



Sexual Orientation and Gender Identity Claims of Asylum:  
A European human rights challenge – SOGICA

***Any protection from abroad in times of border closures and pandemic?  
The 'roulette game' of people suffering SOGI persecution in countries  
of origin and transit***

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# Introduction: scope of the presentation

- Presenting some aspects of the **SOGICA** research
- Connecting SOGI asylum with wider **debates in IHRL and IRL** and the impact of COVID
- Using SOGI asylum to **improve the situation of other claimants** similarly situated

*Focus on ‘**protection from abroad**’ and ‘**access to European asylum systems**’ in light of the refugee notion, the specific experience of SOGI claimants before arrival and the positive implications for a fair decision-making process...*

‘The trauma and persecution [suffered by SOGI claimants] start well before their actual flight to safety’, and ‘the journey to safety can prove particularly treacherous’ (UN SOGI IE, 2019)

*‘Many people died in my presence (...) they kill somebody from my back. (...) You see people die after passing through all this, you come here, Commission give[s] you negative. (...) If you are not strong, you will go mad’ (Just me, Italy)*

# The background: the Project

## ***An ongoing reflection based on the research carried out in the context of SOGICA:***

- ERC funded project for 2016-2020
- case studies: EU, CoE, Germany, Italy and the UK
- socio-legal analysis based on human rights, feminist and queer studies
- Danisi, Dustin, Ferreira, Held, *Queering Asylum in Europe*, 2020, chap. 5 (forthcoming)

## ***Qualitative data collected in Germany, Italy and the UK (Oct 2017-Jan 2019):***

- more than 120 interviews
- more than 15 focus groups
- more than 20 observations in Court
- more than 120 asylum claimants heard (without considering respondents to our Survey)

# The background: the fieldwork

## ***A few trends on countries of origin and travels/arrivals:***

- in **Germany**, claimants from Asia, Africa, Middle-East, Latin-America, many of whom via the Balkan/Mediterranean routes
- in **Italy**, most men from Africa (e.g. Gambia, Ghana, Ivory Coast, Nigeria, Mali) via the Mediterranean route
- in **the UK**, claimants from Asia, Africa, Middle-East, Latin-America, many of whom via 'informal' routes

## ***Additional findings:***

- lack of **legal channels** or heteronormative reading of **existing ones** (*e.g. family reunification*)
- **invisibility** of SOGI asylum in international attempts to regulate migrations flows (*e.g. the UN Compacts*)
- **increased** border closures (before and during the pandemic)
- **no admission/humanitarian programs** addressed specifically to SOGI claimants in Germ, Italy or the UK

## ***What data?***

# What data? The lived experience in country of origin I

According to SOGICA fieldwork,

- **not always a rejection** of countries of origin/feelings of loss, *but*
- always a focus on **the social environment and 'popular justice'**, in terms of community discrimination, abuse and forced concealment of SOGI, rather than legal persecution by States' authorities (≠ COI in use)

*'In Uganda you can't survive. (...) They will say [y]ou have a demon, they believe that if they put a sword on you and cut, bleeding you, that the demon is getting out, that's what they believe'*  
(Rosette, Germany)

*'[In Nigeria] They look [at you] like an animal, so they describe this thing [like] you are an abomination to the land'* (Nelo, Italy)

*'[In Mali] they beat you with a cane to death. People say that our country is a Muslim country and homosexuals do not exist.'* (Momo, Italy)

# What data? The experience in country of origin II

*'[In Cameroon] you are an outcast in the society: first you lose your family, then you lose all the friends you have, and then everywhere you go in the society you are being haunted by the people'* (Alain A., Italy)

*'[In Malawi] even the President says we are like dogs that eat our own vomit. So, the law would say one thing, but the reality is another'* (Stephina, UK)

*'Everyone comes chasing you, they beat you, then they take tyres, put them around you, put some petrol over them and then light you openly on the street'* (Sandra, Germany)

*'It's embedded in your mind from when you're a child that lesbians must die, gay men must die'* (Angel, Germany)

*'I used to dismiss those fears and threats for a long time. By the end of xxx, I felt I [was] no longer safe in Egypt'* (Halim)

**These trends were reported also in relation to States where no criminalisation is in force or that are bound by human rights treaties or that have introduced legislation to protect minorities...**

# What data? The lived experience during travel to Europe

According to the SOGICA fieldwork, SOGI claimants too often:

- do not consciously choose travel routes owing to **forced departures** (*'I have to do it, I have no way'*, Shany, Germ)
- need to cross States with **similar levels of homo- and transphobia**
- need to travel, even up to a year, with **people who (often) are their agents of persecution**
- not able **to ask/receive protection by local authorities**, often due to the intersection of refugeeeness/SOGI
- suffer a higher risk to be exposed to smugglers, traffickers, **sexual abuses and economic exploitation** (*'He promised me to find me a job here. But, when we reach here (...), the job he offered me was prostitution'*, Daphne, UK)

*'Their travels are 'a synonym of violence and ill-treatment' (Chiara, Italy)*

*'They have gone through such a tough journey that they arrive here with an intermingling of psychological issues, including sometimes a certain amount of apathy, as well as restraint in showing their inner feelings'*  
(Susanna, Italy)

# What data? The experience during travel to Europe II

*'The best way was to go to Kakuma Camp (...) to seek for asylum in Kenya. (...) It's where I met fellow Ugandans who are also LGBT people. (...) They told me life was hard there, the camp was full. (...) I had to fly out of Kenya. I went to Turkey (...) I stayed on the streets (...) There was a gay man. He took me to his place. (...) He gave me another choice of life. [But] he started treating me badly (...). He could sometimes even send some guys to force me to have sex with them (...) they raped me (...) I ended up (...) on a small boat from Turkey to Greece (...). We proceeded to Macedonia, from Macedonia we just passed through, we entered Serbia. (then) Hungary. (...) They detained me in Hungary, [but then] they drove us to the next border.'* (X, Germany)

*'I was just (running to save) my life first, and when I got to Niger, to Libya, they were very angry because the money I was supposed to pay, I didn't pay... they have to keep me in different parts, called prison, they call it... kidnapping. (...) They will (...) beat you and tell you to call your people at home to send the money'* (Nelo, Italy)

**These 'abuses', coupled with the need to 'hide' SOGI ('I didn't identify myself as a LGBT', Alain A.), may be worthless because of border controls and closures...**



# Border closures (before and during the pandemic)

Access to a fair asylum system vs. 'undeniable sovereign right to control aliens' (the ECtHR): **the Mediterranean route** as an example via the Italian approach:

## *Before the pandemic*

- cooperation with Lybia in **pull-back operations**, also through the use of EU funds
- criminalisation of **rescue operations**
- denial of **disembarkation** in Italian harbours

## *During the pandemic*

- **Italy is not a 'safe harbour'**
- migrants/asylum claimants are **stuck in Lybia**
- if anyone manages to arrive, **disembarkation denied and forced quarantine**

***No considerations on SOGI grounds at all: all migrants seen, also in public opinion, as an homogenous group made of resilient single adult men, who now bring the 'virus' into Italy. Can IHRL provide a solution?***

# Strategic use of SOGICA primary data?

*What to do with this data? Can the lived experiences of SOGI claimants in country of origin and/or during travel to Europe justify the rise of an individual right to 'request' legal access to Europe under IHRL?*

- key aspect of a fair asylum system: **right to access to a fair procedure** for the determination of the need for international protection... (the EU Charter, the ECHR)
- main issue: **applicability of human rights obligations** binding European States *beyond* Europe

*Let's look at the latest development first...*

# Human rights and legal channels to asylum claimants in Europe

According to the CJEU (*X and X*, 2017):

- EU law does not apply in case of asylum claims lodged in a third country, but **only in relation to applications made on the territory of a Member State**, including at the border or in the transit zones
- as a consequence, the EU Charter – including the right to asylum and the prohibition of torture – does not apply either
- an application for a visa with limited territorial validity made on humanitarian grounds by a third-country national falls **solely within the scope of national law**

According to the ECtHR, the ECHR (*M.N. and Others v. Belgium*, 2020):

- **no obligation to issue humanitarian visas** because the ECHR does not apply in the context of proceedings initiated by individuals through diplomatic representations, *if* such individuals have no connecting ties with the State like nationality or are not under its (physical) control
- as a consequence, **no duties to prevent human rights violations** that may occur after the visa request or in the attempt to get to Europe
- as Belgium and all intervening third-party States argued, a positive finding on the matter of jurisdiction in a migration case involving embassies would imply the **risk of a “not agreed” sort of universal application of the ECHR**

# Is a duty to grant access to European asylum systems still possible?

*States fear that IHRL is interpreted as requiring to grant entry to 'all persons living in catastrophic situations' or 'to everyone who might be exposed to torture everywhere in the world' (M.N., ECtHR, 2020) – False!*

***In light of the lived experience of SOGI minorities in countries of origin and transit, we may still argue that:***

- 1. human rights apply** in case of asylum claims, *if* the relevant State **has knowledge of the effect** that a denial of entry has on a person's life
- 2. duty to prevent human rights violations**, which includes also a **duty to open borders** (even in times of pandemic)

# Determining applicability of IHRL in light of the lived experience of SOGI minorities in countries of origin and transit

*If we pay attention to developments in other human rights systems (ICCPR), we may argue that:*

- **a decision of non-admission** issued by national authorities in case of visa request to lodge a SOGI asylum claim in Europe is an element of 'governmental authority', thus bringing the person under the jurisdiction of that State
- through the visa request, the relevant State becomes aware that **its decision may impact in a direct and reasonably foreseeable manner** on SOGI claimants **owing to the pervasive social discrimination** shown by our data putting their lives at risk
- as a consequence, duty to grant a legal entry to have the asylum claims duly assessed **for preventing violations to the right to life or exposure to torture/non-degrading treatment**

*This reasoning requires **a shift from generalised assumptions on asylum claimants to their specific circumstances and from general control over SOGI claimants to effects of decisions denying entry....*** not easy, but still possible.

# Determining duties to prevention (even in times of pandemic)

Under international law, we may add at least:

- ***obligation of non-cooperation*** with countries that violate human rights, when these violations are publicly known
- ***duty to rescue lives at sea and to grant ‘a place of safety’*** with no delays
- ***avoid derogations to human rights*** that do not respect principles of necessity and proportionality

From a **SOGI asylum perspective** and in light of the lived experience of **SOGI refugees in countries of origin and transit**, these obligations may be interpreted as leading to:

- ***a duty of non-cooperation with homophobic/transphobic third-countries*** in the externalisation of border controls (e.g. Italy/EU with Turkey or Lybia)
- ***a duty to grant ‘a place of safety’ through a comparative exercise*** in terms of safety for SOGI minorities, and also of capacity in health response in times of pandemic (e.g. ***cancel all disembarkation plans*** (see proposals at EU level) in countries with poor human rights records on SOGI grounds)
- ***a duty not to adopt unnecessary quarantines only on refugeeeness/migratory background but to identify specific needs of rescued people, including on SOGI grounds***

# Provisional conclusions...

*A 'duty' to grant SOGI claimants a legal access to asylum systems is arguable if their lived experiences are duly considered, but:*

- fragmentation of IHRL, as different human rights bodies may adopt **different interpretations**
- even if obligations are clearly framed, increasing attempts by States to **use the pandemic to increase controls and justify derogations** from human rights obligations
- even after the pandemic and if obligations are clearly framed, **increasing gap** between international obligations and political agenda

*Key example:* the (expected) **New Pact on Migration** and **CEAS reform** as 'old wine in new bottle' – declared attempt to comply with human rights but not clear obligations still + focus on **returns, borders control** and cooperation with **third countries with high levels of homophobia/transphobia**, and legal access to 'talented' workers...

# The last hope: 'discretionary' programs to access protection from abroad

Some States have set up humanitarian programs:

- addressed to specific situations **not SOGI-related**, such as Syrian nationals forced to flee their country because of war (see Syrian Vulnerable Persons Resettlement Scheme, UK)
- led by (semi)private initiatives, including by religious/oriented communities, with a general/specific **not SOGI-related** mandate
- **dedicated programs** (e.g. Canada) or **individual initiatives** led by NGOs (e.g. Germany)

**But no guarantee that SOGI claimants benefit from these programs**, if not based on non-discrimination as a key principle (in addition - *or in place to* - vulnerability?).



# A final call: more protection from abroad

## *Still a discretionary choice for States, not a right for SOGI claimants....*

- **'the EU and European governments** should introduce humanitarian admission programmes and visas to help people in flight reach Europe safely', also for the positive implications on the assessment of the claim...
- **NGOs** should play a greater role in the call for dedicated programs...
- **activists/lawyers** should elaborate **strategic litigation** plans to bring relevant cases on IHRL grounds before national or international judiciary or quasi-judiciary bodies...
- **everyone** should ask to have considerations based on SOGI included in the management of migration flows

***We all need to make more of the right to access to a fair asylum procedure in Europe!***

# *To know more...*

- visit **www.sogica.org** and check **our social media** (FB and Twitter)
- consult **SOGICA publications**, including:
  - Danisi, 'Crossing borders between IRL and IHRL in the European context: can human rights enhance protection against persecution based on sexual orientation (and beyond)?' *Netherlands Quarterly of Human Rights* 2019, 4
  - Danisi, 'What 'safe harbours' are there for sexual orientation and gender identity asylum claims? A human rights reading of international law of the sea and refugee law', *GenIUS – Rivista di studi giuridici sull'orientamento sessuale e sull'identità di genere*, 2018, 2
- write me @ **C.Danisi@sussex.ac.uk**

*Thanks to all the people who shared their lives with me in the belief to improve the lives of those who will come next, IF they will not be stuck at the borders of Europe...*