

---

# **FILLING THE GAPS? THE ROLE OF UNHCR 'SOFT LAW' INSTRUMENTS IN DEVELOPING THE EU FRAMEWORK ON ASYLUM CLAIMS BASED ON SEXUAL ORIENTATION AND/OR GENDER IDENTITY**

**SOGICA CONFERENCE**

**7 JULY 2020**

**DENISE VENTURI, PHD RESEARCHER IN LAW**

# OVERVIEW

- UNHCR's duty of supervision
- UNHCR's soft law instruments in relation to SOGIESC-based asylum claims
- EU Asylum Law framework on SOGIESC-based asylum claims
- Tracing the influence of UNHCR soft-law instruments
- Conclusions

## UNHCR'S SUPERVISORY RESPONSIBILITY

- **Article 35 of the 1951 Convention + Paragraph 8 UNHCR Statute:** legal basis of UNHCR's supervisory responsibility

*Contracting States undertake to **cooperate with UNHCR** in the exercise of its functions, and shall in particular **facilitate its duty of supervising the application** of the provisions of this Convention.*

- UNHCR 'soft law' instruments: e.g. 1979 Handbook → request of States for 'guidance' in relation to RSD (ExCom No. 8 (XXVIII), 12 October 1977) & **Guidelines on International Protection**

# UNHCR'S DUTY OF SUPERVISION

- UNHCR soft law instruments not legally binding but...
- **Legal interpretative guidance** to decision-makers, governments, legal practitioners, the judiciary, UNHCR staff carrying out RSD
- UNHCR soft law instruments as '**authoritative statements**':
  - Supervisory responsibility
  - Expertise in international protection and specifically in RSD
  - Non-binding, but authoritative guidance
- Potential to foster the consistency of refugee law

# UNHCR'S SOFT LAW INSTRUMENTS IN RELATION TO SOGISC ASYLUM CLAIMS



## **2002 Guidelines No. 1 on gender-based claims**

Refugee claims based on differing sexual orientation contain a gender element'



## **2002 Guidelines No. 2 on membership of a particular social group**

protected characteristics/social perception as alternative approaches  
LGBTI persons as a PSG according to both approaches



## **2012 Guidelines No. 9 on SOGI asylum claims**

2008 UNHCR Guidance  
Substantial and procedural guidance  
Result of consultations and discussions with States and experts

# UNHCR'S SOFT LAW INSTRUMENTS IN RELATION TO SOGISC ASYLUM CLAIMS

- Importance of terminology → Yogyakarta Principles
- Particular social group and LGBTI persons – imputed characteristics
- Persecution, laws criminalizing same-sex relations, concealment
- Procedural and evidentiary matters



## **2012 Guidelines No. 9 on SOGI asylum claims**

2008 UNHCR Guidance  
Substantial and procedural  
guidance  
Result of consultations and  
discussions with States  
and experts

# EU ASYLUM LAW FRAMEWORK ON SOGISC-BASED ASYLUM CLAIMS

- **Common European Asylum System**
  - harmonization but inconsistencies still exist
- **Qualification Directive (2011/95/EU), Article 10(1)(d)**
  - *Depending on the circumstances in the country of origin, a **PSG** might include a group based on a common characteristic of **sexual orientation**. Gender related aspects, including **gender identity**, shall be given due consideration for the purposes of determining membership of a PSG or identifying a characteristic of such a group*
- **Procedure Directive (2013/32/EU):**
  - need of special procedural guarantees due to gender and SOGI (recital 29), trained staff (Art. 15(3))

# TRACING THE INFLUENCE OF UNHCR SOFT LAW INSTRUMENTS

- EU common policy on international protection **in accordance with the 1951 Convention and 1967 Protocol** (Art. 78 TFEU)
- Geneva Convention and Protocol as **cornerstone** of the international legal regime for the protection of refugees (Recital 4 EU QD)
- Valuable **guidance of consultations with UNHCR** when determining refugee status (recital 22 EU QD)
- **Access** to applicants, right to **present views ‘in the exercise of its supervisory role’** (Art. 29 EU PD, ‘Role of UNHCR’) + applicants’ right to communicate with UNHCR (Article 12 EU PD)...



# TRACING THE INFLUENCE OF UNHCR SOFT LAW INSTRUMENTS

## EU QD (2004 – 2011 recast)

- **Cumulative** approach to the interpretation of PSG vs UNHCR's calls to adopt an **alternative** approach (replace *and* with *or*)
- Consultations with UNHCR
- First EC's QD proposal in 2001 – Guidelines No. 2 in 2002 – SOGI Guidance 2008
- Explanatory Memorandum First EC's QD Proposal:
  - **inclusive** approach to PSG – '**inclusive** character of this ground' (UNHCR's comments)
  - specific 'guidelines' for gender-based claims – States to **cooperate** with UNHCR

# TRACING THE INFLUENCE OF UNHCR SOFT LAW INSTRUMENTS

- **UNHCR Handbook as source of reference**, drafted to assist States party in interpreting the Convention's refugee definition (Explanatory Memorandum First EC's QD Proposal)
- **EU QD: UNHCR's valuable guidance** in relation to RSD (recital 22)
- Reference to **UNHCR's supervisory role**
- The Handbook is only one of the means through which supervisory role is exercised

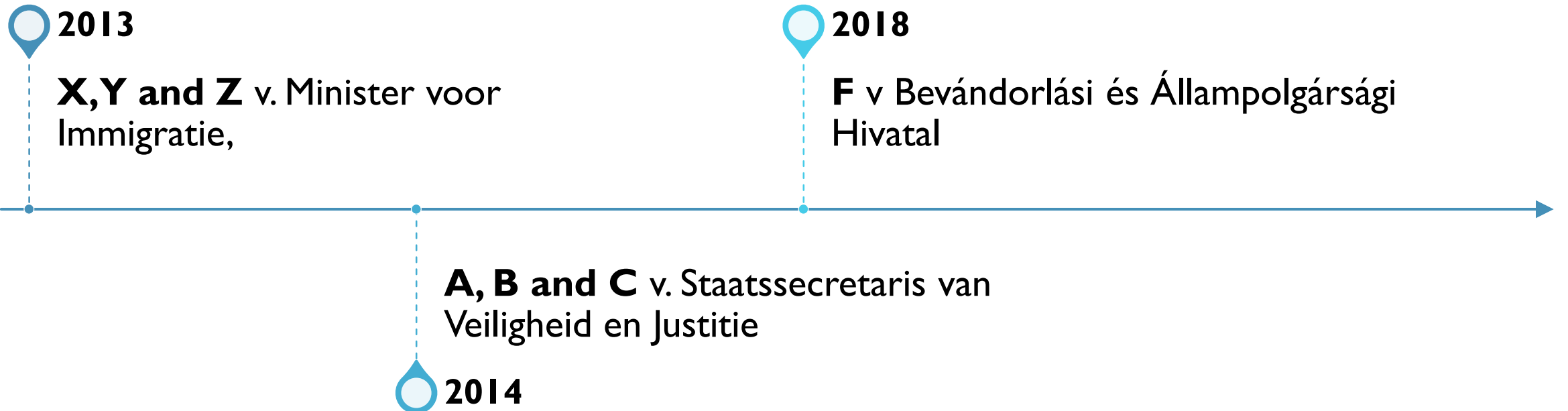
# TRACING THE INFLUENCE OF UNHCR SOFT LAW INSTRUMENTS

## EU PD (2005 – 2013 recast)

- No reference to SOGI in the first proposal
- UNHCR's comments and EP's request → amended proposal
- Special procedural guarantees for reason of SOGI
- Acknowledgment of UNHCR's supervisory role (Article 29.1.c)
  - *Member States shall allow UNHCR [...] to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure.*

# TRACING THE INFLUENCE OF UNHCR SOFT LAW INSTRUMENTS

## CJEU's role vis-à-vis the CEAS UNHCR's interventions before the CJEU



*The views expressed are solely those of the author and do not necessarily represent the views of the United Nations and/or UNHCR.*

# TRACING THE INFLUENCE OF UNHCR SOFT LAW INSTRUMENTS

*XYZ (2013)*

- No express reference to UNHCR observations/positions in the judgement
- Reference to UNHCR Guidelines (Oct 2012 – observations Sept 2012) and role in the AG Opinion (July 2013)
- LGBTI persons ('homosexual') may form a PSG
  - Interpretation of PSG? Criminal laws 'support the finding' of a PSG
  - UNHCR's positions?
- Criminalisation and persecution
  - UNHCR positions?
- Rejection of concealment reasoning & no core/marginal areas of sexual orientation

*The views expressed are solely those of the author and do not necessarily represent the views of the United Nations and/or UNHCR.*

# TRACING THE INFLUENCE OF UNHCR SOFT LAW INSTRUMENTS

*ABC (2014)*

- AG Opinion: UNHCR written observations provided helpful guidance
- Reference to UNHCR as ‘intervener’, but no in-text reference
- Late disclosure and impact on credibility, methods vs human dignity
- UNHCR Guidelines No. 9 as the **only tool** (regional/global level) providing a comprehensive and rights-based approach to assessment of SOGI claims
- Dialogue with the CJEU through the language of human rights – EU Charter as yardstick

## FILLING THE GAPS?

- UNHCR soft law instruments dealing with LGBTI refugees provide a **sensitive and rights-based approach** to the issue
- Gaps and inconsistencies that still exist – but **EU Asylum Law has taken steps for the protection of LGBTI asylum-seekers**
- UNHCR soft law instruments can provide significant **guidance** in the context of SOGIESC-based claims in the EU + UNHCR as **relevant actor** in the EU framework

# FILLING THE GAPS?

## What does influence mean?

- Influence does not (merely) mean quotations and references
- Influence and impact are determined by (a combination of) other factors e.g.:
  - express recognition of UNHCR's supervisory role & valuable guidance
  - Possibility to interact with the CJEU – limits?
  - Consultations with UNHCR during the making of EU law
  - Advocacy at national level
  - UNCHR's role in RSD procedures

## Influence as capacity of shaping



# FILLING THE GAPS?

## Bottom-up approach

- ‘Mainstream’ UNHCR soft law instruments at national level
- Duty of States to cooperate with UNHCR for its supervisory duty
- Soft law instruments: not legally binding deference, but principled deference
- Basis: good level of cooperation with UNHCR

# FILLING THE GAPS?

## ‘Horizontal’ harmonisation

- EASO and its role in fostering CEAS harmonization
- EASO ‘soft law convergence tools’ and UNHCR/UNHCR soft law instruments
  - E.g. *EASO Practical Guide on COI in SOGI cases* + *on Evidence Assessment*

# CONCLUSIONS

- **Promote harmonisation within the CEAS in accordance with 1951 Convention**
  - Due consideration of UNHCR's views
  - 1951 Convention as the cornerstone

© Randy Glasbergen for RapidBI.com



**“My topic is ‘How To Give A Presentation Without Losing Your Audience’s Attention’.  
The End. Thank you for coming.”**

**THANK YOU FOR YOUR  
ATTENTION!**

[denise.venturi@kuleuven.be](mailto:denise.venturi@kuleuven.be)

*The views expressed are solely those of the author and do not necessarily represent the views of the United Nations and/or UNHCR.*