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Deconstructing the binary between ‘forced’ refugees and ‘voluntary’ migrants: The example of SOGIESC claims of asylum

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To the victims of Cutro

Abstract

This contribution aims at addressing a literature gap concerning the analysis of the consequences of the evolution of SOGIESC asylum on international refugee law and especially the differentiation between ‘forced’ refugees and ‘voluntary’ migrants. Namely, this research takes into account the divide upon which international refugee law is founded in order to assess if and how SOGIESC asylum can be used as a critical tool to deconstruct it.

The research proceeds in three steps. The first one is concerned with the analysis of the refugee/migrant binary, its intersection with the forced/voluntary divide and existing literature on both the consequences of the use of legal categories and the historical and political origin of this differentiation in international refugee law. The second one proposes an internal critique of refugee law through the lens of SOGIESC asylum. More specifically, it is argued that while SOGIESC asylum claims pose numerous challenges to traditional interpretations of refugee law, some of the solutions adopted in the last decades, such as discretion and disbelief, reveal the absurd effects of the attempt to reconcile the paradoxical consequences of the forced/voluntary divide and unveil the substratum of external normative paradigms that are necessary in order for the refugee/migrant binary to work. Finally, the third step delves into the analysis of some of these external normative paradigms and on their links with the legal tenets of refugee law. In this sense, it is suggested that the conceptual framework of homonationalism is particularly helpful in understanding SOGIESC asylum and some of its contradictory dynamics.

In its conclusions, this research argues that the differentiation between ‘forced’ refugees and ‘voluntary’ migrants should not be naturalized as a neutral legal fact. Conversely, it is suggested that it should be deconstructed through its historical and political genealogy, both driving its current application. To this end, it is claimed that SOGIESC asylum offers a privileged position to cast such a critical sight onto the binary, inasmuch as it constitutes a symbolic negotiation field for broader dynamics such as the continuous redefinition of the shifting borders of international protection and the reinforcement of a self-proclaimed exceptionalism of Western citizenship based on discourses of human rights and sexuality.

Eventually, it is suggested that adopting such a critical posture towards the current refugee system does not have to entail its refusal. On the contrary, any imagination of new ways forward should acknowledge that the Refugee Convention is just one of the instruments that offer protection and that even scholars in this field should start by rejecting and deconstructing their ‘categorical fetishism’.

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1. Introduction

1.1 Problem statement and research question

In recent decades, international refugee law has come to interpret asylum claims based on sexual orientation and/or gender identity as capable of satisfying the provisions of the Refugee Convention. Recently, scientific research has also witnessed a rising interest in the issue of gender and sexuality in migration and asylum, leading scholars to analyse the features of the so-called SOGIESC claims of asylum. From a legal point of view, these claims present lawyers with interesting challenges interpreting international refugee law and some of its categories such as well-founded fear of persecution, grounds of persecution, and credibility.

At the same time, the ever-evolving phenomenon of global migration, while changing shapes, geographies, and technologies, has been persistently governed by multiple legal regimes, differentiated along a (purposedly) clear-cut divide separating 'forced' refugees from 'voluntary' migrants. Considering the different levels of legal protection accorded to these different categories, scholars have begun to cast a critical look at this divide. Accordingly, research has been conducted to understand the drivers, the legal foundations, and the consequences of this differentiation.

Some scholars have already pointed out how the recent SOGIESC evolution in refugee law can be deemed controversial insofar as one considers the increasing tightening of borders, especially in global north countries. In this sense, the ever-rising exclusion of people on the move from the refugee system clashes with the concurrent and unprecedented inclusion of a narrow category of people, singled out according to their gender and/or sexuality. This suggestion is worth some further analysis if two elements are considered. Firstly, the narratives around refugeehood can be read as discursive tools that, while supporting the inclusion of some 'qualified' few, morally justify the exclusion of many 'undeserving'. Secondly, while these narratives are founded on the distinction between 'forced' and 'voluntary' border crossings, their dichotomous discourse can produce paradoxical consequences since the existing legal system can happen to include 'voluntary' migrants and exclude 'forced' others. Looking at the complex intersections and contradictions between inclusion and exclusion, voluntariness and forcedness, historical progressions of border-tightening and recent trends of inclusion of SOGIESC asylum claimants, it is interesting to wonder whether the latter element can offer a fruitful perspective to look into and beyond the constructedness of the binary upon which our current refugee system is built.

Starting from these provocations, this research aims to deconstruct refugee law trying to understand whether there is something more behind it apart from its ostensibly 'neutral' nature and whether the example of SOGIESC asylum claims, as a recent and still controversial evolution of

refugee law, can provide the tools to proceed in this deconstructive intent. In this sense, this research does not seek to offer a doctrinal reflection upon the legal tenets of SOGIESC asylum. To the contrary, it intends to take a holistic and deconstructive approach, looking at refugee law as a system, both from the inside according to its legal characteristics and from the outside through its relations to external non-legal paradigms.

Three methodological clarifications derive from these premises. Firstly, this research will primarily address the 'global north' and especially Europe as the primary geographical focus points. For this reason, the research holds no claim of exhaustiveness nor rigorous and detailed analysis of individual legal systems. Rather, this geographical reference will be helpful to frame at best the entanglements between international protection and external paradigms, allowing to single out the critical junctures that reveal the constructedness and the genealogies of the refugee system. Secondly, the research will, of course, rely on primary sources to proceed in its arguments. However, contributions of critical legal scholars working in the fields of asylum, gender, and queer studies will play a fundamental role in supporting the deconstructive endeavour. Finally, this research does not claim to provide neither a policy-brief for decision-makers nor a toolbox for judges. On the contrary, if it is true that law and society hold themselves in a mutually influencing relationship, then this research is addressed, first and foremost, to society and scholars. In this sense, the primary aim of this research is to provide a well-structured critical account of our refugee system that can help start thinking at and through it from a different angle.

1.2 Terminological remarks

Before delving into the research, it is useful to clarify some aspects of the terminology that has been adopted.

The word SOGIESC is the latest acronym agreed upon to refer to sexual orientation, gender identity and expression, and sexual characteristics. The shorter acronym SOGI can also be found in publications and official documents, but it is suggested here that SOGIESC is the most appropriate term to use in pursuance of goals of inclusion and exhaustiveness.

It should be noted that SOGIESC and the well-known LGBTIQ+ acronym do not mean the same thing. While the latter is used to refer to the group of individuals that are part of a certain minority, the first one regroups the elements based on which the LGBTIQ+ community is delimited. The relevance of this difference lies in the fact that in the field of migration and asylum not all LGBTIQ+ individuals will file SOGIESC asylum claims and not all recognised SOGIESC refugees will be LGBTIQ+ individuals. This circumstance has multiple origins: certain non-LGBTIQ+ individuals can be persecuted after being wrongly imputed some SOGIESC characteristics; certain

LGBTIQ+ individuals can ask for international protection on different grounds than SOGIESC; certain SOGIESC asylum seekers do not recognize themselves as members of the LGBTIQ+ community; certain non-LGBTIQ+ asylum seekers may decide to strategically refer to SOGIESC elements to obtain asylum. Given these circumstances, this research adopts the term SOGIESC when referring to asylum procedures and their legal implications or the group of characteristics regrouped by the acronym. Differently, this research uses the acronym LGBTIQ+ when referring to individuals that are members of this minority.

Some explanations concerning the terms 'forced' refugees and 'voluntary' migrants are also due. Considering that the aim of this research is precisely to deconstruct the differentiation between these two categories, their use is not meant to be acritical. Conversely, the terms refugee and migrant are adopted whenever the provision of the current legal system will require so, but the second term is preferred to refer to people involved in migration paths generally. Moreover, drawing from the existing literature, the expressions 'people on the move' and 'border crossers' are also used at times to refer to both refugees and migrants. Furthermore, this research adopts the dichotomic terms 'forced' and 'voluntary' to mark the normative dimension of the differentiation between refugees and migrants. While scholars, practitioners, and lawmakers have used many other terms to signify the differences between these two categories, it is argued that their fundamental normative distinction lies in the contrast between the undesired and forced nature of the condition of victim-refugee in need of protection and the voluntariness of the unnecessary but desired choice of migrants to seek more favourable living conditions.

1.3 Overview

The research proceeds through three steps. The first focuses on a critical analysis of the binary between refugees and migrants. This first step aims to understand why it is important to study the differentiation process between different legal categories in migration and refugee law and why the binary between refugees and migrants exists in the first place. The second step introduces SOGIESC asylum from a legal perspective, providing an internal critique of refugee law in light of this recent evolution and its challenging features. In this paragraph, the research endeavours to identify which elements among the legal tenets of SOGIESC asylum constitute a useful tool to deconstruct the binary. Finally, the third and last step enlarges the analysis, taking into account normative paradigms whose origins and logics are external to refugee law to assess to what extent they can offer useful perspectives to look beyond the binary.

2. What about the binary?

2.1 'Forced' or 'unforced'. Why the big deal?

Looking at official documents from UNHCR and IOM, the difference between refugees ('forced' migrants) and other ('voluntary') migrants seems quite clear-cut. In its official vocabulary, IOM does not include refugees in the definition of "migrant",[1] while UNHCR has repeatedly stressed its convinced engagement with the distinctive character of refugees compared to other migrants. More specifically, UNHCR explains the differences between these two categories by reference to the dichotomy forced/voluntary. According to UNHCR, refugees are people forced to leave their country that would suffer deadly risks upon their return, while migrants are people voluntarily choosing to move for other reasons than serious risks to their life.[2]

It would not be pretentious to wonder whether this stark divide along the lines of (in)voluntariness properly translates the complex realities of people on the move into legal categories. To delve into this question, this paragraph will analyse the legal consequences of the categorization of people on the move as either 'forced' refugees or 'voluntary' migrants, as well as the extra-legal implications of the processes of labelling.

According to Erika Feller, former Director of the Department of International Protection of UNHCR, the "hard fought protection regime" for refugees is an "indispensable safety net" that should not be confused with other frameworks concerning 'voluntary' migrants.[3] Also Lama Mourad and Kelsey Norman seem to share the same concern regarding the blurring of refugees and migrants categories inasmuch as they posit that, by conflating one category upon the other, states would be facilitated in enforcing an undifferentiated restraint on migration flows.[4] It is also true, however, that in the last decades even UNHCR has had to acknowledge the changing nature of migration flows, being increasingly characterised as 'mixed'.[5] For this reason too UNHCR has had to accommodate the developing reality by broadening the scope of its activity and enlarging its perspective on international migration.[6] Given these premises, denying or diminishing the existence of different and graded protection needs would be unwise. Nonetheless, it is reasonable to ask whether 'forced'

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[1] IOM, 'Glossary on Migration' <https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf> accessed 8 May 2023.

[2] UNHCR, 'UNHCR Viewpoint: "Refugee" or "Migrant" – Which Is Right?' (*UNHCR Hong Kong*, 27 August 2015) <https://www.unhcr.org/hk/en/1088-unhcr-viewpoint-refugee-or-migrant-which-is-right-2.html> accessed 8 May 2023.

[3] Erika Feller, 'Refugees Are Not Migrants' (2005) 24 Refugee Survey Quarterly 27, 35.

[4] Lama Mourad and Kelsey P Norman, 'Transforming Refugees into Migrants: Institutional Change and the Politics of International Protection' (2020) 26 European Journal of International Relations 687.

[5] Cf. on this: Nicholas Van Hear, Rebecca Brubaker and T Bessa, 'Managing Mobility for Human Development: The Growing Salience of Mixed Migration' (2009) UNDP Human Development Reports Research Paper 2009/20.

[6] Crisp Jeff, 'Beyond the nexus: UNHCR's evolving perspective on refugee protection and international migration /: Jeff Crisp' (2008) Research Paper No. 155 New Issues in Refugee Research.

refugees and ‘voluntary’ migrants are not, in fact, two categories already blurred in reality, whether the persisting clear-cut legal distinction between them is necessary, or even how and why the scope of each category is determined.

Legally speaking, refugees can currently avail themselves of a well-developed and enforced international framework of protection. The same cannot be said for ‘voluntary’ migrants. As Rebecca Hamlin has put it:

> *“The internationally recognized definition of a refugee […] has now been adopted by 148 signatory states. In contrast, international legal instruments that enumerate the rights of migrants more generally have not been widely ratified, especially not by the states that actually host the vast majority of people on the move”.*[7]

Beyond some regional peculiarities[8] influencing the interpretation of the Refugee Convention,[9] this means ‘voluntary’ migrants have far less chances to be legally recognized by states. Even the residual protection from expulsion offered by the international standards of *non-refoulement* cannot guarantee for the conferment of a clear status.[10] Moreover, considering an instrument such as the “Global Compact for Safe, Orderly and Regular Migration”,[11] it is quite clear that the general approach to ‘voluntary’ migrants is driven by managerial considerations, as opposed to the humanitarian character of those inspiring international protection for refugees.[12]

The consequences of this binary are extremely impactful, especially considering its narrative role which allows the moral justification of the exclusion of the many from the national borders and fosters the idea that without this divide no public support for the reception of the few included refugees would be gathered. At this stage of the research, however, it is interesting to observe how the different accessibility to legal status for ‘forced’ refugees and ‘voluntary’ migrants is especially relevant for two reasons: the multi-faceted importance of legal categories and the politically marked dynamism of their interpretation and application.

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[7] Rebecca Hamlin, *Crossing: How We Label and React to People on the Move* (Stanford University Press 2021) 2. See also: Feller (n 3) 28.

[8] OAU Convention governing the specific aspects of refugee problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 (OAU Convention); Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 – 22 November 1984 (Cartagena declaration on refugees); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 (Qualification Directive).

[9] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), 189 UNTS 137 (Refugee Convention).

[10] Alexander Betts, ‘Survival Migration: A New Protection Framework’ (2010) 16 Global Governance 361.

[11] Global Compact for Safe, Orderly and Regular Migration, UNGA Res 73/195 (11 January 2019) UN Doc A/RES/73/195.

[12] It is arguable, nonetheless, that recent developments show a progressive shifting of the managerial paradigm in the context of international protection too, see BS Chimni, ‘Global Compact on Refugees: One Step Forward, Two Steps Back’ (2019) 30 International Journal of Refugee Law 630.

Firstly, recognition by law entails the bestowment of a status, which spares people from living in a "liminal legality" which can be a "source of enormous anxiety with dire material consequences".[13] In this sense, categories have material consequences in the form of rights, state protection, resources.[14] At a more systematic level, categorisation processes produce "hierarchical systems of rights"[15] that subsequently convey "extremely complex set of values, and judgements which are more than just definitional".[16] Finally, the consequences of categories affect media discourses, which can reinforce, trigger, and influence public opinions, host societies and, eventually, the legal system.[17]

It should also be noted that the processes through which these categories are interpreted and applied are not static and independent. On the contrary, they are both dynamic and political.[18] Dynamic because host societies will apply categories and labels differently in space and time according to their views and cultures.[19] Political in the sense that "legal interpretations of the refugee definition are acts of interpretive control, or discursive tactics" through which it is possible to pursue broader political aims.[20] Therefore, legal categories such as 'forced' refugee and 'voluntary' migrant should not be considered neutral.[21] Conversely, the processes through which they are interpreted and adapted to reality should be framed into bureaucratic processes which make instruments of power out of them.[22] According to Zetter

> *"The concept of labelling demonstrates why the fractioning of the label 'refugee' conceals the political agenda of restricting access to refugee status in seemingly necessary apolitical bureaucratic processes".*[23]

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[13] Hamlin (n 7) 7–8.
[14] Heaven Crawley and Dimitris Skleparis, 'Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's "Migration Crisis"' (2018) 44 Journal of Ethnic and Migration Studies 48, 60. For an analysis of the processes of illegalization of migrants that states enact in order to reinforce the control over their territories, see: Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (1st edn, Cambridge University Press 2008).
[15] Crawley and Skleparis (n 14) 51.
[16] Roger Zetter, 'Labelling Refugees: Forming and Transforming a Bureaucratic Identity' (1991) 4 Journal of Refugee Studies 39, 40.
[17] Cf. Simon Goodman and Susan A Speer, 'Category Use in the Construction of Asylum Seekers' (2007) 4 Critical Discourse Studies 165; Simon Goodman, Ala Sirriyeh and Simon McMahon, 'The Evolving (Re)Categorisations of Refugees throughout the "Refugee/Migrant Crisis"' (2017) 27 Journal of Community & Applied Social Psychology 105.
[18] Zetter (n 16) 45.
[19] Nadine El-Enany, 'Who Is the New European Refugee?' (2007) LSE Legal Studies Working Paper No. 19/2007, 3.
[20] Cynthia S Gorman, 'Redefining Refugees: Interpretive Control and the Bordering Work of Legal Categorization in U.S. Asylum Law' (2017) 58 Political Geography 36, 36.
[21] Crawley and Skleparis (n 14) 52; R Zetter, 'More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization' (2007) 20 Journal of Refugee Studies 172, 188; Hamlin (n 7) 10–12.
[22] Cf. Karen Akoka, *L'asile et l'exil: Une Histoire de La Distinction Réfugiés-Migrants* (La Découverte 2020); Tazreena Sajjad, 'What's in a Name? "Refugees", "Migrants" and the Politics of Labelling' (2018) 60 Race & Class 40.
[23] Zetter (n 21) 189–190.

For this reason, it is useful to reflect upon the role of refugees in this system. Their position as exceptions to the state's prerogative of border control is well-known.[24] It is equally agreed that, according to various factors, the refugee system can be "stretched".[25] In this sense, however, the questions would be: why and how is this regime stretched? Why 'forced' refugees can be framed as exceptions to the state's prerogative to exclude foreigners? And, considering this exceptionalism, how are refugees selected, according to which criteria? If it is true that the frontiers dividing refugees from migrants are dynamically and politically negotiated, then the contested space between them and the motives supporting these negotiations are the focus of this research. To clarify these elements, and to explore the roots of the binary 'forced' refugee/'voluntary' migrant, it is necessary to delve into the story behind these categories and the current framework of border(ing) practices and control.

2.2 Casting a critical sight on the binary: what does it lie upon?

We have been proclaiming for decades the crisis of international refugee law, along with the need for new solutions to make it effective again.[26] Considering what has already been said in the previous paragraph, however, one could wonder to what extent this persistent evaluation of international refugee law is in fact determined by its very structure, rather than linked to more superficial technical features or transitory circumstances. This paragraph is inspired by this provocation and is tasked to understand the foundations of the binary between 'forced' refugees and 'voluntary' migrants. First, it will focus on a historical account of the progressive distinction of the category of refugees from that of migrants. Secondly, it will consider states' prerogatives of territorial control and their correlated border(ing) practices.

Numerous legal-historical studies have shown how the category of refugees has not always had the same meaning.[27] On the contrary, it has developed over the decades, also under the influence of power relations among the states involved in the making of this branch of international law.

Katy Long has studied in detail the historical evolution of the relationship between the categories 'refugees' and 'migrants'.[28] Her research has revealed how in the past, until the 50s, refugees were considered as migrants and were dealt with through the same legal instruments existing to address migration flows. Later on, the grave failures in the protection of refugees experienced during the Second World War triggered the separation of the first category from the second, releasing

[24] Nadine El-Enany, 'The EU Asylum, Immigration and Border Control Regimes: Including and Excluding: The "Deserving Migrant"' (2013) 15 European Journal of Social Security 171, 174; Hamlin (n 7) 2.
[25] Betts (n 10).
[26] James C Hathaway and R Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 Harvard Human Rights Journal 115, 115.
[27] Ex multis, see: Peter Gatrell, *The Making of the Modern Refugee* (Oxford University Press 2013).
[28] Katy Long, 'When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection' (2013) 1 Migration Studies 4.

refugees' protection from economic considerations. According to Long, however, the result has been that "in creating a special route for admission deliberately set apart from migration, the humanitarian discourse that protects refugees from harm actually prevents refugees from finding durable solution".[29] At the same time, the "humanitarian discourse intended to *protect* refugees has in fact strengthened many states' restrictionist migration agendas".[30]

It is difficult to indicate a single historical event that marked the shift from fluid refugee and migrant categories to their net demarcation. However, Rebecca Hamlin has identified one significant step in the Evian Conference of 1938 that represented a "key moment" for the "individualization of refugee law", which previously rested on a group-based understanding of the category of refugee applied without any requirement for individual assessment.[31] Almost two decades later, the Refugee Convention has represented another salient event, contributing to the singling out of the "identity of refugee".[32] Finally, Long has identified a third moment during the Cold War, specifically with the US framing of Eastern European migrants as victims of communist regimes and not as impoverished economic migrants.[33]

According to these historical accounts, it took long decades for the refugee/migrant binary to crystallize. This development, nonetheless, should not be naturalized nor taken for granted: history could have been different. Some clear political intents supported these legal evolutions. As affirmed by Hamlin,

> *"This [refugee] definition was explicitly designed to limit the number of people who would fit within it. [...] The refugee was constructed as the exceptional figure with possible claims on state sovereignty, as opposed to migrants who lacked these claims".*[34]

Whose interest was behind this precise objective? Why did states feel the urge to mould international refugee law in the current shape?

According to Long, the humanitarian character of refugee protection resulted from a "politically crafted construction of Western states".[35] Truth be told, as one can evince from Hamlin's research, states from the global south participated in drafting the Refugee Convention. Their points of view and their takes on the refugee definition, however, do not appear in the final version of the Convention, as if bluntly elided from the *travaux préparatoires*.[36] In Hamlin's view, this circumstance

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[29] ibid 4.
[30] ibid 5.
[31] Hamlin (n 7) 37.
[32] Long (n 28) 5.
[33] ibid 20.
[34] Hamlin (n 7) 40.
[35] Long (n 28) 6.
[36] Hamlin (n 7) 97 ff.

should be accounted for in the broader framework of colonialism and state sovereignty.[37] Namely, the birth of refugeehood should be understood as deeply linked to border control and to the "uneven sovereignties" that regulated and regulate the international community.[38] In Hamlin's words:

> *"Histories of the refugee concept that ignore the role of colonialism perpetuate misunderstandings of early international law and make it seem more humanitarian and cosmopolitan that it was".*[39]

This analysis is necessary to understand why and how the current international refugee regime still serves the interests of states from the global north,[40] a conclusion that can be reached also by looking at the limited definition of persecution, established in protection of political and civil rights.[41]

To better understand the substance of these states' interest, we should look at their prerogative of border control and subsequent bordering practices. As already mentioned, the severance of refugees from the broader category of migrants serves well the purpose of justifying the exclusion of the many from national borders, both legally and discursively. In this sense, it would seem quite rational that, in response to crises, states reinforce this narrative while pushing for harsher measures restricting migrants' access to their territory. The relatively recent "New Pact on Migration and Asylum"[42] proposal from the European Commission testifies to this consideration insofar as it focuses on strengthening accelerated and border asylum procedures. More generally, bordering practices include

> *"The imposition of visa requirements on both the refugee-producing countries and the host countries in the regions of origin, carrier sanctions, use of 'safe country' concepts, juxtaposed border controls and [for what concerns the EU] the activities of Frontex".*[43]

Overall, this set of measures has even contributed to reconfiguring the concept of security.[44]

The consequences of these bordering practices are dire and, arguably, not successfully justified by the narrative of the binary. On one side, the harsh defence of national borders has restricted access to asylum to such an extent that not even all 'genuine' refugees receive protection. Studying the European case, Nadine El-Enany has pointed out that, after dangerous migration paths, the individuals that reach European shores "are by no means the most vulnerable refugees".[45] Those even rarer individuals that manage to be recognized as refugees, eventually, are those very few "deserving"[46]

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[37] ibid 27.
[38] ibid 30.
[39] ibid 34.
[40] ibid 96.
[41] ibid 45.
[42] Commission, 'Communication from the Commission on a New pact on Migration and Asylum' (Communication) COM(2020) 609 final.
[43] El-Enany (n 24) 179.
[44] Howard Adelman, 'From Refugees to Forced Migration: The UNHCR and Human Security' (2001) 35 The International Migration Review 7, 15.
[45] El-Enany (n 19) 1.
[46] El-Enany (n 24).

migrants that testify to the effects of the additional filtering layers added to the refugee/migrant binary. On the other side, the daunting amount of resources, infrastructures, and technological devices necessary to sustain the proper functioning of the border control system has led to the formation of an “illegality industry”.[47] According to Ruben Andersson, the economic interests and the supply and production chains produced by this impressive demand for border security trigger, at least in the European context, a “self-perpetuating market of border control and outsourcing/externalisation of migration control”.[48]

Having laid the foundations of the binary, the discursive divide between ‘forced’ and ‘voluntary’ movements can finally be seen under a new light. Indeed, the effectiveness of this divide is ensured by the vitious normative burden associated with ‘voluntariness’ and, more specifically, migrants’ agency. As highlighted by Valeria Ottonelli and Tiziana Torresi, while agency is discursively used to undermine migrants’ claims because of their purposedly ‘whimsical’, voluntary choices, the forcedness determining refugees’ movements is welcomed under the aegis of international protection, even though it is completely stripped of any room for agency.[49] For example, the functioning of the EU ‘Dublin system’, tasked to redistribute asylum claims among member states, clearly shows through its allocating criteria how asylum seekers’ preferences, plans and desires are not considered.[50] Anyhow, in this case too it seems as though the functioning of the forced/voluntary divide does not lead to desirable outcomes inasmuch as “failing to consider whether migrants’ choices are voluntary or non-voluntary may lead to inadequate institutional responses”.[51] Or maybe, as already suggested, and considering that some ‘forced’ migrants will not be recognised as refugees while other ‘voluntary’ migrants will, adequacy is not the criterion that states adopt to assess their policies in this case?

At this point, if international protection is not really – or predominantly – about humanitarianism and human rights, but more about legally accommodating states’ sovereign interests, then the role of categories, labelling processes and legal statuses introduced in the first paragraph can be better grasped. Similarly, then, it is easier to understand what Tazreena Sajjad means when she writes that:

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[47] Ruben Andersson, ‘Europe’s Failed “Fight” against Irregular Migration: Ethnographic Notes on a Counterproductive Industry’ (2016) 42 Journal of Ethnic and Migration Studies 1055.

[48] ibid 1065.

[49] Valeria Ottonelli and Tiziana Torresi, ‘When Is Migration Voluntary?’ (2013) 47 The International Migration Review 783.

[50] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31. From this point of view, it would be interesting to analyse the (arguably) ironical terminological choice behind the instrument of ‘voluntary’ returns, justified precisely thanks to their agency component.

[51] Ottonelli and Torresi (n 49) 790.

> *"The labels, and the discourse of which they are part, make it possible for Europe to deny asylum claims and expedite deportations while being globally accepted as a human rights champion".*[52]

3. International refugee law through the lens of SOGIESC asylum: an internal critique

3.1 Challenging the binary through gender and sexuality: the deconstructive potential of SOGIESC asylum claims

In this juncture, this research argues that SOGIESC asylum plays a particularly interesting and heuristically fruitful role. When one reflects about the fact that the refugee system fosters the inclusion of few to allow the exclusion of many, some questions could arise: who is precisely included in this group of few? And why? Some researchers have already addressed this nexus and asked if and how a connection can be found between the evolution of international refugee law following recent SOGIESC asylum cases and the increasingly tightened borders of global north countries. Calogero Giametta, for example, has wondered whether "this 'queer' focus [could] be a political expedient rather than an actual engagement to protect LGBTI migrants' rights".[53]

It is not argued here that recent evolutions in SOGIESC asylum are not significant from the point of view of the protection of LGBTIQ+ individuals and other people suffering from persecution based on sexual orientation and/or gender identity. On the contrary, it is suggested that, given the layered relevance of categories and legal statuses, and considering the historical and political genealogy of the distinction between refugees and migrants, the case of SOGIESC asylum can provide a particularly fruitful point of view to unveil and deconstruct what hides behind the forced/voluntary divide.

This said, we can ask ourselves: if the divide can be strategically used to second states' priorities and satisfy external normative logics, can SOGIESC asylum work as a "political expedient" that enhances the binary by revitalising its narrative? Is it appropriate to envision a link between SOGIESC asylum and the tightening of global north borders, a connection that proceeds beyond mere juxtaposed or even diverging historical progressions, namely those of LGBTIQ+ rights on the one side and of migrants' rights on the other? To try and start answering these questions, this chapter will focus on an 'internal' critique of the law regulating SOGIESC asylum claims, retracing those short-circuits, contradictions, and loopholes that can – arguably – unveil the political behind the neutral.

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[52] Sajjad (n 22) 40.

[53] Calogero Giametta, 'New Asylum Protection Categories and Elusive Filtering Devices: The Case of "Queer Asylum" in France and the UK' (2020) 46 Journal of Ethnic and Migration Studies 142, 146.

3.2 What is new with SOGIESC asylum claims?

The recognition of refugee status for persecution motivated by sexual orientation and/or gender identity is a relatively recent phenomenon that has been developing only since the 80s/90s.[54] Part of the interest in this category, a case study in continuous evolution from a legal perspective, stems also from this circumstance.

Global north countries have progressively accepted sexual orientation and gender identity as elements apt to constitute a 'particular social group' and have traced in the grave violations of LGBTIQ+ people's human rights the necessary requirements for the individuation of a well-founded fear of persecution.[55] Nonetheless, as highlighted by Bina Fernandez, "legislative reforms that recognise the eligibility of lesbians and gays to be considered refugees and asylum seekers have been slower to be implemented and are still deeply contested".[56]

Based on scholarly works, it is possible to pinpoint a series of challenges that SOGIESC asylum cases present international refugee law with. While some of these will be extensively addressed in the next paragraphs, it is useful to provide their general overview in order to grasp the relevance of the potential impacts of SOGIESC asylum claims on this branch of international law.[57] SOGIESC asylum represents a challenge for international refugee law with respect to the definition of persecution, and especially the interpretation of the necessity and/or sufficiency of the criminalization of SOGIESC conducts in the countries of origin. Moreover, if on the hand the inclusion of private actors in the plethora of actors of persecution is now consolidated, on the other hand the assessment of SOGIESC cases seems to be still affected by a bias privileging the 'public' aspect of persecution compared to the 'private' one.[58] Additionally, international refugee law is not easily interpreted when it comes to SOGIESC cases and the determination of membership of a particular social group. Indeed, the necessary internal and/or external elements to satisfy to be part of such a particular social group, on top of the possible limits to set on 'non-fundamental' activities that should not be protected under this provision, are still debated. Finally, as it will be further developed in the next paragraphs, SOGIESC asylum claims represent controversial cases with respect to the application of the so-called

[54] Giametta (n 53).

[55] Bina Fernandez, 'Queer Border Crossers: Pragmatic Complicities, Indiscretions and Subversions' in Dianne Otto (ed), *Queering International Law. Possibilities, Alliances, Complicities, Risks* (Routledge 2017) 198; Jenni Millbank, 'A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation, 1989–2003' (2005) 14 Social & Legal Studies 115, 116.

[56] Fernandez (n 55) 197.

[57] Cf. in this sense: Jenni Millbank, 'Fear of Persecution or Just a Queer Feeling' (1995) 20 Alternative Law Journal 261; Jenni Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law: A Reply to Hathaway and Pobjoy' (2012) 44 New York University Journal of International Law and Politics 497, 498–499; Fernandez (n 55) 202.

[58] Carmelo Danisi and others, *Queering Asylum in Europe: Legal and Social Experiences of Seeking International Protection on Grounds of Sexual Orientation and Gender Identity* (Springer 2021) 272.

discretion reasoning and to the imposition of a qualified burden of proof for the satisfaction of credibility requirements.

Some clear examples of the consequences of these controversial legal features can be found both in the US and in the European context. In the first case, many legal scholars have widely discussed the evolution of the interpretation of persecution in SOGIESC cases, particularly stressing the undesirable circumstance of different and contrasting positions of different courts across the country.[59] National inconsistencies in the application of refugee law in SOGIESC cases appear to be even more striking in the European context if one considers the supposed homogenisation effect of a common system to manage asylum (CEAS). Some empirical studies have documented the extent to which member states take different positions on the challenging issues mentioned before, while highlighting significant variations also across time and even among single states.[60]

Inasmuch as it interested with the construction of a binary between 'forced' refugees and 'voluntary' migrants, this research will focus on two SOGIESC challenges that can be read into the frameworks of the forced/voluntary divide and the historical and political foundations of the binary: discretion reasoning and credibility.

3.3 From discretion…

Discretion reasoning can be generally defined as that set of arguments and requirements adopted by asylum authorities to dismiss asylum claims on the basis that the claimant could hide, completely or in part, those characteristics based on which they are at risk of being persecuted. In the case of LGBTIQ+ asylum seekers, discretion reasoning translates into the assumption that claimants can return to their country – internally relocating if needed – and spare themselves from persecution by concealing their sexual orientation and/or gender identity. The broad consequences of this kind of reasoning in asylum decision-making are quite dire. According to Jenni Millbank, these range from the improper assessment of internal relocation alternatives and well-founded fear based on relevant country of information to the erroneous analysis of the link between criminalisation of SOGIESC behaviour, state persecution, persecution from non-state actors and availability of state protection.[61] More drastically, the authors of the comparative European study "Fleeing Homophobia" have found that, by applying the discretion requirement, asylum authorities unreasonably ask people to conceal

[59] See on this, among others: Alan G Bennett, 'The Cure That Harms: Sexual Orientation-Based Asylum and the Changing Definition of Persecution' (1999) 29 Golden Gate University Law Review 279; Brian J McGoldrick, 'United States Immigration Policy and Sexual Orientation: Is Asylum for Homosexuals a Possibility' (1994) 8 Georgetown Immigration Law Journal 201.

[60] Thomas Spijkerboer and Sabine Jansen, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in the EU* (Coc Nederland/VU University Amsterdam 2011); Danisi and others (n 58).

[61] Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 The International Journal of Human Rights 391, 394–395.

some of their most intimate characteristics thus violating their fundamental rights and eventually "collude[ing] with homo- and transphobic actors in the country of origin in violating the expression of LGBTI rights".[62]

The application of discretion reasoning has undergone a significant judicial evolution in the past two decades. Indeed, it has been progressively rejected at the highest judicial levels by an increasing number of countries, ranging from Australia to Sweden, from the Netherlands to the UK,[63] passing through an official rejection by UNHCR in its 2008 Guidance note on SOGIESC asylum claims and later in its Guidelines No. 9 on the same topic.[64] More recently, discretion reasoning has also been clearly rejected by both European higher courts, the CJEU in its two cases *X, Y, and Z*[65] and *Y and Z*[66] and the ECtHR in its case *I.K.* against Switzerland.[67] Nonetheless, the two main European comparative studies about SOGIESC asylum, "Fleeing Homophobia" and "SOGICA", found in 2011 and in 2021 that discretion reasoning is still being applied in a series of European states.[68]

As it will be argued later, discretion reasoning is arguably hardly eliminable since it is deeply entrenched in the legal structure of international refugee law.[69] Given this premise, it is suggested that, to better grasp the link between the configurations of discretion reasoning and the forced/voluntary divide, it is useful to focus on one particular debate.

When back in 2012 James Hathaway and Jason Pobjoy published an article titled "Queer cases make bad law" interested in analysing two significant cases of the Australian and UK supreme Courts,[70] their stances sparked a vivacious debate among refugee law scholars in the merits of discretion reasoning.[71] The two cases under scrutiny, both concerning gay asylum applicants that had

[62] Spijkerboer and Jansen (n 60) 8.
[63] Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law' (n 57) 507–508.
[64] UNHCR 'Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (Geneva 2008); UNHCR 'Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity' (Geneva 2012).
[65] Joined cases C-199/12 to C-201/12 *Minister voor Immigratie en Asiel v X, Y, and Z v Minister voor Immigratie en Asiel* [2014] OJ C 9/8.
[66] Joined cases C-71/11 and C-99/11 *Federal Republic of Germany v Y and Z* [2012] OJ C 331/5.
[67] *I.K. c. Suisse* App No 21417/17 (ECtHR, 19 December 2017).
[68] Spijkerboer and Jansen (n 60) 33–41; Danisi and others (n 58) 281–283.
[69] Cf. Janna Wessels, *The Concealment Controversy: Sexual Orientation, Discretion Reasoning and the Scope of Refugee Protection* (Cambridge University Press 2021).
[70] *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*; *Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia: High Court, 9 December 2003; *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010.
[71] James C Hathaway and Jason M Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 New York University Journal of International Law and Politics 315; Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law' (n 57); John Tobin, 'Assessing GLBTI Refugee Claims: Using Human Rights Law to Shift the Narrative of Persecution within Refugee Law' (2012) 44 New York University Journal of International Law and Politics 447; Deborah Anker and Sabi Ardalan, 'Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law' (2011) 44 New York University Journal of International Law and Politics 529; Wessels (n 69).

decided to conceal their sexual orientation in their countries of origin or that were faced with the authorities' rejection of their asylum claim by virtue of the requirement to conceal their sexual orientation upon return, authoritatively rejected discretion reasoning in SOGIESC asylum claims. Analysing the courts' reasoning, Hathaway and Pobjoy conversely contested two controversial conclusions deriving, according to them, from a misinterpretation of refugee law.[72]

Firstly, while generally welcoming the rejection of discretion reasoning, the authors criticized the courts as far as they detected a well-founded fear of persecution even when applicants would autonomously choose to behave discreetly in the country of origin. In this sense, following Hathaway and Pobjoy, the courts should have recognized that the relevant assessment to carry out would not regard an 'exogenous', physical harm caused by actors of persecution, but rather an 'endogenous', psychological one determined by the detrimental consequences suffered internally by the applicants because of their condition of concealment. According to the authors, the distinction between 'exogenous' and 'endogenous' is essential insofar as neglecting it, as they believe the courts have done, would allow judges to acknowledge a well-founded fear of persecution suffered by the applicants by virtue of a (exogenous) harm that, in cases of concealment, is simply non-existent.

Secondly, the authors have contested the excessively broad interpretation of the "for reasons of"[73] clause by the courts as far as they have not established a boundary to actions deemed fundamental for the individual and protected by refugee law. Drawing a parallelism with asylum claims based on different grounds of persecution, the authors state that, in the cases under scrutiny, the courts have not demonstrated the causal link that, according to refugee law, should exist between the activities that ostensibly expose applicants to persecution and the ground of persecution. Accordingly, the authors argue that, by not excluding activities that are not fundamentally linked to the specific ground of persecution from the scope of international protection, the courts have erroneously interpreted refugee law and stretched the system to a – politically – dangerous extent.

As far as this research is concerned, this debate is particularly relevant in the framework of the forced/voluntary divide. Hathaway and Pobjoy, arguably indirectly reaffirming discretion reasoning, ask why refugee law should protect LGBTIQ+ asylum seekers that either choose to conceal their identity or could at least avoid performing 'non-fundamental' activities. Can Hathaway and Pobjoy's arguments be read as a well-construed refusal of voluntariness?

Looking at Hathaway and Pobjoy's first remark with the lens of the forced/voluntary divide, one could reformulate their position as follows: it is correct to reject discretion reasoning in the form of a forceful requirement to conceal one's sexual orientation or gender identity, but it is incorrect from

[72] Hathaway and Pobjoy (n 71) 339.
[73] Refugee Convention (n 9), art 1(A).

the point of view of refugee law to reject discretion reasoning in those cases where asylum seekers voluntarily opt to stay in the closet, unless the assessment of persecution is based on an endogenous harm. Put in these terms, the authors' position would seem to reconcile the paradox, already mentioned, according to which not all forced migrants will be recognised as refugees and some voluntary migrants are nonetheless recognised as refugees. Imposing the forced/voluntary divide on SOGIESC asylum seekers in these terms, however, produces absurd consequences, showing once again the political and deeply normative nature of this divide.

As well-said by Millbank, "discretion logic is a particularly invidious form of victim blaming because it affirms the perspective, if not the conduct, of the persecutor".[74] Indeed, this subtle use of the forced/voluntary divide shifts the burden of refugee protection from the persecutor to the applicant who, when choosing not to disclose their identity, would deprive themselves of the availability of protection. In this sense, Hathaway and Pobjoy's argument seems misplaced for at least three reasons. Firstly, the assumption that LGBTIQ+ people would be spared from persecution by concealing themselves is mistaken: the closet is an unsafe space.[75] Secondly, the focus on the choice to behave discreetly and, potentially, on the subsequent 'endogenous' harm is short-sighted since, upon return in a country where LGBTIQ+ individuals are exposed to 'exogenous' harm, the choice to be discreet would soon turn, in any case, into a very cogent requirement. Thirdly, from a normative point of view, the implicit suggestion that the choice to stay closeted is 'free' is as flawed as the exclusionary understanding of voluntariness in the forced/voluntary divide.[76] From this point of view, the *HJ and HT* case of the UK Supreme Court suffers from the same bias inasmuch as, in the case of applicants opting for concealment, derives different legal consequences from different reasons supporting this choice. Accordingly, the Court has stated that discretion reasoning should not be applied if concealment is dictated by fear of persecution. Conversely, if concealment derives from other 'personal' reasons, then discretion reasoning should not be restricted.

Coming to Hathaway and Pobjoy's second argument, the ambiguous relationship with the forced/voluntary divide gets even more insidious. Claiming that certain 'trivial' activities are not fundamental to one's sexual orientation and/or gender identity, the authors argue that the "for reasons of" clause of refugee law should be interpreted as imposing boundaries to the protection of LGBTIQ+ expressions and behaviours from persecution. In the framework of the forced/voluntary divide, this proposition would be equivalent to a refusal of refugee status in those cases where LGBTIQ+

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[74] Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law' (n 57) 504.
[75] Spijkerboer and Jansen (n 60) 38; Wessels (n 69) 224.
[76] See on this: Wessels (n 69) 67.

applicants voluntarily chose to perform certain non-fundamental activities that could have been avoided, respecting a discreet attitude, without resulting in a forced concealment.

Once again, if read under this light, Hathaway and Pobjoy's argument could be seen as a further step in reconciling the forced/voluntary paradox mentioned above. It is argued, however, that their position is both ill-construed and revealing of further non-legal normative content. On the one hand, Hathaway and Pobjoy bend the controversial and debated acts/identity dichotomy[77] to draw an improper parallel with the boundaries of protected activities set in political or religious persecution cases. Referring to Millbank's clear explanation: "This focus on 'activity' is misleading in addressing the question of nexus and persecution. 'Activity' associated with sexual orientation does not *cause* the persecution, nor does it *form the basis of protection*; it simply reveals or exposes the stigmatized identity".[78] Hathaway and Pobjoy try indeed to argue that certain 'trivial' activities should not be protected because they are far removed from the convention ground of particular social group, exactly as it happens in cases of religions and political persecution. Implicitly, however, they recognize that those activities would lead to persecution as far as they would reveal one's SOGIESC and they posit that they can be avoided without causing an excessive violation of human rights. After all, if the presence of discretion reasoning in the authors' argument was not acknowledged, one should eventually ask what the difference between 'fundamental' and 'trivial' activities is if they equally lead to persecution and the gravest 'exogenous' harm.

On the other hand, this controversial relation to human rights reveals the broader critical issue of drawing lines between fundamental and non-fundamental activities: who draws them? According to which criteria? No international human rights instruments currently provide express protection of LGBTIQ+ rights:[79] what consequences does this circumstance entail in this case? Hathaway and Pobjoy recognize the difficulty of drawing lines in this field, but at the same time they appear to provide an unsatisfactory solution:

> *"The protected status of sexual orientation ought more generally to encompass any activity reasonably required to reveal or express an individual's sexual identity. We acknowledge, of course, that there can be no single, universally acceptable definition of such an activity, and note the importance of ensuring a culturally sensitive and inclusive approach. But it remains that there will be some activities at least loosely associated with sexual identity*

[77] See on this: ibid 22–23.

[78] Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law' (n 57) 510.

[79] The only instrument in this sense are The Yogyakarta Principles, which re-formulate universal human rights in LGBTIQ+ terms according to specific conditions and necessities. These principles are not, however, binding (The Yogyakarta Principles. Principles on the application of international human rights law in relation to sexual orientation and gender identity (Geneva, 2007); The Yogyakarta Principles plus 10. Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (Geneva, 2017)).

which […] are not reasonably required to reveal or express an individual's sexual identity".[80]

Drawing lines in the case of SOGIESC cases is particularly difficult considering that there is no "organized hierarchy, no published doctrine, policy platform, text or foundational document"[81] to guide a fair, non-discriminatory and culturally sensitive assessment. For this reason, it is argued that any line drawn between 'fundamental' and 'trivial' activities has to rely on external normative paradigms, which have little to do with the legal contents of international refugee law.

It should be acknowledged that, notwithstanding progressive judicial developments rejecting discretion reasoning, its application is not yet fully eliminated. As already mentioned, the English case of *HJ and HT*, more than fully rejecting discretion reasoning, has "reformulated [it] in a new, cumbersome test".[82] Similarly, the judgements of the CJEU rejecting discretion reasoning in its 'reasonable expectation' form have stopped short of clarifying how European law should be interpreted when it is found that an applicant will effectively choose to behave discreetly, configuring the situation considered by Hathaway and Pobjoy.[83] More generally, as it has been shown by the SOGICA research,

> *"Although the concept was rejected by the CJEU's decision in X, Y and Z and has been slowly set aside across Europe and beyond, more subtle forms of this 'discretion argument' (or, more accurately, concealment) persist and are not necessarily held to be incompatible with the CJEU's ruling".*[84]

Investigating why it is so difficult to get rid of discretion, Janna Wessels has stated that discretion will not disappear because it represents the "flip side, or the mirror image, of the uncertainties related to the scope of what it is that is protected in refugee law"[85] and thus the "site where the extent of the Convention grounds is negotiated in refugee law".[86] If the previous analysis on the link between the debate stemming from "Queer cases make bad law" and the forced/voluntary divide is well-placed, Wessels's conclusion reinforces the argument according to which discretion, understood as this space of negotiation of the extension of the refugee protection, is yet another instrument to mould the discourses around the binary between 'forced' refugees and 'voluntary' migrants.

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[80] Hathaway and Pobjoy (n 71) 382.
[81] Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law' (n 57) 516–517.
[82] Danisi and others (n 58) 277.
[83] Wessels (n 69) 75.
[84] Danisi and others (n 58) 277.
[85] Wessels (n 69) 243.
[86] ibid 23.

3.4 …To disbelief…

Many scholars have highlighted in different geographical contexts how, quite recently, the harsh Western scrutiny on SOGIESC asylum claims has increasingly availed itself of the new tool of 'disbelief' instead of the one of 'discretion', progressively dismissed by the courts.[87] Fernandez has stated in this sense that: "The rejection of 'discretion reasoning' has only been partial, and resistance to LGBTI asylum claims persists now through the heightened scrutiny of credibility".[88] In the context of this research, this evolution is particularly relevant for two interconnected reasons. On the one side, the heightened scrutiny on credibility framed as a reaction to the loss of the previous discretion instrument provides an additional element to further the understanding of the working of the binary. On the other side, the specific shape that credibility assessments have taken, as far as existing empirical studies have documented them, gives proof of some of the external normative paradigms that have already been mentioned and that influence asylum decision-making.

Even the most recent empirical study on SOGIESC asylum claims has detected a widespread and persistent culture of disbelief that continues to cause negative credibility assessments and subsequent refusals of asylum claims.[89] More studies, in any case, have extensively mapped different state practices concerning credibility, highlighting how much they can vary between different contexts and depending on different variables.[90] At the European level in particular, a significant event marking a general attitude of disbelief can even be traced in the CJEU's jurisprudence. In its *A, B, and C* case,[91] indeed, the Court has rejected the proposition that declared sexual orientation can be established as a fact, and that, conversely, it should be considered and assessed as any other element of proof.[92]

While the requirement to assess all instances of self-identification *per se* does not seem to differentiate SOGIESC claims from other asylum claims, it should be noted that the subsequent burden of proof imposed on SOGIESC claims can have regrettable consequences, especially if one considers that in its *A, B, and C* case the CJEU has left some leeway for asylum authorities to make decisions partially based on stereotypes.[93] In fact, all the studies mentioned above agree on one aspect. Credibility assessments appear to be strongly biased by a series of stereotypes about sexual orientation and gender identity.[94] Such stereotypes are not sex-, gender-, and culture-neutral. Quite

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[87] Millbank, 'From Discretion to Disbelief' (n 61); Spijkerboer and Jansen (n 60) 47.
[88] Fernandez (n 55) 204.
[89] Danisi and others (n 58) 313.
[90] Spijkerboer and Jansen (n 60); Massimo Prearo, 'Stato, Politica e Morale Dell'asilo LGBTI' in Noemi Martorano and Massimo Prearo (eds), *Migranti LGBT. Pratiche, politiche e contesti di accoglienza* (Edizioni ETS 2020).
[91] Joined Cases C-148/13 to C-150/13 *A, B, and C v Staatssecretaris van Veiligheid en Justitie* [2015] OJ C 46/4.
[92] Thomas Spijkerboer, 'Asylum Decision-Making, Gender and Sexuality' in Evangelina Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar 2022) 202.
[93] CJEU *A, B, and C* (n 91) para 62. On this aspect, see also: Spijkerboer and Jansen (n 60) 62.
[94] For an exhaustive analysis of these stereotypes see: ibid 47–65.

on the contrary, they have clear origins in heterosexual and cisgender paradigms and in Wester-based cultural understanding of sexual orientation and gender identity. The authors of the "Fleeing Homophobia" research project have shown how hetero-cis-based stereotypes build-up the 'acceptable' and comprehensible expression of non-straight and non-cis identities, eventually reinforcing the dominant heterosexual and cisgender normative system.[95] The researchers of the SOGICA project, instead, have reported how Western *tropoi* of sexual orientation and gender identity are forced upon SOGIESC asylum seekers, making it even more difficult to fit into pre-determined categories.[96] The distinction between being closeted and being out and proud or the expectation of a well-construed and thought-through emotional journey recollecting the path of self-discovery against feelings of shame, difference, exclusion, guilt triggered by supposedly unbearable public and private situations in the countries of origin are good examples of the working of Western cultural imperialism in these cases.[97]

Finally, Massimo Prearo has ventured even beyond these findings to highlight the moral and political dimension underlying SOGIES asylum.[98] According to the researcher, cultural tensions are not enough to explain the institutional attitude towards SOGIESC asylum seekers. On the contrary, the system is marked by a moral connotation

> *"Insofar as the categories of sexual orientation and gender identity [...] are produced and produce a framework that the institutional agents use to formulate (and justify) a judgement concerning the 'goodness' or the 'badness' of LGBTI migrants' stories, which I define as SOGI framework".*[99]

Where do these considerations leave us? The analysis of the evolution of SOGIESC asylum has shown how asylum decision-making has progressively shifted from a discretion paradigm requiring concealment from the applicant to a disbelief paradigm expecting "new practices of *indiscretion*" and "'hyper-visible' public performances of sexuality"[100]. Talking about discretion, it has been argued that Hathaway and Pobjoy's position could be interpreted as an attempted solution to the paradoxical consequences of the forced/voluntary divide. Eventually, however, it has been shown that such an understanding of discretion reasoning fosters absurd consequences and leads to different configurations of exclusion. Similarly, the application of high standards of credibility can be read as an attempt to protect the forced/voluntary divide by 'bogus' asylum seekers and 'fake' LGBTIQ+

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[95] ibid 62.
[96] Danisi and others (n 58) 312.
[97] See also: Dany Carnassale, 'Immaginari Del Genere e Della Sessualità Tra Esperienze Di Migrazione e Richieste Di Protezione Internazionale' in Noemi Martorano and Massimo Prearo (eds), *Migranti LGBT. Pratiche, politiche e contesti di accoglienza* (Edizioni ETS 2020) 39–41.
[98] Massimo Prearo, 'The Moral Politics of LGBTI Asylum: How the State Deals with the SOGI Framework' (2021) 34 Journal of Refugee Studies 1454.
[99] ibid 1457.
[100] Fernandez (n 55) 204.

individuals. In this case too, nonetheless, it has been shown that this heightened scrutiny only answers to a series of sex-, gender- and culture-related stereotypes that only shift the exclusionary effects of the refugee/migrant binary. These stereotypes do not work simply – or predominantly – to exclude as many applicants as possible from inclusion into the refugee system. Rather, they serve the purpose of reformulating and reiterating the convincing narrative of the binary while concurrently validating only certain ways of living one's own SOGIESC, hence exalting only the Western way of being LGBTIQ+. In this sense, this widespread concern of debunking uncredible stories and unveiling fake applicants can be interpreted as a further adverse effect of the imposition of the refugee/migrant binary as a tool to enact external moral and political aims.

Before proceeding to the analysis of these external normative paradigms, however, it can be useful to single out some legislative and judicial concerns originating from the European context to identify what are the 'interstices' into which these paradigms can crawl and find shelter under seemingly neutral legal provisions.

3.5 …Towards where? Some European interstices for the external critique

This paragraph will focus on two 'interstices' of the European legal system: some tensions in the CJEU and the ECtHR's case-law and a critical reference in a provision of the Qualification Directive.[101]

The CJEU case *X, Y, and Z*[102] has already been mentioned regarding the rejection of the discretion requirement. It should be considered now regarding the issue of criminalization. Indeed, in this case the CJEU has stated that the criminalization of LGBTIQ+ conduct in the countries of origin is not enough to constitute persecution. On the contrary, effective enforcement of criminal measures should be assessed to recognize the risk of persecution. This decision is arguably problematic from different points of view. First of all, in this case the CJEU does not seem to acknowledge that the criminalization of LGBTIQ+ acts/identity already entails state-sponsored homophobia that would also determine the unavailability of state protection against non-state actors' violence.[103] Secondly, the Court does not seem to acknowledge that persecution of LGBTIQ+ people can arise indirectly based on other criminal law provisions, or even in countries where existing legislation protecting LGBTIQ+ minorities are not enough to avert discrimination and lack of protection.[104] Finally, the

[101] Qualification Directive (n 8).
[102] CJEU, *X, Y and Z* (n 65).
[103] Danisi and others (n 58) 275; Spijkerboer and Jansen (n 60) 25–26; Millbank, 'From Discretion to Disbelief' (n 61) 394–395. See how in Italy, thanks to a decision of the Corte di Cassazione, criminalization in the countries of origin is deemed sufficient to prove persecution (Corte di Cassazione Sez. VI Civile *ordinanza* No. 15981 of 29 May 2012).
[104] Danisi and others (n 58) 271. See on this note the French case, where, thanks to a decision of the Conseil d'Etat, even in absence of specific criminalizing laws, persecution can be "based on other laws abusively applied to this social group or on behaviours emanating from the authorities, encouraged or fostered or simply tolerated by them" (ECRE,

decision of the CJEU in *X, Y, and Z* seems at odds with both Article 9(2)(b) of the Qualification Directive, providing that persecution can consist of legal measures which are in themselves discriminatory, and the ECtHR's findings based on article 8 ECHR that criminalization of same sex sexual conduct constitutes a continuing and direct violation of human rights.[105] This tense relation with the ECtHR's case-law should be complemented by an additional tension internal to the latter court's jurisprudence. As highlighted by Spijkerboer, the Court's case-law on article 8 seems at odds with some negative decisions on article 3 concerning two Iranian and one Libyan homosexual applicants[106] facing return to their countries, both criminalizing and providing grave punishments for homosexuality.[107]

The second interstice is enshrined in article 10(d) of the Qualification Directive, which states that:

> *"Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered criminal in accordance with national law of the Member States"*.

The latter sentence seems to introduce a link to the evolution of state homobitransphobia in member states and make refugee protection of LGBTIQ+ residually dependent on the level of protection of LGBTIQ+ nationals of European member states. From an interpretative point of view, the formulation of the article would arguably cast us back into Hathaway and Pobjoy's controversial reasoning on lines to be drawn between fundamental and trivial activities. From a critical and political point of view, this provision "supports the view that refugee law may only continue to develop in practice as long as it reflects the values of the host society".[108] This of course creates uncomfortable situations concerning discriminatory commonalities between receiving countries and countries of origin, the interpretation of the universality of human rights, and the supposedly progressed position of global north countries compared to global south countries.

Given these interstices and these considerations, in any case, it is eventually possible to wonder: how do such external normative paradigms affect the refugee system?

'Preliminary Deference? The Impact of Judgments of the Court of Justice of the EU in Cases X.Y.Z., A.B.C. and Cimade and Gisti on National Law and the Use of the EU Charter of Fundamental Righs' 21 <https://ecre.org/wp-content/uploads/2017/03/CJEU-study-Feb-2017-NEW.pdf> accessed 7 May 2023).

[105] *Norris v. Ireland* App No 10581/83 (ECtHR, 26 October 1998); *Dudgeon v. United Kingdom* App No 7525/76 (ECtHR, 22 October 1981). See on this the analysis of Thomas Spijkerboer: Spijkerboer (n 92) 197–198.

[106] *F. v the United Kingdom* App No 17431/03 (ECtHR, 22 June 2004); *I.I.N. v the Netherlands* App No 2035/04 (ECtHR, 20 december 2004); *M.E. v Sweden* App No 71398/12 (ECtHR, 26 June 2014).

[107] Spijkerboer (n 92) 197–198.

[108] El-Enany (n 19) 10.

4. The failures of the current refugee system and some external normative paradigms: an external critique

4.1 The binary and its paradox: pragmatic failures

The internal critique of SOGIESC asylum regarding discretion and disbelief has already unveiled the detrimental consequences of the effort to enforce the binary and ensure that those migrants that cross borders voluntarily are not recognised as refugees. Focusing on the other side of the paradoxical consequences of the forced/voluntary binary, forced migrants that are left excluded from the protection of refugee status should be considered now.

Across past decades, numerous scholarly voices have pointed out the controversial limits of international protection. Adopting the point of view of the absence of state protection more than the cause of persecution, authors such as Alexander Betts, Andrew Shacknove and James Hathaway have tried to unveil the unduly constraints of the current refugee definition and, conversely, to re-elaborate broader and more consistent definitions of refugeehood.[109] According to these authors,

> *"Fear of persecution by reason of one's civil or political status […] is simply not an adequate standard to embrace all those who require protection because they have been coerced to migrate".*[110]

Nonetheless, while acknowledging the ever-increasing number of different drivers of displacement, "states and international institutions generally continue to see the world largely in terms of the economic migrant/refugee dichotomy", a circumstance that eventually highlights the "ethically and legally arbitrary basis" of the current refugee system.[111]

If one comprehends the basic threats from which an individual can suffer in case of absence of state protection as divided into three categories, "persecution, vital (economic) subsistence, and natural calamities",[112] it should subsequently be acknowledged that the current refugee system falls short of offering substitute protection to the individuals falling into the two latter categories.

A contemporary reading of Shacknove's categorical differentiation, informed by the most recent scientific research, would read the broader category of adverse effects of climate change into the category of natural calamities. A growing legal literature can be found on this topic, especially regarding the shortcomings of current international law in dealing with the mass displacement consequences triggered by climate change.[113] 'Climate' migration seems particularly challenging for

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[109] Betts (n 10); Andrew E Shacknove, 'Who Is a Refugee?' (1985) 95 Ethics 274; James C Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 Journal of Refugee Studies 113.
[110] Hathaway (n 109) 120.
[111] Betts (n 10) 362.
[112] Shacknove (n 109) 278.
[113] See among others: Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press 2012); Andrea Thompson, 'Wave of Climate Migration Looms, but It Doesn't Have to Be a Crisis' (*Scientific*

international refugee law insofar as it disrupts the classic interpretations of persecution and the absence of state protection, as well as of particular social group. Beyond legal debates on potential extensive interpretations of refugee law that cover ‘climate’ asylum seekers, however, current practice still appears to lag behind. Overall, and for now, the lack of substitute international protection for those migrants that, while being forced to leave their countries, are excluded from recognition of refugee status is a pragmatical failure that testifies to the paradoxical consequences of the refugee/migrant binary and its reliance on external normative paradigms.

Looking at the intersection between these pragmatic failures and the Wester-driven genealogy of the refugee system, it becomes clear how one example of external paradigm can already be retraced in the limited definition of refugeehood which carries an additional normative burden linked to the differentiation between civil-political and socio-economical rights.[114] Keeping in mind the Western preference for the first set or rights, even the terminological alternatives adopted to refer to the binary can be better framed: the distinction of forced, *political* refugees from voluntary, *economic* migrants represents the amplifying effect of a layered binary, whose bindingness is reinforced by the juxtaposition of different vectors of the alleged legal and normative Western superiority.

Considering the specific aim of the research, however, it is suggested that, to fully grasp the role of external normative paradigms, the focus should be on a further example.

4.3. Sexual democracy, homonationalism and the controversial position of SOGIESC asylum

The controversial position of SOGIESC asylum in the broader context of European asylum and migration has already been noted in the previous paragraphs through the contribution of Calogero Giametta. In his research, the author has tried to find explanations to the recent enlargement of refugee protection to SOGIESC asylum seekers, concurrent to a parallel reinforcement and tightening of borders and asylum procedures. This concern is even more legitimate when one considers how, in many cases, this new enlargement of refugee protection has clashed with less LGBTIQ+-progressive contexts at the domestic level in some receiving countries.[115] To try and explain such a circumstance and substantiate that external normative element that has already been posited in the analysis of the internal contradictions of SOGIESC asylum, this research suggests that the conceptual framework of homonationalism can offer a fruitful reference.

American, 23 March 2018) <https://www.scientificamerican.com/article/wave-of-climate-migration-looms-but-it-doesnt-have-to-be-a-crisis/> accessed 10 May 2023; Gregory White, *Climate Change and Migration: Security and Borders in a Warming World* (Oxford University Press 2011).

[114] Cf. Monica Saxena, ‘More than Mere Semantics: The Case for an Expansive Definition of Persecution in Sexual Minority Asylum Claims’ (2006) 12 Michigan Journal of Gender & Law 331, 338.

[115] Leonard Birdsong, ‘“Give Me Your Gays, Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution…”: The New Grounds for Grants of Asylum’ (2008) 32 Nova Law Review 357, 360–361.

Various scholars have already traced a shift in Western democracies towards their 'sexual' dimension, meaning the acquisition by normative discourses associated with sexuality of a relevant role regarding the characterization of the democratic nature of the nation-state.[116] This link between sexuality and nationhood, however, has not been established in a void, but in an exclusionary comparison with sexual and racial 'others' to which conservative, retrograde and discriminatory sexual attitudes have been imputed.[117] The establishment of this divide between progressive and retrograde countries has found a good discursive tool in the right of certain minorities, such as women (femonationalism)[118] or the LGBTIQ+ community (homonationalism).[119] The latter conceptual framework can be beneficial to understand certain dynamics of SOGIESC asylum.

The clear-cut distinction between an inclusive global north against a homobitransphobic global south can be retraced even in the very introduction of Hathaway and Pobjoy's paper insofar as the authors explain flows of SOGIESC asylum seekers from the south to the north as the predictable consequence of this divide.[120] More importantly, however, the discursive application of this homonational divide can offer a clearer lens to read the paradoxical consequences of both discretion and disbelief. On the one side, concealment is re-proposed to those who come from the 'other' side of the world, where being closeted is just part of the narrative. On the other side, being out and proud, being legible from a gender and sexuality point of view are requirements imposed on those who want to participate in the homonationalist citizenship. Through this process, those few who eventually are accepted among the many, the queer refugees, transform into two things. Firstly, the perfect examples of the Western refugee paradigm, imbued with individualization and a liberal worldview, the "embodied metaphor for the personal journey needed to achieve one's individual freedoms".[121] Secondly, 'trophies of the West', testaments to the success of the Western mission of universal civilization which, however, are left with no agency and no story to tell but one: that of homonationalism and its excluding narratives.[122]

Homonationalist discourse in migration and asylum does not go without adverse consequences. As Spijkerboer has argued, SOGIESC asylum threatens to destabilize the dichotomy between the

[116] Éric Fassin, 'Les frontières sexuelles de l'État' (2006) 34 Vacarme 164; Éric Fassin, 'Sexual Democracy and the New Racialization of Europe' (2012) 8 Journal of Civil Society 285.
[117] Judith Butler, 'Sexual Politics, Torture, and Secular Time' (2008) 59 The British journal of sociology 1; Éric Fassin, 'La démocratie sexuelle et le conflit des civilisations' (2006) 26 Multitudes 123; Sarah Bracke, 'From "Saving Women" to "Saving Gays": Rescue Narratives and Their Dis/Continuities' (2012) 19 European Journal of Women's Studies 237.
[118] Sara R Farris, *In the Name of Women's Rights: The Rise of Femonationalism* (Duke University Press 2017).
[119] Jasbir K Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press 2007); Jasbir Puar, 'Rethinking Homonationalism' (2013) 45 International Journal of Middle East Studies 336.
[120] Hathaway and Pobjoy (n 71) 316–318.
[121] Giametta (n 53) 154.
[122] Francesca Romana Ammaturo, 'The "Pink Agenda": Questioning and Challenging European Homonationalist Sexual Citizenship' (2015) 49 Sociology (Oxford) 1151, 1155; Fernandez (n 55) 206.

sexual 'us' and 'others'. If it is true that "asylum law functions through a dichotomy between an idealized notion of Europe as a site characterized by human rights, and non-European countries as sites of oppression",[123] then the European asylum dilemma would arise insofar as if Europe

> *"Takes itself seriously, the asylum claims of these people cannot be accepted because they are considered unenlightened non-Europeans and hence should be excluded because they threaten to undermine the normative order. But simultaneously, the asylum claims cannot be rejected because that would require denying how unenlightened non-European societies are when dealing with, especially, women or LGBT people".*[124]

The tension arising from this dilemma can be retraced in various legal instances in Europe, especially in the judicial discourse of its courts, the CJEU and the ECtHR. Spijkerboer has identified two of such instances in two issues of refugee law that have already been analysed in this research: the criminalization of homosexuality and the assessment of a person's sexual or gender identity.[125] Francesca Romana Ammaturo has retraced a broader homonationalist discourse intrinsic in the ECtHR judicial discourse.[126] Ammaturo, more specifically, analyses the cases *F v UK* and *I.N.N. v the Netherlands*[127] in which, she argues, the Court reaffirms the "discourse of 'homophobic versus homophile' countries"[128] and "reinforces a concept of European Sexual Citizenship that is strongly homonationalist in nature".[129] Inasmuch as, in the cases mentioned by Ammaturo, the ECtHR does not find a violation of the applicants' fundamental rights when faced with their return to Iran, it looks like the judicial standards applied by the Court, if compared to those referred to in its broader jurisprudence, are affected by the (implicit) qualification of Iran as an homophobic country.

Ammaturo's contribution seems particularly striking inasmuch as it highlights two relevant aspects for the purposes of this research. The first is the acknowledgement that the fostering of a European sexual identity based on the respect of LGBTIQ+ human rights comes at the expense of the exclusion and degradation of retrograde 'others', both outside and inside Europe.[130] The second is the deconstruction of the European agenda on LGBTIQ+ rights that extends also to SOGIESC asylum,

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[123] Thomas Spijkerboer, 'Gender, Sexuality, Asylum and European Human Rights' (2018) 29 Law and Critique 221, 2.
[124] ibid 3.
[125] ibid 14. More specifically, Spijkerboer refers to the *Norris v Ireland* and *Dudgeon v UK* ECtHR cases (n 105) and the *X, Y, and Z* CJEU case (n 65) regarding the first issue and to the *Van Kuck v Germany* ECtHR case and the *A, B, and C* CJEU case (n 94) with respect to the second issue (*Van Kuck v Germany* App No 35968/97 (ECtHR, 12 September 2003)). As mentioned before (n 91), the tension inherent in the assessment on one's sexual or gender identity does not come *per se* from the probatory requirement imposed on self-identification in asylum law, but rather by the interconnectedness of this circumstance with the detrimental consequences of the stereotyped credibility standards affecting SOGIESC asylum claimants.
[126] Ammaturo (n 126).
[127] *F v UK*, *I.N.N. v the Netherlands* (n 106).
[128] Ammaturo (n 126) 1156.
[129] ibid 1151.
[130] ibid 1151, 1162.

which allows to look beyond its declared humanitarian nature and to grasp its usefulness as a discursive and normative tool to sustain the working of the refugee/migrant binary.

5. Conclusion: deconstructing the binary through SOGIESC asylum

5.1 Recollecting the findings of the research

This research has endeavoured to understand if and to what extent SOGIESC asylum can be used as a tool to deconstruct the binary between 'forced' refugee and 'voluntary' migrant. It is now possible to answer affirmatively to the research question. Actually, as it has been shown, SOGIESC asylum constitutes a symbolic field where the internal contradictions of its legal tenets reveal the constructedness and the arbitrariness of the binary.

By analysing the multiple roles of categories, it has been shown how there is much more than 'just law' at play behind being labelled as a refugee or a migrant. More precisely, it has been argued that the binary between 'forced' refugees and 'voluntary' migrants does not exist *per se* as an independent legal construct. Conversely, it should be framed and rooted in its Western historical origins and political binds. In light of these considerations, it has been suggested that the binary only works thanks to and in favour of normative paradigms whose origin and logics are external to refugee law.

To put SOGIESC asylum into this context and to assess its deconstructive potential, both an internal and an external critique have been elaborated. From an internal point of view, the research has focused on discretion reasoning, disbelief, and their tight and ambivalent links to the divide between forcedness and voluntariness. Considering the paradoxical consequences of the forced/voluntary divide, determining the exclusion of some 'forced' asylum seekers and conversely the inclusion of other 'voluntary' migrants, the example of SOGIESC asylum has triggered two considerations. On the one hand, the absurd consequences of discretion reasoning and disbelief have testified to the fact that the attempt to reconcile the paradox of the forced/voluntary divide is bound either to fail or to contradict some of the main tenets of refugee law, shifting for example the burden of international protection from receiving states to the discreet individual. On the other hand, and as a consequence of the first consideration, framing the shift from discretion to disbelief as a strategy to reconfigure the tight scrutiny on asylum claims has fostered, once again, the acknowledgement that the refugee system only works with the support of external normative paradigms. Therefore, from an external point of view, this research has taken homonationalism into account as a useful conceptual framework to read SOGIESC asylum and its entanglements. Through this lens, the research has shown how the inclusion of the queer refugee is conditional upon the satisfaction of strict normative

criteria and valuable for the reinforcement of a (European) Western sexual citizenship that defines itself by excluding the homobitransphobic 'others'.

Observing some pragmatic failures of the current refugee system, which does not effectively realize its promise to offer substitute protection to those who are forced to flee, two final considerations can be proposed to answer the research question. Firstly, the binary between 'forced' refugee and 'voluntary' migrant should not be essentialized and, to the contrary, should be understood as a strategic discursive tool that, by including the few and excluding the many, conceals the defence of sovereignty and borders with humanitarianism. Secondly, SOGIESC asylum adds a layer to this frame insofar as it constitutes a symbolic field of negotiation for the construction of a (European) Western sexual citizenship against the homobitransphobic 'others', the ambiguous relation between the universalising afflatus and the relativistic limitedness of the human rights mission, and the contested boundaries of international protection. From this point of view, SOGIESC asylum seems to constitute a particularly fruitful field for such negotiations inasmuch as it is not only politically and morally heavily signified, but also quantitatively not too burdensome. In the end, if it helps to enhance the binary, why not include some gays?

5.2 Final thoughts and ways forward

For the sake of clarity, this research does not argue that protecting LGBTIQ+ individuals from persecution constitutes an undesirable evolution of international refugee law, and neither that behind SOGIESC asylum there is no genuine interest for human rights. Quite differently, this contribution aims to show the complex entanglements of SOGIESC asylum into broader structures, dynamics, and narratives moving far beyond humanitarianism and refugee law. Exactly in this sense, then, the conclusions reached by this research should sustain an effort not to demonize the recent SOGIESC evolution in the refugee system, but to avoid its naturalization, its crystallization as a given form of protection simply deriving from the supposedly clear boundaries of international protection.

Precisely in this spirit, this research shall conclude with some final thoughts and possible ways forward.

In light of the historical, and politicised, dimension of SOGIESC asylum, particular attention should be reserved not only to the past development of refugee law in this field, but also to its future evolutions, especially considering the shifting levels of protection of LGBTIQ+ rights at the domestic level in receiving countries. During the research, the controversial aspect of the enlargement of refugeehood to SOGIESC asylum seekers compared to the hostility against LGBTIQ+ individuals of certain domestic environments has already been remarked. The framework of homonationalism has also been recalled to explain how it is possible to understand a heightened scrutiny of the credibility

of SOGIESC asylum claims in the context of the creation of an exclusionary Western sexual citizenship. Considering the increasing resonance of anti-gender and anti-LGBTIQ+ movements in different Western contexts, it is interesting to wonder what the consequences will be on SOGIESC asylum and the discourses supporting it. If it is true that SOGIESC asylum is a negotiation field for the reinforcement of the narrative of a Western human rights exceptionalism, it seems clear that rising homobitransphobic movements and instances pose at least a challenge to the integrity of the homonationalist discourse. Whether this challenge will be met by a gradual downgrade of the level of protection of LGBTIQ+ rights which serves as a demarcation line between 'us' and 'them' or rather by a shift in the normative substratum that allows the exclusion of the 'others' is yet to be seen.

Concluding with some constructive considerations, it is argued that the overcoming of the exclusionary force of the binary should be fostered both on a legal and on a scientific level. From a legal perspective, Jaya Ramji-Nogales has suggested that "the refugee/economic migrant binary […] poses a central challenge to efforts to reinvent global migration law".[131] According to her, even at the stage of imagination and creativity, the refugee paradigm is so rooted and persistent that it is difficult for lawmakers as well as scholars to think of something radically different, a true alternative. Worsening this circumstance is the widespread concern, both among those who are actively engaged with the binary and those who cautiously criticise it, that leaving the Refugee Convention behind would jeopardize even the narrow protection that the international community currently manages to offer. It is not argued here that this concern is misplaced. Indeed, considering the political aims steering the working of the binary, the fear of losing even the small exceptions to states' tight border control is comprehensible. However, it is suggested that a critical and deconstructive approach to the binary is not bound *per se* to result into an elimination of the Refugee Convention. On the contrary, as argued by Hamlin, "the Refugee Convention […] is one instrument and should not be the only tool for helping people".[132] Similarly, the fear of compromising refugee protection should not lead to the essentialisation of the current definition of refugeehood, the reinforcement of the exclusion of those who do not fit in it and simultaneously the moral characterization of those who do as somehow 'deserving'.

According to Hamlin, some alternative solutions that respect these conditions already exist:

> *"Regional definitions such as the ones that exist in Africa and Latin America have been downplayed and sidelined, but have great potential. There is also great potential in other instruments of protection, and in the concept of non- refoulement, which is embedded in customary law and at least theoretically protects a much larger swath of people".*[133]

[131] Jaya Ramji-Nogales, 'Moving Beyond the Refugee Law Paradigm' (2017) 111 AJIL Unbound 8, 11.
[132] Hamlin (n 7) 161.
[133] ibid 161–162.

In any case, as a leading principle, it should be acknowledged that, once a genuine humanitarian concern identifies new categories of individuals in need, then international protection should not be framed as a selection process of few among many, and Conventions should adapt to evolving protection needs and not vice-versa. However, the imagination and the development of additional alternatives cannot but pass through a previous step that leads to a final consideration regarding scholars' role in their activity of knowledge production.

Far from defending the idea that refugee law should get rid of categories, this research suggests that an attentive critical approach to categories and the refusal of "categorical fetishism"[134] are two necessary elements to allow the production of knowledge that aims to be unbounded from the exclusionary logic of the current binary. Categories are indeed necessary to the functioning of the legal system. Nevertheless, their content and their mutual relations should not be given for granted, they should not be naturalized. Conversely, legal categories should be accounted for through their genealogy and in their constructedness.[135] In this sense, the scholar approaching categories in refugee and migration law should be critical of moral superstructures attached to legal statuses. The role of the scholar, therefore, should be to debunk normative binaries that divide border crossers among deserving and undeserving, true and fake, forced and voluntary.

[134] Crawley and Skleparis (n 14) 60.
[135] Cf. Crawley and Skleparis (n 14).

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