation under EU Law: case PPU C-638/16 X, X v État Belge*, in *Conflict and Compromises between Law and Politics in EU Migration and Asylum Policies*, 2018, 46, at <http://odysseus-network.eu/conference-2018/>.

25 Regulation (EC) no. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, in OJ 2009 L 243/1.

26 *Opinion in case C-638/16 PPU X. and X. v. État Belge*, Advocate General Mengozzi, 7 February 2017.

27 *Ibid.*, 148.

28 To the knowledge of this author, to this day no human rights bodies, at universal or regional level, have read the prohibition of torture as a way to impose the issue of a humanitarian visa to avoid torture in a situation that does not fall within the "jurisdiction" of a State party. As for the European Court of Human Rights, this evolution might be prevented by the 'restrictive' approach adopted in the past by the Court on jurisdictional links between contracting States and alleged victims living

benefit from what appears to be a potential (inevitable) development of international human rights law (and also, in case of harmonisation of relevant rules, of EU law).

Coming to the general rules on international responsibility, the potential consequences of the assistance or aid given to countries of transit to prevent asylum claimants, including those who seek protection on SOGI grounds, from reaching European borders and/or returning them to third countries seems less controversial. Although human rights violations are not perpetrated by European States or by the EU, their international responsibility may nonetheless be raised for cases of torture, prohibited ill-treatment, and arbitrary detentions as reported by international bodies and NGOs. In fact, the non-incidental assistance or aid aimed to create the conditions for perpetrating those violations can be crucial for demanding the suspension of any cooperation with countries of transit under customary international law²⁹. Yet, for this to happen, according to the relevant rules on international responsibility, it is necessary that European States providing aid or assistance connected to those violations are *aware* that that aid or assistance will result in such wrongful acts³⁰. Although doubts might exist about the fact that these requirements are met when this reasoning is applied to migrants taken as a whole category³¹, it is argued that these requirements are certainly satisfied when people seeking asylum on SOGI grounds are involved. In fact, how sexual and gender minorities are treated in most countries of transit is common knowledge, and it is equally knowable that assistance or aid aimed to keep them under homophobic and transphobic countries' authorities is an undisputable route to violations of the right to life and of the prohibition of torture. As a result, under international law, European States should stop such assistance and aid, or, if they are willing to cooperate, they should carry out this cooperation in a way that does not endanger SOGI claimants. The same reasoning may be applied to the aid and assistance provided by the EU³².

In sum, the combination of these positive and negative obligations and calls for responsibility might lead to safe routes for people fleeing homophobia and transphobia. Interestingly, in granting this group an alternative to dangerous travel paths, international human rights law makes clear that specific considerations based on their personal characteristics should be adopted. That is also why SOGI considerations should be integrated in the implementation of the international framework governing travel on the high seas and disembarkation, at least in relation to the treatment to be granted and to the identification of the place where the disembarkation occurs.

3. The duty to rescue and disembark: towards *safe(r) destinations*?

To a certain extent, once people seeking asylum have set sail on the Mediterranean, international obligations binding European States and, possibly, EU agencies seem clearer: not only are they called upon to save lives in the sea, but when boats have not entered into their maritime space, European States cannot push back migrants in a collective way without giving each of them – individually – the opportunity to present their case for international protection. These obligations are essentially enshrined in the international law of the sea³³ and in international human rights treaties, especially in the ECHR as read by

outside. For an illustrative case of this approach, see European Court of Human Rights, 11 December 2006, *Ben El Mahi v. Denmark*, no. 5853/06 (dec.).

29 See International Law Commission, *Draft Articles on the Responsibility of States*, *supra*, Art. 16.

30 The element of knowledge in such a scenario may indeed be capable of satisfying the intent element under Art. 16, *ibid*. See the comment to the Article provided by the International Law Commission and, as applied to the European approach, D. Davitti, M. Fires, *Offshore Processing and Complicity in Current EU Migration Policies*, in *European Journal of International Law Talk!*, 10-11 October 2017; A. Skordas, *A 'Blind Spot' in the Migration Debate? International Responsibility of the EU and its Member States for Cooperating with the Libyan Coastguard and Militias*, in *EU Immigration and Asylum Law and Policy*, 30 January 2018.

31 *Contra* F. De Vittor, *Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di 'accordi' per il controllo extra-territoriale della migrazione*, in *Diritti umani e diritto internazionale*, 1/2018, 24.

32 International Law Commission, *Draft Articles on the Responsibility of States of International Organisations*, *supra*, Art. 14. It is worth noting that, under its Treaties, the EU has an obligation to develop its international relations in light of its founding values that include the respect (and the protection) of human rights: see Art. 3.5 and 21.1 of the *Treaty on the European Union*, OJ 2010 C 83/13. On this subject, M. Balboni, C. Danisi (eds.), *Human Rights as a Horizontal Issue in EU External Policy*, forthcoming.

33 *SAR*, *supra*; *International Convention for the Safety of Life at Sea*, adopted on 1 November 1974 and entered into force on 25 May 1980. See also International Maritime Organization, *Resolution MSC.155(78) on the Adoption of Amendments to the SAR*, 1979, 20

the European Court of Human Rights (ECtHR) in the famous *Hirsi* case³⁴. Yet, it seems that the ways in which these very general duties are respected may aggravate the suffering of people seeking asylum, especially of those with specific needs.

The current policy of the Italian Minister of Internal Affairs is illustrative of the risks. After having prevented NGOs' boats from searching for and rescuing people in the Mediterranean who have been left at the mercy of the sea by smugglers³⁵, his subsequent directive aims to block all rescue ships, including (incredibly) those of the Italian Coast Guard, from docking and disembarking in Italy³⁶. As has been pointed out elsewhere, every time a ship with rescued migrants arrives, we are forced to witness political stand-offs and macho posturing, while people are left stranded³⁷. In this scenario, without appropriate considerations based on a human rights lens, people fleeing homophobia and transphobia may experience additional distress. At least two different aspects related to the consequences of these new policies are explored here to establish how these people may be granted a 'safe harbour' worthy of the term.

First, to this day SOGI considerations have not played any role in the definition of the bilateral or multilateral agreements on the disembarkation of migrants after they have been rescued. Yet, they are crucial to the obligations under the international law of the sea in light of the human rights treaties to which European States are bound, if the additional suffering SOGI claimants often experience is to be avoided. To be more specific, if we analyse the duty of coastal States for establishing and carrying out search and rescue operations, it is easy to find that the State where the rescue has taken place is not (also) under an obligation to allow disembarkation³⁸. Hence, that State – i.e. Italy in the Mediterranean, because of Malta's refusals and Libya's deficiencies – is only called upon to take the lead in finding a State that might accept disembarkation. In practice, this means that if Italy is not obliged to allow rescued migrants to land in its own territory, it should coordinate all actors involved to identify a 'place of safety'. In the context of these activities of coordination and subsequent designation of a place of safety, the adoption of a human rights lens is indeed crucial for people fleeing for SOGI related reasons.

On the one hand, there is no evidence that, to the present day, this coordination has been carried out with due diligence³⁹, especially in terms of speed, and has been based on the criterion of proximity. This state of affairs has resulted in prolonging the journey of rescued migrants, with evident implications for those who have specific needs. For instance, in the case of *Acquarius*, when Spain finally accepted to disembark migrants, the expected journey was soon deemed dangerous in light of the precarious condition of the rescued people. Such a situation might be intolerable, for example, for people who claim asylum on gender identity and experience particular health issues. Equally, as some claimants reported during the SOGICA fieldwork in Italy, without appropriate information on the 'common living rules' in the boat, i.e. no discrimination allowed to sexual and gender minorities, the experience of fear and persecution originating in the country of origin persists. Of course, in the case of rescue operations, these aspects should be added to the extreme physical and psychological suffering connected to their rescue.

On the other hand, there is no indication that, up to this point, this coordination has differentiated the level of 'safety' of the place of disembarkation in response to rescued people's individual experiences. In other words, since the identification of the destination of rescued people has not been based on human rights grounds as required by the above relevant rules, there have been no guarantees that SOGI asylum claimants will disembark in a State without widespread homophobia and transphobia. This concern is more than a hypothetical one, especially if we consider the proposals, advanced both at EU

May 2004, Annex 5. For a recent analysis of current practices, D. Ghezelbash, V. Moreno-Lax, N. Klein, B. Opekin, *Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia*, in *International and Comparative Law Quarterly*, 2018, 315.

34 European Court of Human Rights, *Hirsi and Others v. Italy*, *supra*.

35 Interestingly, most SOGICA participants in Italy confirmed they had been abandoned on the high seas by their smugglers. On NGOs' involvement, see K. Gombeer, M. Fink, *Non-Governmental Organisations and Search and Rescue at Sea*, in *Maritime and Safety and Security Law Journal*, 4/2018, 1.

36 Among others, *The Telegraph*, 10 July 2018, at www.telegraph.co.uk/news/2018/07/10/italy-intensifies-campaign-against-migrants-refusing-access/

37 C. Woollard, *Editorial: The Story of the Summit: European Solutions not EU Solutions*, in *European Council on Refugees and Exiles Bulletin*, 29 June 2018.

38 M. Fink, K. Gombeer, *The Aquarius Incident: Navigating the Turbulent Waters of International Law*, in *European Journal on International Law Talk!*, 14 June 2018.

39 V.P. Tzevelekos, E. Katselli Proukaki, *Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?*, in *Nordic Journal of International Law*, 4/2017, 427.

and national level, for establishing disembarkation platforms in North Africa⁴⁰. Having into mind their internal legislation on sexual and gender minorities, there is no doubt that, on SOGI grounds, no country in that region can be identified as a place of safety where an application for international protection will be fairly assessed. Even more, such solutions are far from being based on the international law of the sea's relevant rules.

Second, another neglected issue in the relevant academic debate relates to the treatment reserved to those rescued migrants that are prevented from disembarking because of the lack of an agreement intra-EU or between EU Member States and other European States⁴¹. The *Diciotti* case is illustrative in this respect. Firstly, migrants were forced to stay in the Sicilian harbour of Catania for days. Secondly, when an agreement for their disembarkation was eventually reached, the coordinated solution included Albania as one of the countries of destination for a group of those migrants. From a SOGI perspective, both these aspects appear to be extremely problematic. On the one hand, there is no evidence that SOGI was a criterion for allowing people fleeing homophobia and transphobia to disembark along with other claimants having specific needs⁴². On the other, SOGI considerations did not apply in identifying Albania as a destination country, raising the risk that, if they were present, asylum claimants belonging to sexual and gender minorities were sent to that country⁴³. In relation to both aspects, Italy's international human rights law commitments, in conjunction with EU related obligations, would have suggested a different approach.

In fact, considering that rescued migrants were under the jurisdiction or control of Italian authorities⁴⁴, the ECHR – particularly Article 3, on the prohibition of torture and other degrading and inhuman treatment, and Article 5, on the right to liberty and security – applied. According to the principles established in the ECtHR's case law, Italy should have adopted appropriate actions to avoid the treatment of people rescued by the *Diciotti* reaching the threshold of severity established by Article 3 ECHR as amounting to torture or inhuman or degrading treatment⁴⁵. Italy was also under a clear obligation to not restrict the personal freedom of the people seeking international protection according to Article 5 ECHR, unless the conditions provided for in paragraph 1, f), of this provision were met. In fact, it is widely accepted that this part of Article 5 ECHR allows contracting States to arrest or detain a person 'to prevent his effecting an authorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'⁴⁶. It does not seem that rescued people fall into one of these situations. All this means that, as far as *Diciotti* is concerned, the holding of people in the Sicilian harbour for days amounted to *prima facie* unlawful detention and possibly, due to the related psychological and physical suffering, degrading treatment in contrast with Article 3 ECHR. Moreover, it may be argued that Italy had a duty to respect these international commitments taking into account the individual conditions of every person 'detained' on the boat, including their SOGI. The ECtHR's reading of the ECHR supports this view. On the one hand, in case law on Article 3 ECHR, it has affirmed that the level of severity required to find degrading treatment depends also on personal characteristics and conditions of the person at stake, such as sex, health and age, thus potentially also including sexual orientation and gender identity⁴⁷. As a result, if Italy did not pay appropriate attention to these factors in determining the living conditions on the boat, it was not able to prevent degrading treatment of those who may have been fleeing

40 European Council, *Conclusions*, 28 June 2018, EUCO 9/18, para. 5; European Commission, *The Legal and Practical Feasibility of Disembarkation Options. Follow-Up to the Informal Working Meeting of 24 June 2018*, June 2018; Ead., *Non-Paper on Regional Disembarkation Arrangements*, 24 July 2018; IOM/UNCHR, *IOM-UNHCR Proposal to the European Union for a Regional Cooperative Arrangement Ensuring Predictable Disembarkation and Subsequent Processing of Persons Rescued at Sea*, 29 June 2018.

41 This aspect would be increasingly important if recent proposals aimed to process asylum requests at seas will be eventually adopted and implemented: see European Council on Refugees and Exiles, *Italy and Austria Look to 'Solve' Disembarkation Crisis by Processing Migrants at Sea*, 21 September 2018.

42 See *Nave Diciotti, sbarcano i minori dopo l'ok di Salvini*, at <https://tg24.sky.it/cronaca/2018/08/22/nave-diciotti-maltempo-catania.html>.

43 See below for the evidence related to Albania, as well as any non-EU Member State, and for the reasons why this risk emerges.

44 See already European Commission of Human Rights, 24 June 1996, *Sanchez Ramirez v. France*, no. 28780/95; European Court of Human Rights, Grand Chamber, 12 May 2005, *Ocalan v. Turkey*, no. 46221/99.

45 For example, European Court of Human Rights, Grand Chamber, *Khlaifia and Others v. Italy*, *supra*; 11 June 2009, *S.D. v. Greece*, no. 53541/07.

46 European Court of Human Rights, Grand Chamber, *Khlaifia and Others v. Italy*, *supra*, para. 90.

47 *Ibid.*, para. 158-167. On the application of the prohibition of torture and inhuman and degrading treatment to measures motivated by one's sexual orientation, including implications under the principle of *non-refoulement* and the lack of any form

persecution on SOGI grounds. On the other hand, in the seminal case *O.M. v. Hungary*, the ECtHR established in unequivocal terms that, even when a person is lawfully deprived of his/her/their liberty at their borders, contracting States' authorities shall adopt appropriate measures in light of migrants' sexual orientation⁴⁸. The fact that this deprivation of liberty occurred in a boat flying the Italian flag has to be seen 'only' as an additional element, because migrants were already placed under Italy's control⁴⁹. Hence, Italy should have considered adopting appropriate measures for identifying such people and, if present, addressing their specific needs by providing adequate support or disembarking them together with other people having particular needs⁵⁰.

To go further, under Article 13 ECHR on the right to an effective remedy, all migrants rescued by the *Diciotti* were entitled to present their individual case to Italian authorities, especially if there was any risk of being exposed to torture or other prohibited treatment if returned to the country of origin or to a third country⁵¹. This obligation is also crucial for the identification of Albania as a destination country for a group of rescued people. Without any previous individualised assessment of this risk, also to be carried out on SOGI grounds, there are substantial reasons to maintain that the agreement, which followed the *Diciotti* incident, was unlawful. More generally, the danger is that similar agreements will increase in number as long as the policy of closed harbours continues to be implemented. Albania will be followed by other non-EU Member States that, despite everything, are not required to apply EU standards as those set out in the Common European Asylum System (CEAS) and the CFR. Although countries that are members of the Council of Europe, like Albania, have ratified the ECHR, this is not a sufficient guarantee that human rights will be respected and the asylum request will be duly examined, as the ECtHR has often recalled⁵². This is even more the case for people claiming asylum on SOGI grounds. To take the example of Albania as in the *Diciotti* case, it is known that it has a poor record in terms of respect of sexual minorities' rights as well as asylum standards⁵³. Therefore, any agreement between the country of disembarkation and the receiving countries must be reconciled nonetheless with the risk of indirect *refoulement*. In other words, only a previously EU/EU Member States' assumption of responsibilities for relocation of people with specific needs after disembarkation, including those fleeing on SOGI grounds, may justify the cooperation or involvement of non-EU States.

In sum, the increasing sophistication of the legal reasoning around the general duties binding coastal States at political level seems to result in the circumvention of their human rights obligations. The consequence is a worrying, and growing, refusal of private ships sailing the Mediterranean to rescue and save people on the high seas⁵⁴. Despite international human rights law seeming to imply an obligation binding a plurality of States to protect migrants at sea as a corollary of the duty of due diligence⁵⁵, based on criteria of effectivity and capacity, European States are instead engaged in a joint strategy to prevent arrivals. It is no coincidence that, in this strategy, human rights law is regarded as a separate non-applicable legal framework or, in the best scenario, not fully integrated in the implementation of rescue and disembarkation policies. For this reason, despite its potential role in protecting rescued migrants in general, and more specifically people claiming asylum on SOGI grounds, the path towards 'safer harbours' seems to be increasingly harsher.

of recognition of same-sex relations, see C. Danisi, *Tutela dei diritti umani, non discriminazione e orientamento sessuale*, Napoli, Editoriale Scientifica, 2015, ch. 4.

48 European Court of Human Rights, 5 July 2016, *O.M. v. Hungary*, no. 9912/15.

49 European Court of Human Rights, Grand Chamber, *Hirsi and Others v. Italy*, *supra*, para. 70-82; Grand Chamber, 23 March 2010, *Medvedyev and Others v. France*, no. 3394/03; and case law referred to in footnote 44.

50 See *Nave Diciotti, sbarcano i minori dopo l'ok di Salvini*, *ivi*.

51 European Court of Human Rights, Grand Chamber, *Sharifi and Others v. Italy*, *supra*, para. 166-181.

52 European Court of Human Rights, Grand Chamber, *Saadi v. Italy*, *supra*, para. 147.

53 ASGI, *Diciotti: Illegittimo trasferire i migranti in Albania*, 28 August 2018. In general, see the results of the Universal Periodic Review within the framework of the Human Rights Council, completed in 2014, at www.upr-info.org/en/review/Albania/Session-19---April-2014.

54 UNHCR, *Desperate Journeys. Refugees and Migrants Arriving in Europe and at Europe's Borders*, 2018, at <http://www.unhcr.org/desperatejourneys>.

55 V.P. Tzevelekos, E. Katselli Proukaki, *supra*, 427.

4. The duty to address specific needs at arrival: towards *safe(r) receptions*?

From the analysis carried out it is evident that, without a change in the political struggle within the EU, Member States of first arrival will continue to face increased responsibilities. Moreover, while the policy of externalisation of management of migration flows is supposed to be further implemented, the countries placed at the Southern borders of the EU will be the natural hosts of a new phase of migration polices dominated by the hotspot approach⁵⁶. As has been recalled elsewhere⁵⁷, this general impasse may be shattered in the near future if two current proposals on the table are eventually adopted. The first one seems to consist in the approval of a list of European harbours where, on a rotatory basis, rescued migrants will be disembarked. The second one is the widely awaited reform of the Dublin Regulation system into a more jointly responsible allocation of asylum requests among EU Member States. Since both proposals are, however, far from seeing the light, it may be supposed that Southern European countries will continue to bear the burden of reception in the near future. This aspect is aggravated by the system currently in place for identifying which EU Member State has the responsibility to evaluate their asylum application, as governed by the Dublin Regulation⁵⁸.

In fact, under the Dublin Regulation these countries already appear to be a forced destination for the evaluation of requests for international protection. While this system remains unfair for countries of first arrivals from a general point of view⁵⁹, the adoption of a SOGI lens allows us to see that it has particularly unfavourable consequences for claimants on SOGI grounds. Its provisions seem to exclude *a priori* that these people can benefit from all the criteria established therein. Crucially, the focus on family relationships, which is aimed to reunite family members during the asylum determination process, may be ineffective for this group of claimants if family is understood in heteronormative terms⁶⁰. The issue is not (only) whether the concerned Member State identifies same-sex unions as a family or not. There are other considerations. Firstly, from a general point of view, it would be impossible for these claimants to be married to their same-sex partners; clearly this impossibility is in itself part of the reason for fleeing their countries of origin and, possibly, part of the harm leading to persecution. Secondly, although civil partnership is included in the Regulation as a basis for identifying a family, for the same reasons now mentioned, this form of legal recognition is not provided to these claimants in their countries of origin (and of transit). Thirdly, a joint reading of Articles 2 and 10 of the Dublin Regulation, related to a family member who is also an asylum seeker to be reunited at arrival, seems to require that the family should have originated in the country of origin. This leaves out, in legal terms, the possibility that a person who requests asylum on SOGI grounds and who has met his/her same-sex partner in one of the countries of transit could be transferred to the same country where the latter is processed, if his/her partner has reached EU first. Fourthly, a joint reading of Articles 2 and 9 of the same Regulation supports in principle the possibility that, irrespective of where the union has originated, a claimant who is the same-sex partner of a refugee living in EU can be reunited with the latter during the asylum determination process. Yet, it is unclear how these third-country nationals can prove their relationship. Again, if they had to hide their SOGI to avoid persecution even in the countries of transit, proving their relationship might be an insuperable obstacle unless 'shared' persecution may be in itself a proof of their union. This requires, of course, that the concerned EU Member State be ready to read the Dublin Regulation's criteria through a SOGI lens.

However, as participants of the SOGICA project in Italy consistently reported, it is difficult for people claiming asylum, especially after being rescued and disembarked in a European harbour, to declare their family status in 'Western terms'. This difficulty is compounded by the fear of declaring at arrival the real reason for fleeing their countries of origin. Consequently, people requesting international protection on SOGI grounds who are in a same-sex relationship and can be reunited in another EU

56 S. Velluti, *New Migrant Processing Centres in EU Must Avoid Inhumanity of 'Hotspots' in Greece and Italy*, in *The Conversation*, 9 July 2018.

57 M. Fink, K. Gombeer, *The Aquarius Incident*, *supra*.

58 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, in OJ 2013 L 180/31.

59 F. Munari, *The Perfect Storm on EU Asylum Law: The Need to Rethink the Dublin Regime*, in *Diritti umani e diritto internazionale*, 2016, 517 ss.

60 Regulation (EU) no. 604/2013, *supra*, Articles 2, 9, 10 and 11.

Member State may also be forced, under the current system, to remain in the first country of arrival for the determination of their refugee status⁶¹.

In sum, although SOGI specific data is not available, in light of general trends of arrivals people claiming international protection on SOGI grounds getting to Europe across the Mediterranean risk 'being stuck' in Southern-Europe States. That is why, considering the support of relevant EU agencies for the management of the hotspots set up in these countries, a twofold exploration is required to assess whether or not the latter provide a 'safe harbour', in terms of first reception, to people fleeing homophobia or transphobia.

First, considering that all States involved – Greece, Italy and Spain – are called on to implement the Reception Directive as EU Member States, nothing in that Directive requires them to provide any kind of SOGI-dedicated services at arrival⁶². For instance, as SOGICA participants confirmed, there is no obligation whatsoever to inform people who disembark that SOGI can be the reason for granting international protection or to make all migrants aware that sexual and gender minorities are protected by law. Yet, as many reported, during and after disembarkation, people may be totally unaware of the place they have reached and whether it is somewhere where sexual and gender minorities are at risk of being prosecuted or not⁶³. Only those people with a high level of education and/or from wealthy families seem to have had a clear overall picture of what was happening to them. To make things worse, neither national or EU law requires in these countries the setting up of reception centres dedicated to those asylum claimants who identify themselves as LGBTI+. Only if they are recognised as 'vulnerable' asylum applicants, for the (unrelated) reasons provided by Article 21 of the EU Reception Directive, might their specific needs be handled effectively⁶⁴. Hence, there are needs that EU-driven legislation does not address and the sense of fear that these asylum claimants have experienced throughout their lives is likely to remain vivid upon arrival in Europe. Except for NGOs' attempts to fill the gap by way of (informal) coordination, sensitization or setting up of dedicated centres or simply shared living spaces⁶⁵, the reception systems of the countries at EU borders are far from effective at providing safety on SOGI grounds.

Second, more and more people in need of international protection seem to be channelled at arrival into EU-led 'hotspots', which will be further entrenched with the setting up of the new so-called 'controlled centres'⁶⁶. Rather than filling the above gap in protection, this system seems to expand it. Because there are no specific provisions regulating these centres, we might hope that, at the very least, the standards set out by the Reception Directive will be ensured (as well as those enshrined in the CFR, which certainly applies). Yet, the way these centres are currently managed seems to infringe even these minimum standards, aggravating the fate of people seeking asylum on SOGI grounds. At root, the ultimate goal of the EU hotspot system is to accelerate the process of identification and distinction between people who are in need of international protection and those who have migrated for economic reasons. According to the evidence available, this process takes place in a very short period of time and in very precarious material conditions⁶⁷. Only taking into account these aspects, it is clear that such a system risks being very far from facilitating the expression of claimants' real reasons for leaving their countries (especially when these reasons are not yet clear in 'Western terms'⁶⁸). The involvement of EU agencies, such as the European Asylum Support Office (EASO), is not a guarantee that this risk can be

61 All research carried out in this field report that data on SOGI asylum requests are rarely collected. For the reasons explored here, the collection of data on the application of the Dublin Regulation to people requesting asylum on SOGI grounds seems even more difficult. For the few statistics available, see www.sogica.org.

62 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection, in OJ 2013 L 180/96. For the new recast proposal and implications for people in need of international protection on SOGI grounds, see the analysis carried out by Nuno Ferreira below.

63 Almost all interviewees who participated in the SOGICA fieldwork in Italy have arrived by sea and reported this state of confusion/fear, which was not relieved by the subsequent operations aimed to identify and allocate them in different temporary reception centres across the country (i.e. without any considerations based on SOGI). For instance, X, male, 23 years old from Cameroon, interviewed in October 2017 (refugee status granted in Italy).

64 See Directive 2013/33/EU, *supra*, Art. 22.

65 In relation to Italy, see the dedicated section at www.ilgrandecolibri.com/en/migrants.

66 European Council, *supra*.

67 ASGI, *Chiuso l'hotspot di Lampedusa-CILD, ASGI e IndieWatch: "Condizioni disumane e violazioni dei diritti umani"*, 14 March 2018.

68 See the seminal study of J. Millbank, *From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom*, in *The International Journal of Human Rights*, 2-3/2009, 391.

avoided. Despite EASO's commitment to the issue of SOGI asylum and the principles that should guide their work⁶⁹, it is not even clear whether they can be held accountable for this processing and how this responsibility can eventually be raised. In short, these hotspots do not generally match the European human rights framework's standards, while falling short of adopting a SOGI lens, in particular.

The combination of these factors, to be read in conjunction with the growing evidence of discrimination against all people having a migratory background in some countries⁷⁰, may in the near future result in reception conditions at arrival that might be even less safe than those currently in place. Yet, as contracting parties of the ECHR, EU States have already, at arrival, a duty to individually assess the needs of asylum applicants '*who claim to be a part of a vulnerable group*'⁷¹ (including in border areas or, as argued above, in any circumstance where they are placed under the authorities' control, such as on the high seas). According to the ECtHR, this positive obligation is meant to avoid situations '*which may reproduce the plight that forced these persons to flee in the first place*', especially when they are placed with other people coming from countries '*with widespread cultural or religious prejudice against such persons*'⁷². Hence, when Southern European countries are called upon to offer initial reception to rescued people, they are already under a duty to carry out individualised assessments at arrival for avoiding the risk of reproducing the environment of persecution already suffered or feared in their lives.

Crucially, if this duty is not respected in all phases of reception, the denial of a 'safe space' to people claiming asylum on SOGI grounds may create a case under Article 3 ECHR for the purpose of disapplying the Dublin Regulation. In line with the principles emerged in *O.M. v. Hungary* recalled above and the other relevant ECtHR's case law⁷³, the state of the reception system can be one of the essential elements that a contracting State should take into account when deciding to send applicants back to another State party under that Regulation. Hence, the possibility of leaving people claiming asylum without accommodation or accommodating them '*in overcrowded facilities without any privacy*' or '*in insalubrious or violent conditions*' should raise reasonable doubts about the risks of exposing the concerned person to treatment prohibited by Article 3 ECHR on the part of the sending State. When '*particularly underprivileged and vulnerable*' groups⁷⁴ are involved, these doubts should be set aside through individual assurances provided by the country of destination. After *O.M. v. Hungary*, it might also be argued that SOGI claimants should receive specific guarantees that they would be taken in charge in a manner adapted to their personal condition. Therefore, even if the current system of reception for rescued SOGI claimants in Southern European countries does not amount to a case of total failure to comply with dignified living as found in *M.S.S. v. Belgium and Greece*⁷⁵, the prohibition of *refoulement* applies to the benefit of people fleeing homophobia and transphobia if 'specific' and 'individualised' assurances to have granted a 'safe space' in the country of destination are not provided. Put this way, a very important consequence is that the onus to prove that reception conditions at arrival would not attain the threshold of severity required to bring them within the scope of Article 3 ECHR rests on concerned States, not on

69 Regulation (EU) no. 439/2010 of the European Parliament and of the Council of 19 May 2010 Establishing a European Asylum Support Office, OJ 2010 L 132/11; Regulation (EU) no. 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) no. 2016/399 of the European Parliament and of the Council and Repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) no. 2007/2004 and Council Decision 2005/267/EC, OJ 2016 L 251/1, where interestingly sexual orientation is recalled in relation to the prohibition of discrimination binding the Agency in performing its tasks and exercising its powers (Article 21).

70 See, among others, the steps adopted at UN level in relation to increasing racist incidents in Italy: *UN to Send Team to Italy over Racism*, 10 September 2018, at www.ansa.it/english/news/politics/2018/09/10/un-to-send-team-to-italy-over-racism_c7cc61fb-ab44-4650-8903-0dd66bcc0150.html.

71 European Court of Human Rights, *O.M. v. Hungary*, *supra*, para. 53. On the concept of vulnerability in international law, recently F. Ippolito, *Vulnerability on Trial: An Emerging Criterion for Advancing Migrants Protection in Migrant's International Adjudications?*, in *Rivista di Diritto Internazionale*, 1/2018, 40; Ead., Iglesias Sanchez S., *Protecting Vulnerable Groups: The European Human Rights Framework*, Bloomsbury, Oxford, 2015.

72 European Court of Human Rights, *O.M. v. Hungary*, *supra*, para. 53.

73 European Court of Human Rights, 4 November 2014, *Tarakhel v. Switzerland*, no. 29217/12, paras. 108-122.

74 As the European Court of Human Rights calls them in the case law here recalled. This does not imply that, in our view, SOGI claimants should be considered 'inherently' vulnerable. For a critic on this terminology, see A. Timmer, L. Peroni, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, in *International Journal of Constitutional Law*, no. 4, 2013, 1056. Interestingly, although in EU law it is possible to find the term 'vulnerable' in relation to specific groups (see Art. 21 of the Reception Directive here recalled), it will be changed in 'people with special needs' in the context of the ongoing reform process. See the analysis of N. Ferreira below.

75 European Court of Human Rights, 21 November 2011, *M.S.S. v. Belgium and Greece*, no. 30696/09, for example paras. 352 and 357.

people claiming asylum on SOGI grounds. At the same time, from a more theoretical perspective, this would have the effect of expanding the protection of the principle of *refoulement* in the area of reception on the grounds of persecution instead of being connected – as it is interpreted today – to extreme ‘objective’ situations of violence, trauma, or medical conditions⁷⁶. As a result, in line with the reasoning followed in *N.S.* by the CJEU⁷⁷, an ECHR-based reading of the CFR would also raise under EU law a prohibition on returning SOGI asylum claimants to the countries at the EU borders, even if these countries are responsible for evaluating their asylum request. These countries are indeed called to resort to the sovereignty clause, included in the same Regulation, to avoid violations of their obligations under international human rights law unless the conditions of reception in Southern European countries are adequate for the needs of this group of asylum claimants.

In sum, although safe reception for people in need of international protection on SOGI grounds remains absent as a goal both in the policies of States more exposed to arrivals and in the EU’s agenda⁷⁸, under international human rights law, as well as EU law, there is scope for according them safer reception conditions that address their specific needs. There is also scope for reacting against the lack of safe reception. This includes the duty not to send back people in countries, even intra-EU, which are unable to avoid environments reproducing the fear of persecution on SOGI grounds. As in other areas where SOGI claims are gradually emerging from the shadows, the problem here lies in the divide between legal safeguards and political convenience, which brings us to ask finally if Europe (and specifically the EU) is a ‘safe harbour’ where people fleeing homophobia and transphobia may really be empowered to live without fear.

5. Is Europe (really) a ‘safe harbour’ for people claiming asylum on SOGI grounds?

From the analysis carried out above, if compared with the progress reported within the EU and some Member States to this date⁷⁹, a ‘bifurcated’ trend can be seen to emerge⁸⁰.

On the one hand, especially as far as the refugee status determination is concerned, some EU Member States and the EU have deployed some efforts to set the conditions for creating a safe space for people claiming asylum on SOGI grounds. The primary reason for this change rests on the fact that people claiming international protection on SOGI grounds are no longer invisible. It is no coincidence that today, although there remains much room for improvement⁸¹, the EU’s reform of the CEAS takes into account this group’s needs.

On the other hand, when the external developments on the management of migration flows and on the operations on the high seas are included in the overall analysis, SOGI based considerations remain absent. As has been argued here, despite international and European obligations, no references have been made to the specific conditions and needs of people escaping from persecution based on SOGI grounds during the 2018 Mediterranean ‘crisis’. While this precludes the possibility of speeding up legal pathways to Europe, the clear risk is that of trapping people fleeing homophobia and transphobia in the countries of transit. It is evident that all recent joint or individual EU State and EU efforts have been

76 Despite it can be criticised as a controversial approach, see two opposite cases where the ECtHR has referred to personal characteristics to reach a similar interpretation: European Court of Human Rights, Grand Chamber, *Tarakhel v. Switzerland*, *supra*, paras. 99 and 119; 14 March 2017, *Ilias and Ahmed v. Hungary*, no. 47287/15. See also, at universal level, Committee against Torture, 3 September 2018, *A.N. v. Switzerland*, no. 742/2016, CAT/C/64/D/742/2016, related to a survivor of torture to be transferred to Italy under the Dublin Regulation.

77 European Court of Justice, Grand Chamber, 21 December 2011, *N.S. and Others*, Joined cases C-411/10 and C-493/10, points 94-108.

78 But see N. Ferreira, C. Danisi, M. Dustin, N. Held, *The Reform of the Common European Asylum System: Fifteen Recommendations from a Sexual Orientation and Gender Identity Perspective*, SOGICA/University of Sussex, May 2018.

79 M. Balboni, *La protezione internazionale in ragione del genere, dell’orientamento sessuale e dell’identità di genere*, Torino, Giappichelli, 2012; S. Jansen, T. Spijkerboer, *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, 2011, at www.refworld.org/docid/4ebba7852.html.

80 T. Spijkerboer, *supra*, 220. This is especially true especially if this analysis is compared with the contributions that will follow in this Issue.

81 See the analysis developed below by N. Ferreira and the consequential recommendations for improving the CEAS.

devoted to achieving internal security by preventing migrants from arriving in Europe, rather than promoting and protecting human rights of those seeking international protection. Worse, by selecting instruments that bypass democratic and judicial scrutiny⁸², the Union itself is *de facto* jeopardizing asylum claimants' entitlements to protection rather than drawing attention to those who have specific needs.

These two aspects seem more interconnected than it is commonly thought. On the one side, preventing people claiming asylum on SOGI grounds from reaching European shores is aimed at ensuring that the wide European framework of protection, including obligations here analysed, will not apply. That is why there is a need to at least verify ways to enhance the international responsibility of involved States and, possibly, of the EU in terms of complicity in relevant human rights violations occurring beyond European borders. Equally, there is a need to stress that SOGI considerations should also be part of the external dimension of national/EU attempts to deal with migration flows. On the other side, the current systematic focus on external efforts might undermine attempts to raise the internal level of protection for people in need of international protection, SOGI claimants in particular. It hampers indeed the emergence of the conceptualisation of 'safe space' here advanced in terms of safer routes, safer harbours and safer receptions.

It is no coincidence that the ongoing processes of reform in Italy and in Europe are far from integrating such understanding of safety for people fleeing homophobia and transphobia.

Firstly, the attention paid to immigration control concurred with the adoption in Italy of a reform that, in speeding up the determination process and returns, has jeopardized these applicants' safety (rather than strengthening their legal safeguards). The elimination of the hearing before the judge of first-instance and of the possibility to submit a second-instance appeal are, in practice, most damaging to those claimants for whom documentary evidence is a problematic element of their status determination⁸³. Despite the possibility for first-instance judges to hear claimants where necessary, there is no guarantee that people claiming international protection on SOGI grounds will always be heard across the country. In fact, as the evidence gathered during the SOGICA fieldwork in Italy seems to confirm, the preliminary non-identification of SOGI people as claimants with specific needs in the Italian asylum legislation leaves enough room for judges to apply different approaches and standards to these claims. If these implications are added to the 'unbalanced relations of power' characterised by the administrative decision-making process at the Territorial Commissions for the Recognition of the Status of Refugee⁸⁴, the reform deprives increasingly these claimants of a fair evaluation in a 'safe space'. Secondly, the focus on harmonisation at all costs as a part of the wider *European Agenda on Migration*⁸⁵ may risk justifying lower standards of protection in some Member States, contrary to a human rights-based reading of the obligations binding them under the 1951 Geneva Convention⁸⁶. To give an example, Italy did not implement Article 8 of the Qualification Directive on internal protection as 'a way to reject' asylum claimants' requests *because* they may be 'safe' in another part of their country of origin. It is known that for people fleeing homophobia and transphobia internal protection is a particularly problematic issue and should not be applied⁸⁷. Yet, the CEAS proposed reform, to be adopted through Regulations, leaves no room for avoiding the use of internal protection as an argument for Italian decision-makers. If the new rules are not applied domestically through a human rights' lens, for the first time those who request international protection in Italy will also need to convince decision-makers that internal relocation is not an option in their own case (without the possibility of appeal in case of rejection, as explained above). In brief, the attempt to re-define the internal frameworks in light of the *rationale* embedded in external policies seems to prevent the EU and its Member States from setting the conditions for the creation of 'safe spaces' for

82 Among others, see C. Danisi, *supra*; M. Gatti, *The EU-Turkey Statement: A Treaty That Violates Democracy*, in *European Journal of International Law Talk!*, 18-19 April 2016; S. Peers, *The Final EU/Turkey Refugee Deal: A Legal Assessment*, in *EU Law Analysis*, 18 March 2016; T. Spijkerboer, *supra*.

83 A.D. De Santis, *L'eliminazione dell'udienza (e dell'audizione) nel procedimento per il riconoscimento della protezione internazionale. Un esempio di sacrificio delle garanzie*, in *Questione Giustizia*, 2, 2018, 208-213. For a throughout analysis of the implications for SOGI claimants, see Patrizia Palermo's contribution below.

84 M. Veglio, *Uomini tradotti*, in *Diritto, Immigrazione e Cittadinanza*, 2, 2017, 10.

85 European Commission, *A European Agenda on Migration*, 13 May 2015, COM(2015)240 final.

86 J. Poon, *Challenging Harmonisation and Uniformity in EU Asylum Law: A Broader Problem of International Law*, in *KSLR EU Law Blog*, 12 July 2018.

87 UNHCR, *Guidelines on International Protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2012, para. 51-56.

SOGI claimants by, *inter alia*, embedding the principle of the most favourable standard as a guidance for reforming their asylum systems⁸⁸.

As a conclusion, Europe has the potential to be a 'safe harbour' for people fleeing homophobia and transphobia, granting them lives free from fear. These would include, among other things, safer routes, safer destinations and safer reception conditions. In dealing with the current Mediterranean crisis, EU States and the EU have surely failed to take into account the evolution of human rights law and, more specifically, to implement relevant rules, such as those related to the international law of the sea, through a human rights lens. At the same time, instead of enhancing asylum claimants' and refugees' protection, including SOGI ones, they have defined new policies and reforms that erode current legal safeguards. For these reasons, without the adoption of a SOGI perspective on the external dimension of migration policies and a renewed commitment to existing human rights obligations, Europe might waste this potential and be, instead, a harbour that is increasingly unattainable. The risk of leaving people in need of international protection on SOGI grounds in troubled waters is certainly high.

88 C. Favilli, *L'Unione che protegge e l'Unione che respinge. Progressi, contraddizioni e paradossi del sistema europeo di asilo*, in *Questione Giustizia*, 2, 2018, 32-33.