



# Beyond the Rainbow? An Intersectional Analysis of the Vulnerabilities faced by LGBTIQ+ Asylum-Seekers

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## Abstract

Sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) are often considered among the main personal characteristics which are likely to give rise to special procedural and reception needs, often resulting in labelling lesbian, gay, bisexual, trans, intersex and queer (LGBTIQ+) asylum-seekers and refugees as “vulnerable”. However, SOGIESC issues should not be analysed in isolation, as there are various factors that can impact on one’s experience in the country of origin and throughout the asylum procedure. This paper shows the added value of mobilizing intersectionality in the assessment of SOGIESC asylum claims. By analysing soft law instruments, legislation and case law and taking Italy as a case study, this paper shows that intersectionality can be a useful analytical tool that can support a better understanding of how LGBTIQ+ asylum-seekers experience their “vulnerabilities”, as well as sustain State practices that address their protection needs in the asylum domain.

## Keywords

LGBTIQ+ asylum-seekers – intersectionality – Italy – vulnerability – refugee status determination

## 1 Introduction

Abocar has just turned 18. He is sitting on a chair and touches one of his bracelets nervously. There is a desk in front of him. He looks around the room, then his eyes land on the desk. There are some papers on it with his name, however Abocar cannot tell exactly what the papers are about. He quickly glances at the black man sitting next to him, who has just introduced himself as Alphonse. They talked before and he gave Abocar some information on the procedure. Abocar thinks that Alphonse must be very knowledgeable, and he is glad they could speak in their native language. This man is older than him – he could be his father. Meanwhile, a young, white woman enters the room and sits at the desk in front of Abocar. She then warmly greets Alphonse, and Abocar thinks the two must have known each other for a long time. Then the young white woman turns to Abocar and, in her language, she asks him how he is doing. Abocar speaks that language a bit, as he is going to school; so, he responds in the woman's language, with some efforts, that he is doing well, and he thanks her. The woman asks him: "So, Abocar, I see from your registration form that you had to flee your country because you were threatened to death. Could you tell me more about this?". Alphonse translates the question into Abocar's native language. Abocar thinks to himself: "That's just the tip of the iceberg. How am I going to explain myself? I left because I like men ... This woman seems very gentle and friendly, and this man too. But will they ever believe me?"<sup>1</sup>

As Nuno Ferreira and I once wrote, '[L]et's start with people. Because law should be about people, not (just) about abstract notions and fuzzy values'.<sup>2</sup> When I started carrying out interviews with asylum-seekers and refugees during the fieldwork for my doctoral research, I faced the manifold challenges that

1 Abocar is a fantasy name. This dialogue is a simulation I wrote based on the judgement of the First Instance Court of Bologna of 8 January 2022, which will be analysed later on in this paper, see – *v Commissione Territoriale per il Riconoscimento della Protezione Internazionale di Bologna – Ministero dell'Interno* [2022], R.G. No. 9744/2019, (Tribunale Ordinario di Bologna – Sezione Specializzata in materia di Immigrazione, Protezione Internazionale e Libera Circolazione Cittadini UE). The name of the appellant was erased in the published judgement, and it is replaced here by the symbol "--".

The views expressed in this paper are solely mine and do not necessarily reflect the views of the United Nations. I wish to warmly thank Dr. Luc Leboeuf, Dr. Francesca Raimondo and Federica Sorge for their constructive comments to this paper. All errors remain my own.

2 Nuno Ferreira and Denise Venturi, 'Testing the untestable: the CJEU's decision in Case C-473/16, *F v Bevándorlási és Állampolgársági Hivatal*' (European Database of Asylum Law, 28 June 2018) <<https://www.asylumlawdatabase.eu/en/journal/testing-untestable-cjeu%E2%80%99s-decision-case-c-47316-f-v-bev%C3%A1ndorl%C3%A1si-%C3%Ag-s-%C3%Aillampolg%C3%A1rs%C3%Aigi-hivatal>> accessed 1 October 2023.

conducting empirical research entails, especially to those trained as lawyers.<sup>3</sup> Nonetheless, the study of the legislation and the case law alone could not provide me with sufficient explanations to the complexities I was confronted with when dealing with the topic of asylum and issues related to SOGIESC.<sup>4</sup> Abocar's story, as many others, is full of complexities, which are necessarily confronted with the legal provisions regulating international protection – i.e., the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (hereafter, Refugee Convention)<sup>5</sup> and, given the European Union (EU) focus of the present paper, the legal instruments pertaining to the Common European Asylum System (CEAS),<sup>6</sup> in addition to relevant domestic law.

The first, immediate, layer of complexity that emerges from Abocar's story is his sexual orientation. Hard and soft law<sup>7</sup> instruments concerning asylum claims based on SOGIESC consider this aspect of one's identity as likely to give rise to special procedural and reception needs – often resulting in labelling LGBTIQ+ asylum-seekers and refugees as “vulnerable”.<sup>8</sup> In the case of Abocar, however important his sexual orientation may be to his identity, there are indeed many more layers that are crucial to fully grasp his story and ensure

3 On the relevance of an interdisciplinary approach to the understanding of asylum claims, and particularly on the contribution of anthropology, see Bianchini, K., 2022. An Illustration of Anthropology's Contribution to Refugee Law Research. *German Law Journal* 23(7), pp. 943–959. More generally on the need to engage with empirical research in refugee law, see recently Ghezelbash, D. and Keyvan, D., 2023. Understanding the Politics of Refugee Law and Policy Making: Interdisciplinary and Empirical Approaches. *Journal of Refugee Studies*, pp. 2–23; Janmyr, M., 2022. Ethnographic Approaches and International Refugee Law. *Journal of Refugee Studies*, pp. 2–19.

4 Venturi, D., 2017. Reflections on empirical research with LGBTI refugees – A Legal Scholar's perspective. *Oxford Monitor of Forced Migration* 6(2), pp. 20–23.

5 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

6 European Commission, ‘Common European Asylum System’, <[https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en)> accessed 1 October 2023.

7 For the purpose of the present work, the concept of “soft law” is understood broadly, as referring in general to non-legally binding instruments, regardless of their specific nature as guidelines, notes, recommendations and standards.

8 A note on terminology: this paper uses the acronym “LGBTIQ+” with reference to persons who are not heterosexual or cisgender (or are not perceived as such). This acronym is not exhaustive, and I acknowledge the limits that using an acronym entails. I am also aware that the expression “LGBTIQ+ persons” does not identify a homogeneous group of people, since the experiences of LGBTIQ+ persons are different and varied. Moreover, the reference to sexual orientation and gender identity shall be understood as encompassing SOGIESC issues more generally, unless otherwise specified. On LGBTIQ+ international protection applicants and vulnerability see, among other, Leboeuf, L., 2021. ‘Humanitarianism and Juridification at Play:

appropriate protection responses. SOGIESC can be expressed in a multitude of ways, and concurring factors and/or layers of identity – such as ethnicity, socio-economic background, level of education, age, but also the applicant's mental state during the asylum interview – may be equally important to unravel and address in order to adequately cater for one's needs, and, ultimately, ensure fairness in how international protection requests are handled.

For some critical and relatively recent scholarship,<sup>9</sup> concepts such as “complexities” and “layers of identities” rhyme with intersectionality. The latter concept has surfaced many times during my professional practice, as well as during the fieldwork for my academic research.<sup>10</sup> Intersectionality has equipped me with multi-layered glasses to better read into the “law in action” from the “law in the book”,<sup>11</sup> and has trained me to embrace complexities and avoid “one-size-fits-all” approaches.

Against this backdrop, this paper investigates the application of the concept of intersectionality to SOGIESC-based asylum claims. Notably, it illustrates that soft-law instruments pertaining to SOGIESC asylum claims recognize the added value of intersectionality. It further argues that the CEAS framework contains provisions that can be leveraged in support of an intersectional approach to SOGIESC asylum claims. Finally, by relying on case law analysis and empirical data regarding Italy, this paper demonstrates the added value of mobilizing intersectionality in the assessment of SOGIESC asylum claims.

The next section introduces the concept of intersectionality and explores its use in soft-law instruments relevant to SOGIESC asylum claims. Section 3 focuses on arguments for intersectionality in the CEAS, by focussing on Directive 2011/95/EU recast (Qualification Directive, QD) and Directive

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‘Vulnerability’ as an Emerging Legal and Bureaucratic Concept in the Field of Asylum and Migration’. *Vulner Research Report 1* <[https://www.vulner.eu/85193/VULNER\\_WP1\\_IntroReport.pdf](https://www.vulner.eu/85193/VULNER_WP1_IntroReport.pdf)> accessed 1 October 2023; Leboeuf, L., 2023. ‘Lived Vulnerabilities in Asylum and Migration: Confronting the “Vulnerability” Label with Migrants’ Experiences’, <[https://www.vulner.eu/130930/VULNER\\_research-report-2\\_2023-06-02\\_MT.pdf](https://www.vulner.eu/130930/VULNER_research-report-2_2023-06-02_MT.pdf)> accessed 1 October 2023; Danisi, C., Dustin, M., Ferreira, N. and Held, N. (2021). *Queering asylum in Europe: Legal and social experiences of seeking international protection on grounds of sexual orientation and gender identity*, Springer, Basel, Switzerland, pp. 44–45.

9 Taha, D., 2019. ‘Intersectionality and Other Critical Approaches in Refugee Research: An Annotated Bibliography’, Local Engagement Refugee Research Network Paper No. 3 <<https://carleton.ca/lerrn/wp-content/uploads/Intersectionality-and-Other-Critical-Approaches-in-Refugee-Research.pdf>> accessed 1 October 2023.

10 See below (n 13).

11 Cf. among others, Halperin, J.L., 2011. *Law in Books and Law in Action: The Problem of Legal Change*. *Maine Law Review* 64(1), pp. 45–76; Goodale, M. (2017). *Anthropology and Law: A Critical Introduction*. New York University Press, New York, United States.

2013/32/EU recast (Procedure Directive, APD).<sup>12</sup> After having examined this framework, Section 4 discusses the application of intersectionality in SOGIESC asylum cases drawing from the analysis of Italian case law and semi-structured interviews conducted with asylum-seekers and decision-makers in Italy for the purpose of my doctoral dissertation.<sup>13</sup> In particular, the paper focuses on a selected case study with the purpose to analytically illustrate the practical implementation and the impact of an intersectionality-informed reasoning in SOGIESC asylum cases. To this end, the paper relies also on some of the findings of the VULNER project, notably with regard to Italy.<sup>14</sup>

In face of the many complexities of SOGIESC asylum claims, this paper ultimately shows how intersectionality may support a better understanding of how LGBTIQ+ asylum-seekers experience their “vulnerabilities”,<sup>15</sup> as well

12 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 L 337 and Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180.

13 This paper relies on part of the data collected through the fieldwork that I conducted for my doctoral research (Italy, 2017–2018–2019–2022–2023), as well as on my professional practice in the field of refugee law in Italy (cf. n 1). Specifically, the present paper builds only on a limited set of data collected for my doctoral dissertation and illustrates only some preliminary findings. As such, and given that my doctoral dissertation is ongoing, the preliminary conclusions in this paper are not meant to be exhaustive and shall not preclude the development of additional reflections based on a more thorough analysis of additional available data.

14 The VULNER project is an international research initiative funded by the EU under the Horizon Europe programme in view of improving knowledge on migrants' vulnerabilities, and of identifying best practices and strategies to address them – see <<https://www.vulner.eu/3169/about>> accessed 1 October 2023.

15 In 2019, the (back then) UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz (UN Independent Expert on SOGIESC), and the (back then) UNHCR's Assistant High Commissioner for Protection, Volker Türk, declared that the ‘unique vulnerability and specific needs’ of LGBTIQ+ asylum-seekers and refugees must be recognized, also considering that, for many of them, ‘the trauma and persecution start well before their actual flight to safety’ and ‘the journey to safety can prove particularly treacherous for many LGBTI refugees who continue to face prejudice and violence in countries of transit and host countries’ – see UN Human Rights – Office of the High Commissioner, ‘UN rights experts urge more protection for LGBTI refugees’ (Press Release 1 July 2019) <<https://www.ohchr.org/en/press-releases/2019/06/un-rights-experts-urge-more-protection-lgbti-refugees>> accessed 1 October 2023. In general, “vulnerability” is used throughout this paper to underline the difficulties and disadvantages that LGBTIQ+ applicants may face throughout the asylum procedure, sometimes because the asylum system itself may create or

as sustain State practices that address their specific protection needs when implementing asylum law provisions.

## 2 Intersectionality and Its Application to Asylum Claims Based on Sexual Orientation and Gender Identity

People seeking asylum due to SOGIESC-based persecution are norm-breakers in contexts where hetero- and cis-normativity are rules.<sup>16</sup> For this reason, they are at risk of violence and therefore sexual orientation and gender identity will often be the principal grounds for which they are discriminated and persecuted against. However, persecution and discrimination on these grounds do not happen in isolation; there may be additional grounds for which a person is discriminated or persecuted against,<sup>17</sup> as well as there may be other factors

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exacerbate such hurdles for applicants. Hence, the use of “vulnerability” in this context does not mean that LGBTIQ+ asylum applicants are “victims”, and it is not used to deny their agency. See, among others, Freedman, J., 2019. The uses and abuses of «vulnerability» in EU asylum and refugee protection: Protecting women or reducing autonomy? Los usos y abusos de la «vulnerabilidad» en el asilo de la UE y la protección de refugiados: ¿Proteger a las mujeres o reducir la autonomía?. *Papeles del CEIC* 2019(1), pp. 1–15; Danisi, Dustin, Ferreira, Held (n 8) 44, 63, 115.

16 See The Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity (Yogyakarta Principles), 2007, 6 <[http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf)> accessed 1 October 2023. Although not legally binding, the Yogyakarta Principles constitute an authoritative interpretation on the application of International Human Rights Law to sexual orientation and gender identity elaborated by a group of experts – cf. UNHCR, ‘Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’ (UNHCR Guidelines No. 9), 23 October 2012, HCR/GIP/12/01, para. 7 <<https://www.refworld.org/docid/50348afc2.html>> accessed 1 October 2023. See also UNHCR, ‘Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees’ (UNHCR Guidelines No. 1), 7 May 2002, HCR/GIP/02/01, para. 16 <<https://www.refworld.org/docid/3d36fic64.html>> accessed 1 October 2023.

17 On persecution for more than one Refugee Convention ground, see UNHCR, ‘Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees’, April 2001 <<https://www.refworld.org/docid/3b20a3914.html>> accessed 1 October 2023; UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (UNHCR RSD Handbook), April 2019, HCR/IP/4/ENG/REV.4, para 67 <<https://www.refworld.org/docid/5cb474b27.html>> accessed 1 October 2023; Colloquium on Challenges in International Refugee Law, 2002. International Refugee Law: The Michigan

that can worsen the harm inflicted or reduce access to possible redress – or, on the other hand, there may be factors or situations enhancing one's resilience and ability to obtain effective protection. Only a careful analysis of these various reasons, layers and determinants, together with a systemic analysis of the power structures and networks the individual is situated in, allow grasping a full and proper picture of experiences and risks of discrimination and persecution. From this viewpoint, it is immediate to understand how SOGIESC issues cannot be considered in a vacuum; and in light of all this, an intersectional approach may help unpack these multiple layers and help read through the complexities of SOGIESC asylum claims.

The importance of adopting an intersectional approach has been highlighted in various soft-law instruments pertaining to SOGIESC as well as in guidance related to combating violence against women – in consideration that other aspects, in addition to gender, play a significant role in this regard.<sup>18</sup> The first version of the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, issued in 2007, contained only one reference to what can be considered an intersectional approach, affirming that States shall 'take account of the manner in which such discrimination [based on sexual orientation or gender identity] may intersect with other forms of discrimination'.<sup>19</sup> In 2017, the Yogyakarta Principles were updated and complemented by a set of additional principles and additional State obligations<sup>20</sup> to give account of the development in International Human Rights Law especially in relation to gender expression and sex characteristics. These updated Yogyakarta Principles ("Plus 10") underlined the 'emerging understanding of violations suffered by persons on grounds of sexual orientation and gender identity and the recognition of the distinct and intersectional grounds of gender expression and

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Guidelines on Nexus to a Convention Ground. *Michigan Journal of International Law* 23(2), 210, 213; Dustin, M., and Ferreira, N. 2017. Canada's Guideline g: improving SOGIE claims assessment?. *Forced Migration Review* 56, pp. 80–83; Danisi, Dustin, Ferreira, Held (n 8) 260.

18 UNHCR Guidelines No. 1 (n 16) paras. 22–23; UNHCR, Guidelines No. 9 (n 16) para. 13. See also Sosa, L. (2017). *Intersectionality in the Human Rights Legal Framework on Violence Against Women: at the Centre or at the Margin?*, Cambridge University Press, Cambridge, United Kingdom.

19 Principle 2(e), of the Yogyakarta Principles (n 16).

20 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 (Yogyakarta Principles Plus 10), 10 November 2017 <[http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf)> accessed 1 October 2023.

sex characteristic'.<sup>21</sup> Besides acknowledging that gender expression and sex characteristics can intersect with sexual orientation and gender identity, the Yogyakarta Principles Plus 10 expressly mentioned the intersecting nature of SOGIESC-related factors, not only amongst themselves but also in relation to other elements. As stated in the Preamble, SOGIESC-related factors

are each distinct and intersectional grounds of discrimination, and that they may be, and commonly are, compounded by discrimination on other grounds including race, ethnicity, indigeneity, sex, gender, language, religion, belief, political or other opinion, nationality, national or social origin, economic and social situation, birth, age, disability, health (including HIV status), migration, marital or family status, being a human rights defender or other status.<sup>22</sup>

As it will be illustrated through the analysis of empirical data, a theoretical framework grounded in intersectionality may facilitate the recognition of these dynamics, even in the asylum context. Intersectionality allows adopting an all-encompassing perspective that is dynamic and respectful of each individual situation. In the foreword to the recent volume "Queering Asylum in Europe", which explores the experiences of LGBTIQ+ asylum-seekers and refugees in Germany, Italy and the United Kingdom, the UN Independent Expert on SOGIESC wrote that '[I]ntersectionality is absolutely essential to creating asylum and migration policies that are not just inclusive, but ultimately also effective in the long run for all stakeholders involved'.<sup>23</sup>

## 2.1 *Intersectionality in "Soft-Law" Instruments concerning SOGIESC-Based Asylum Claims*

As it emerges from the short and non-exhaustive overview above, there is indeed a recognition that SOGIESC-related issues must be analysed in their interactions with other aspects, even when SOGIESC may be the primary reasons of harm. The United Nations High Commissioner for Refugees (UNHCR) underlined the close link between gender and SOGIESC in relation to persecution in its Guidelines No. 1 on gender-related claims, affirming that '[R]efugee

<sup>21</sup> Yogyakarta Principles Plus 10 (n 20) 4.

<sup>22</sup> Ibid., 7. Additional references can be found *ibid.* in Principle 34 on the Right to Protection from Poverty, according to which '[P]overty [...] can be compounded by discrimination on the grounds of sexual orientation, gender identity, gender expression and sex characteristics'.

<sup>23</sup> Danisi, Dustin, Ferreira, Held (n 8) xiii–xiv.



claims based on differing sexual orientation contain a gender element<sup>24</sup> since SOGIESC-based persecution is oftentimes driven by the fact that applicants refuse to (or are perceived as refusing) adhere to roles and expectations attributed to their sex assigned at birth.<sup>25</sup> These concepts were restated and further elaborated by UNHCR in its Guidelines No. 9 issued in 2012, which are devoted specifically to SOGIESC-based refugee claims.<sup>26</sup> These Guidelines were issued as a supplement to the aforementioned Guidelines n. 1,<sup>27</sup> with the aim to 'provide substantive and procedural guidance' on RSD in SOGIESC asylum cases,<sup>28</sup> to ensure a proper and consistent interpretation of the refugee definition. These Guidelines adopt a human rights approach to SOGIESC, in particular by making reference to the first edition of the Yogyakarta Principles. UNHCR Guidelines No. 9 are of paramount importance for the subject matter, since they constitute the first, and so far the only, global instrument specifically devoted to the substantial and procedural aspects of SOGIESC-based asylum claims. Although these Guidelines do not expressly mention the concept of intersectionality, it can be stated that they are informed by an intersectional perspective. This is made clear at the outset of the Guidelines No. 9, which expressly recognize that factors such as sex, gender,<sup>29</sup> age, nationality, ethnicity may intersect and thus 'may contribute to and compound' the effects of SOGIESC-based violence and discrimination.<sup>30</sup> Moreover, UNHCR Guidelines No. 9 acknowledge that the experiences of LGBTIQ+ people vary considerably and are heavily influenced by their background, which in turn may impact on the way LGBTIQ+ asylum-seekers and refugees may be able – or unable – to express and experience their SOGIESC.<sup>31</sup> On this basis, UNHCR Guidelines

24 UNHCR Guidelines No. 1 (n 16) para. 16.

25 Ibid. Moreover, para. 23 also notes that gender-related persecution could be linked to one or more of the 1951 Refugee Convention grounds – cf. (n 17).

26 Cf. UNHCR Guidelines No. 9 (n. 16) para. 13 on the intersection between gender, sexual orientation and gender identity.

27 And also as a complement to UNHCR, 'Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees' (UNHCR Guidelines No. 2), 7 May 2002, HCR/GIP/02/02 <<https://www.refworld.org/docid/3d36f23f4.html>> accessed 1 October 2023.

28 UNHCR Guidelines No. 9 (n. 16) para. 4.

29 Regarding gender, see in particular UNHCR Guidelines No. 9 (n. 16) para. 13.

30 UNHCR Guidelines No. 9 (n. 16) para. 3.

31 Ibid. and *ibid.*, para. 13.

No. 9 affirm that LGBTIQ+ people suffer ‘multiple layers of discrimination’<sup>32</sup> – which recalls the concept of intersectional discrimination.<sup>33</sup>

A couple of years before UNHCR issued its Guidelines No. 9, the UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) had expressly mentioned the relevance of intersectionality as a ‘basic concept’<sup>34</sup> for understanding the scope of States’ obligations to combat discrimination against women,<sup>35</sup> clearly recognizing how sexual orientation and gender identity, amongst other factors, are ‘inextricably linked’<sup>36</sup> to sex and gender-based discrimination against women. Against this backdrop, States parties to the CEDAW have an obligation to ‘legally recognize such intersecting forms of discrimination and their compounded negative impact’.<sup>37</sup> It follows that the policy that States parties to the CEDAW need to put in place in order to comply with their obligation to combat discrimination must encompass an intersectional approach, including vis-à-vis refugee and asylum-seeking women who, as specified in the CEDAW Committee General Recommendations (GR) No. 28, are ‘most marginalized and [...] may suffer from various forms of intersectional discrimination’.<sup>38</sup> The CEDAW Committee further elaborated these arguments in its GR No. 32 concerning the gender-related dimensions of refugee status.<sup>39</sup> The Committee explicitly recognized that gender-based

32 Ibid., para. 13.

33 Crenshaw has explained that intersectionality does not indicate a mere sum of discrimination based on different grounds, but rather how the coexistence of different grounds generates unique experience(s) of discrimination. See, among others, Crenshaw, K., 1989. Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics. *University of Chicago Legal Forum* 1, pp. 139–167. See also the Editorial to this Special Issue.

34 CEDAW Committee, ‘General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (CEDAW Committee GR 28), 16 December 2010, CEDAW/C/GC/28 CEDAW, para. 18 <<https://www.refworld.org/docid/4d467ea72.html>> accessed 1 October 2023. More generally on intersectional discrimination and the CEDAW, see Campbell, M., 2016. CEDAW and Women’s Intersecting Identities: A Pioneering Approach to Intersectional Discrimination. *Oxford University Working Paper* 2(3).

35 Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

36 CEDAW Committee GR 28 (n 34) para. 18.

37 Ibid. See also CEDAW, ‘General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19’, 26 July 2017, CEDAW/C/GC/35, para. 12 <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no-35-2017-gender-based>> accessed 1 October 2023.

38 CEDAW Committee GR 28 (n 34) para. 26.

39 CEDAW Committee, ‘General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women’ (CEDAW Committee

asylum claims ‘may intersect with other proscribed grounds of discrimination, including age, race, ethnicity/nationality, religion, health, class, caste, being lesbian, bisexual or transgender and other status’.<sup>40</sup> The CEDAW Committee further translated this into a procedural requirement by virtue of which State parties should ensure that interviewing techniques in refugee status determination (RSD) procedures ‘are sensitive to gender, age and other intersectional grounds of discrimination and disadvantage that compound the human rights violations that women refugees and asylum seekers experience’.<sup>41</sup>

Although the General Recommendations issued by the CEDAW Committee are not legally binding, they indeed provide authoritative guidance to States parties to assist them in implementing the measures needed to comply with their obligations under the CEDAW. Since EU Member States (MS) are all parties to the CEDAW, the General Recommendations address also to them, including when it comes to implementing appropriate interviewing techniques during asylum interviews which may thus permit to look at intersectional aspects of gender-related asylum claims – including SOGIESC-based claims.<sup>42</sup>

While, as mentioned above, UNHCR had already acknowledged the importance of adopting an intersectional approach to SOGIESC-based asylum claims, more recently it has started referring expressly to intersectionality as a framework to understand, interpret and analyse the challenges faced by forcibly displaced LGBTIQ+ persons and brought about by SOGIESC-based asylum claims. In June 2021, UNHCR and the UN IE on SOGIESC organized a Global Roundtable on Protection and Solutions for LGBTIQ+ people in forced displacement, one of whose aims was to explore ‘the ways in which an intersectional understanding of LGBTIQ+ forcibly displaced and stateless individuals’ complex experiences is reflected in specific policy and programmatic responses.’<sup>43</sup> The

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GR 32), 5 November 2014, CEDAW/C/GC/32 <<https://www.refworld.org/docid/54620fb54.html>> accessed 1 October 2023.

40 Ibid., para. 16.

41 Ibid., para. 50(d).

42 On EU MS’ obligations under the CEDAW and, more generally, on the CEDAW into the EU system, see European Parliament, DG for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs – Gender Equality, ‘How could the Convention On the elimination of all forms of discrimination Against women (CEDAW) Be implemented in the EU legal framework?’, 2011 <[https://www.europarl.europa.eu/RegData/etudes/note/join/2011/453193/IPOL-FEMM\\_NT\(2011\)453193\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/note/join/2011/453193/IPOL-FEMM_NT(2011)453193_EN.pdf)> accessed 1 October 2023.

43 UNHCR, ‘Global Roundtable on Protection and Solutions for LGBTIQ+ People in Forced Displacement – Summary Conclusions (Summary Conclusions)’, June 2021, 7 <<https://www.refworld.org/docid/61e20c77.html>> accessed 1 October 2023. See also *ibid.*, 20 and 27.

“Discussion Paper”<sup>44</sup> and the “Summary Conclusions on Protection Solutions for LGBTIQ+ People In Forced Displacement and Statelessness”,<sup>45</sup> which were among the outcomes of the Global Roundtable, contain various references to intersectionality. The way this concept is mobilized is mainly twofold; first, it is used to describe the risks faced by LGBTIQ+ persons in situations of forced displacement,<sup>46</sup> and second, it serves to emphasize the relevance of a human rights-based approach grounded, in particular, in the elaboration provided by the CEDAW Committee in relation to forcibly displaced LGBTIQ+ persons, including asylum-seekers and refugees.<sup>47</sup> The “Summary Conclusions”, in particular, include recommendations directly related to the relevance of adopting an intersectional approach to the RSD procedure, namely by assessing credibility ‘on the basis of an individual, balanced, intersectional and holistic evaluation of all the evidence’,<sup>48</sup> and by evaluating the risk of persecution giving full account to an intersectional understanding of the diversity of experiences of SOGIESC refugees.<sup>49</sup>

In line with the outcomes and recommendations stemming from the Global Roundtable, UNHCR has started incorporating intersectionality expressly as a framework in its guidance on forcibly displaced LGBTIQ+ persons.<sup>50</sup> The updated UNHCR “Need to Know Guidance on Working with LGBTIQ+ Persons in Situation of Forced Displacement”, issued in 2021, includes a section devoted specifically to intersectionality.<sup>51</sup> This Guidance further elaborates on the concept presented in the UNHCR Guidelines No. 9 by clearly acknowledging that LGBTIQ+ persons are not a homogeneous group; although they may share some

44 UNHCR, ‘LGBTIQ+ Persons in Forced Displacement and Statelessness: Protection and Solutions – Discussion Paper’ (Discussion Paper), June 2021 <<https://www.refworld.org/docid/6ue16944.html>> accessed 1 October 2023.

45 UNHCR (n 43).

46 UNHCR (n 44) 20–21.

47 Ibid. and 30; UNHCR (n 43) 32.

48 These recommendations are addressed to UNHCR, civil society actors and States – see UNHCR (n 43) 32.

49 Ibid.

50 More generally, see UNHCR, ‘Age, Gender and Diversity (AGD)’, <<https://www.unhcr.org/age-gender-diversity/>> accessed 2 October 2023; UNHCR, ‘Tip sheet on applying the UNHCR age, gender and diversity policy to LGBTIQ+ persons’, March 2021 <<https://www.unhcr.org/media/tip-sheet-applying-unhcr-age-gender-and-diversity-policy-lgbtq-persons>> accessed 2 October 2023.

51 UNHCR, ‘Need to Know Guidance: Working with Lesbian, Gay, Bisexual, Transgender, Intersex and Queer Persons in Forced Displacement’, 2021, 13 <<https://www.refworld.org/docid/4e6073972.html>> accessed 2 October 2023. The Guidance also outlines the specific experiences of lesbian, gay, bisexual, trans, queer persons in situation of forced displacement through the lens of intersectionality.

experiences, 'their needs are also quite distinct, depending on their SOGIESC and on other age, gender and diversity factors such as their nationality, ethnicity, faith, socioeconomic background, level of education, physical appearance and disability'.<sup>52</sup> Furthermore, UNHCR's enhanced focus on intersectionality has also been reflected in a new training package on the concept of intersectionality, which also looks at SOGIESC amongst the various characteristics that can overlap and give rise to compounded forms of discrimination.<sup>53</sup>

This non-exhaustive overview illustrates the relevance of intersectionality in relation to SOGIESC-issues, and notably in the context of asylum, with UNHCR progressively and more expressly referring to this concept as a workable framework to approach asylum claims of LGBTIQ+ persons.<sup>54</sup> Although the above-mentioned instruments are not legally binding, they can nonetheless provide authoritative guidance to States, especially as far as UNHCR Guidelines on International Protection are concerned, since they are issued pursuant to UNHCR's mandate and its duty to supervise the application of the Refugee Convention.<sup>55</sup>

<sup>52</sup> Ibid.

<sup>53</sup> UNHCR and University of New South Wales (UNSW), 'Intersectionality and the age, gender & diversity approach' <<https://www.unhcr.org/what-we-do/how-we-work/safeguarding-individuals/intersectionality-and-age-gender-diversity-approach>> accessed 2 October 2023. These training materials introduce and explain the concept of Intersectionality and UNHCR's Age, Gender and Diversity policy (cf. n 50). The training materials were developed for UNHCR and partners who engage and work with people affected by forced displacement and statelessness. Training is one of the priorities areas in follow-up to the Global roundtable, see UNHCR, 'Protecting LGBTIQ+ people in situations of forced displacement: A Stocktaking on UNHCR progress since the 2021 Roundtable', June 2023 <<https://www.unhcr.org/media/priorities-follow-global-roundtable-protection-and-solutions-lgbtqi-people-forced>> accessed 2 October 2023.

<sup>54</sup> Intersectionality is also expressly incorporated in the joint UNHCR-IOM, 'Training Package on the protection of people with diverse SOGIESC', September 2021 <<https://www.unhcr.org/what-we-do/how-we-work/safeguarding-individuals/lgbtiq-persons/sogiesc-and-working-lgbtqi-persons>> accessed 2 October 2023 – see, in particular, modules 1–7.

<sup>55</sup> Although UNHCR guidelines are not legally binding, they retain a special position in the international refugee regime by virtue of UNHCR's supervisory duty. UNHCR's supervisory role is enshrined in Article 35(1) of the Refugee Convention and Article 8 of UNHCR Statute (see, among others, O'Byrne, K., 2013. Is there a Need for Better Supervision of the Refugee Convention?. *Journal of Refugee Studies*, 26(3), pp. 330–359; Goodwin Gill, G., 2014. The Dynamic of International Refugee Law. *International Journal of Refugee Law* 25(4) 4, pp. 651–666). During the years, UNHCR has fulfilled its duty of supervision by elaborating documents aimed at promoting coherence, providing guidance and observing States' practices to build on them to elaborate instruments capable of providing legal guidance. With regard to RSD, the main result is the UNHCR RSD Handbook, as well the Guidelines on International Protection (n 17). Although not legally binding, UNHCR's positions should not be considered 'irrelevant', but regarded as 'authoritative statements

### 3 Intersectionality and SOGIESC Issues in the Common European Asylum System

Differently from the soft law instruments illustrated above, the CEAS instruments – and notably the Qualification and the Procedure Directives – do not contain any immediate and clear reference to intersectionality. However, this does not imply an absence *tout court* of legal provisions that can be mobilized to support the view that adopting an intersectional perspective is an obligation EU MS must adhere to when assessing asylum claims. Both the Qualification and the Procedure Directives require the examination of – and decisions on – asylum applications to be taken on an individual basis.<sup>56</sup>

Article 4 of the Qualification Directive is particularly crucial in this regard, not only for its content, but also because it is the only provision in the CEAS architecture dealing with evidentiary issues.<sup>57</sup> According to this provision, the assessment of international protection applications must be ‘carried out on an individual basis’; and this applies both to the assessment of evidence and

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whose disregard requires justification’ (Kälin, W. ‘Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond’, Global Consultations on International Protection/Second Track, 1 June 2001 <<https://www.refworld.org/docid/3b3702384.html>> accessed 2 October 2023). States parties have a contractual obligation to cooperate with UNHCR and facilitate its duty of supervision, as provided by Article 35(1) of the Refugee Convention. On UNHCR’s supervisory role and the value of its guidance, see further and among others Hathaway, J.C. and Foster, M. (2014). *The Law of Refugee Status*, Cambridge University Press, Cambridge, United Kingdom, 3; Bailliet, C., 2015. National Case Law as a Generator of International Refugee Law: Rectifying an Imbalance within UNHCR Guidelines on International Protection. *Emory International Law Review* 29, pp. 2060–2083; UNHCR, ‘Note on the Mandate of the High Commissioner for Refugees and his Office’, October 2013 <<https://www.refworld.org/docid/5268c9474.html>> accessed 2 October 2023; Juss, S.S. and Harvey, C. (eds) (2013), *The UNHCR Handbook and the interface between ‘soft law’ and ‘hard law’ in international refugee law*, Elgar Publishing, Cheltenham, United Kingdom.

56 See, notably, Article 4 QD and Article 10(a) APD. See also Article 8(2) QD and Article 11(2) QD.

57 Specifically on Article 4 QD, see Noll, G., 2005. Evidentiary assessment and the EU qualification directive, New Issues in Refugee Research – UNHCR Working Paper No. 117 <<https://www.refworld.org/docid/4ff65bf2.html>> accessed 2 October 2023. As pointed out by Noll, this provision is however not exhaustive of all evidentiary issues concerning international protection cases. Nonetheless, Article 4 QD can be considered ‘a unique contribution to the dilemma of evidence’ (ibid., 2). On the relevance of Article 4 QD regarding evidence and credibility assessment, see also European Asylum Agency (EUA), Evidence and Credibility Assessment in the Context of the Common European Asylum System, Judicial analysis, 2023, 122 <[https://euaa.europa.eu/sites/default/files/publications/2023-02/Evidence\\_credibility\\_judicial\\_analysis\\_second\\_edition.pdf](https://euaa.europa.eu/sites/default/files/publications/2023-02/Evidence_credibility_judicial_analysis_second_edition.pdf)> accessed 2 October 2023.

to the legal evaluation of that evidence.<sup>58</sup> Notably, the individualized assessment shall take into account, among other elements,

the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm.<sup>59</sup>

This provision, enshrined in Article 4(3)(c) QD, is the starting point to advocate for an obligation to adopt an intersectional approach to the assessment of international protection claims. First, all the various factors related to an applicant's personal circumstances must be considered – to be noted that the list of factors mentioned in this provision is not exhaustive. Particularly, 'background' is potentially an open box that can include other elements amongst which professional experience, culture, position in the society but also level of literacy, and mental makeup. EU MS' obligation to take into account 'the individual position and personal circumstances of the applicant' implies that asylum applications cannot be assessed through a one-dimension viewpoint, or by taking into account one circumstance only – and this regardless of the element(s) the applicant based their asylum claim on. Secondly, this obligation is functional to the assessment of both past persecution and future risk of persecution. This implies that the assessment of what may, or may not, amount to persecution cannot be determined aprioristically, for example through a mere reading of country-of-origin information – rather, it will depend on the applicant's individual situation and personal circumstances. These have to be taken into account in an all-encompassing manner when assessing the risk of persecution.

It should be noted that Article 4 QD, and notably its para. 3(c), should be read in combination with other provisions of the Qualification and Procedure Directives, amongst which Article 15(3) APD, according to which personnel conducting interviews need to be 'competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability'.<sup>60</sup> Only if interviewers possess the necessary skills, they will be able to put applicants in a position to fully present their claim. Another important link can

<sup>58</sup> See, among others, EUAA (n 57) 87.

<sup>59</sup> Article 4(3)(c) QD.

<sup>60</sup> Article 15(3)(a) APD.

be made between Article 4(3)(c) and Article 4(3)(b) QD. The latter states that the individual assessment shall consider ‘relevant statements and documentation [...] including information on whether the applicant has been or may be subject to persecution [...]’ – and, as elaborated above, Article 4(3)(c) QD requires looking at the applicant’s individual circumstances to assess their exposure to persecution in the past, and risk in the future. This link between let. b and let. c of Article 4 QD becomes particularly relevant when it comes to credibility assessment, as both the Qualification and Procedure Directives are silent in this regard, with the exception of the – limited – guidance laid down in Article 4 QD. In this regard, para. 5 of this provision deals with the situation where ‘the applicant’s statements are not supported by documentary or other evidence’ by providing criteria to assist with the assessment in such circumstance.<sup>61</sup> Para. 5 too must be read together with the preceding ones of Article 4 QD (and especially para. 3), underlining once more the relevance of an individualized assessment that encompasses a thorough analysis of an applicant’s personal circumstances.

When it comes to factors to be given account to in the assessment of applications according to the criteria outlines above, the prominent role of gender stands out clearly. In the Qualification Directive, gender is understood as including gender identity and sexual orientation for the purpose of defining a particular social group; and hence, acts of persecution which are of a ‘gender specific nature’<sup>62</sup> will also include persecution due to an applicant’s sexual orientation or gender identity. It follows that sexual orientation and gender identity too must be considered together with the other factors related to an applicant’s personal circumstances in order to proceed to the individualized assessment required by the Directives and notably Article 4(3)(c) QD.

The obligation to consider the individual positions and circumstances of an applicant entails, as a necessary prerequisite, an identification and close exploration of the said elements. Notwithstanding the importance of an individualized assessment, it would be perhaps too far-fetched to simply equate it

61 ‘EU law only provides limited norms governing evidence and credibility assessment’ but it provides ‘a basic framework for understanding the approach which the competent national authorities, acting under the supervision of their courts and tribunals, must follow when assessing the facts and circumstances under Article 4(3) QD (recast) and conducting the examination of the merits of an application for international protection’, see EUAA (n 57), 104. See also UNHCR, ‘Beyond Proof, Credibility Assessment in EU Asylum Systems’, May 2013, 89 <<https://www.refworld.org/docid/519b1fb54.html>> accessed 2 October 2023. On Article 4(5) QD and the issue of the “benefit of the doubt”, which is not examined specifically here, see *ibid.* and EUAA (n 57), 110–111.

62 Article 9(2)(f) QD. See also Recital 30 QD.



to an intersectional approach. The latter does not merely mean looking at the possible multiple sources of harm in isolation. More appropriately, an intersectional outlook captures the interconnectedness of multiple layers, and how such intersection impinges, as a result, on one's situation by creating unique experience(s) of discrimination. Therefore, an approach that truly accounts for the applicant's 'individual situation and personal circumstances',<sup>63</sup> must necessarily look not only at which these factors are, and what consequences each of them may bring about – but also at their interaction. Should the analysis of such interconnected dimension be neglected, then the individualized assessment would not be truly individualized.

Article 4(1) QD indicates that EU MS have a duty to 'assess the relevant elements of the application' in cooperation with the applicant. In this regard, it is worth underlining that, as the Court of Justice of the European Union (CJEU) stated in the famous *A, B, C* ruling – which dealt specifically with SOGIESC asylum claims – this duty of cooperation remains in place for EU MS regardless of whether they decide or not that it is the applicant's duty to substantiate their application.<sup>64</sup> Hence, MS' duty to cooperate in the assessment will also cover the applicant's personal circumstances and individual situation, including to assess the risk of persecution, as the CJEU clearly affirmed in the above-mentioned ruling.<sup>65</sup> Moreover, the CJEU indicated that the assessment of facts and circumstances under Article 4 QD is a two-tier assessment, whereby the first stage concerns the establishment of material facts (constituting the evidence) while the second stage relates to the 'legal appraisal of that evidence'<sup>66</sup> to determine if an applicant can be recognized refugee status.<sup>67</sup> Thus, the duty to take into account the applicant's personal circumstances needs to be fulfilled both in the first tier – i.e. the credibility assessment – as well as in the second tier – i.e. the legal analysis. The duty to take into account personal circumstances extends to the RSD interview too; according to the CJEU in the *A, B, C* ruling, authorities must conduct interviews 'in a manner that takes account of the personal and general circumstances surrounding the

63 Article 4 QD.

64 Joined Cases C-148/13 to C-150/13, *A, B, C v Staatssecretaris van Veiligheid en Justitie* [2014] ECLI:EU:C:2014:2406, para. 56. Although this judgement was delivered in a case involving gay asylum-seekers, the findings are valid generally for all asylum applications. See further Case C-277/11, *M. M. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General* [2012] ECLI:EU:C:2012:744.

65 *A, B, C* ruling (n 64), para. 57 to be read in conjunction with para. 56.

66 Ibid., para. 55. See also *M. M.* ruling (n 64) para. 64 and *EUAA* (n 57) 58–59.

67 Or subsidiary protection according to Article 15 QD.

application'.<sup>68</sup> That is why, as mentioned before, staff conducting interviews must be competent to give due consideration to 'the personal or general circumstances surrounding the application' – which include (but are not limited to) gender, sexual orientation and gender identity and 'in particular, the vulnerability of the applicant'.<sup>69</sup> In the context of Article 15(3) APD, vulnerability can be interpreted as an all-encompassing term to signify that there are multiple factors that could impact on the applicants' ability to fully present their claim, and which should therefore be duly taken into account. Hence, EU MS are required to ensure that applicants are put in a condition to present their application in a 'comprehensive manner'.<sup>70</sup>

These arguments point out that, although EU Asylum does not clearly refer to an intersectional approach to be adopted in the assessment of asylum applications, yet there are provisions that can be mobilized to maintain that EU MS have a duty to thoroughly account for all factors and circumstances surrounding an applicant, and to analyse how these elements and situations influence and shape each other. Only an assessment that pays attention to such interconnections can be considered adequately individualized and thus in accordance with the legal criteria set out in the Qualification and Procedure Directives. This is the case also for SOGIESC-based claims, particularly taking the viewpoint that SOGIESC and gender issues are influenced by a multitude of factors pertaining both to the applicants' individual circumstances as well as to the environment and the situations they find themselves into.<sup>71</sup>

The next section will illustrate the extent to which an intersectionality analysis emerges in the practice, with a view to evaluate how this approach could be operationalized and systematized in the assessment of SOGIESC asylum claims, in order to achieve better outcomes.

68 *A, B, C* ruling (n 64) para. 70. The obligation to give account to the applicant's individual circumstances is also recalled in two additional CJEU rulings concerning SOGIESC asylum-seekers, see 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* [2013] ECLI:EU:C:2013:720, paras. 58 and 73; Case C-473/16, *F v Bevándorlási és Állampolgársági Hivatal* [2018] ECLI:EU:C:2018:36, paras. 33 and 41.

69 Article 15(3)(a) APD. Para. 70 of the *A, B, C* ruling (n 64) makes reference to the same provision contained in the previous version of the APD.

70 Article 15(3) APD.

71 See also Recital 30 QD.

#### 4 Intersectionality in Action in SOGIESC Asylum Cases

This section sheds light on the added value that intersectionality may bring when deployed in the assessment of SOGIESC-based asylum claims. It does so by focusing on the case study of Italy. To this end, it combines the analysis of selected case law of Italian Courts, preliminary findings from semi-structured interviews carried out in Italy,<sup>72</sup> as well as some findings and data emerging from the VULNER project.<sup>73</sup> In particular, this section zooms in on a selected case which elucidates the significant – and encouraging – contribution that intersectionality can bring to the assessment of SOGIESC asylum-claims.<sup>74</sup>

The Italian case law concerning SOGIESC-based asylum claims provides an interesting frame to explore the application of an intersectional approach.<sup>75</sup> Although the concept itself has never been expressly mentioned in the judicial decisions so far,<sup>76</sup> there is nonetheless a consistent reference to the importance of weighing up the applicant's individual circumstances. The Italian Supreme Court (*Corte di Cassazione* – Court of Cassation), in particular, has consistently affirmed the importance of carrying out an individualized assessment in SOGIESC asylum cases that gives account to all relevant personal circumstances of an asylum applicant. As explained in the previous section, an individualized assessment cannot be equated *tout court* to an intersectional approach. Nonetheless, throughout its case law, the Italian Supreme Court has not only acknowledged the relevance of individual circumstances in the assessment of credibility in SOGIESC asylum cases but has also progressively taken steps to analyse and unfold their impact in their compounded dimension when assessing the credibility of an asylum applicant.

In 2017, the Supreme Court expressly stated that credibility assessment in SOGIESC asylum cases cannot be dictated by decision-makers' subjective views, but must be the result of a clear, reasoned and structured process solidly grounded in the criteria established by law.<sup>77</sup> The relevant criteria are those transposing Article 4 QD into the Italian legislation, and they encompass

72 Cf. (n 13) regarding methodology.

73 Cf. (n 14) regarding the VULNER research project.

74 Cf. (n 13) regarding limitations of the present paper.

75 More generally on SOGIESC in the Italian case law, see among others Marchetti, S. and Palumbo, L. (eds). 2021. Vulnerability in the Asylum and Protection System in Italy: Legal and Policy Framework and Implementing Practice, 2021, Vulner Research Report 1, 69 <[https://www.vulner.eu/78645/VULNER\\_WP4\\_Report1.pdf](https://www.vulner.eu/78645/VULNER_WP4_Report1.pdf)> accessed 2 October 2023; Danisi, Dustin, Ferreira, Held (n 8).

76 To my knowledge as of September 2023 – cf. (n 14).

77 – *v Ministero dell'Interno* [2017], No. 26921/2017, (Corte di Cassazione, Sez. VI).

the obligation, as illustrated above, to give due account to the applicant's individual circumstances.<sup>78</sup> It follows that a systematic and legally sound credibility assessment cannot neglect a thorough analysis of all personal circumstances, as they may also impact the applicants' ability to substantiate their claims and, in turn, their credibility.<sup>79</sup>

These principles are well-established in the case law of the Supreme Court in matters related to LGBTIQ+ applicants; yet, the reasoning is often limited to reiterating the need for an individualized assessment, often just cross-referencing previous decisions on this aspect.<sup>80</sup> There does not seem to be an actual elaboration of which elements are particularly relevant, if one may weigh more than the others – and there is no substantial elaboration on how other individual circumstances may intersect with sexual orientation. Nonetheless, it is worth mentioning an additional, and closely connected path, that the Italian Supreme Court has also explored, which stems from the reasoning introduced above but at the same time has the potential to be framed as an attempt to look at intersecting factors and their impact on credibility in SOGIESC asylum cases. In 2018, the Supreme Court ruled on a subsequent application lodged by an applicant fearing persecution due to his sexual orientation. Relying on the CJEU ruling in *A, B, and C*,<sup>81</sup> the Court of Cassation stated that 'a gay claimant can be still deemed credible even if he has not confessed the real reason for fearing persecution at the first available occasion before national authorities'.<sup>82</sup> The Supreme Court went on to explain that the assessment of credibility in this context should take into account 'the peculiarity of the cases, the social background and the life experiences, the applicant's sex and age, and the overall background of origin and individual characteristics of the applicant'.<sup>83</sup> This is indeed a welcome elaboration regarding the applicant's individual circumstances, although the ruling still did not argue clearly whether and how these factors can intersect with sexual orientation (and, as a consequence, impact on credibility). Two years later, the Supreme Court took another small, yet relevant step, towards what can be considered an intersectional perspective. Building on the 2018 judgement, the Court specified that

78 Article 3 of Decreto Legislativo 19 November 2007, No. 251 (Legislative Decree transposing EU QD into the Italian system).

79 See, for example, *UNHCR* (n 61).

80 See, among others, – *ν Ministero dell'Interno* [2018], No. 26969/2018, (Corte di Cassazione, Sez. VI).

81 *A, B, C* ruling (n 68).

82 – *ν Ministero dell'Interno* [2017] No. 18128/2017 (Corte di Cassazione, Sez. VI). The translations of decisions of Italian Courts from Italian into English has been done by the Author.

83 *Ibid.*, p. 2.

the individual characteristics exemplified in that judgement shall be taken into account when assessing the credibility ‘in general, and definitely not the least when the claim concerns topics related to sexuality.’<sup>84</sup> In addition, the Court pointed out some individual circumstances that deserve particular attention in SOGIESC-based asylum claims, by making reference to the impact that shame, intimacy and hesitancy may have on the disclosure – all elements pertaining to sexuality and, even more, to sexual orientation.<sup>85</sup> These are factors that relate to the applicant’s situation and position and therefore should be rightly part of the assessment.

These steps may not be decisive, but indeed they indicate the Supreme Court’s willingness not only to acknowledge the relevance of individual circumstances, but also to take a closer look at them and assess how SOGIESC may entangle with them and be impacted in the context of credibility assessment. Although the Supreme Court has never mentioned “intersecting factors” so far, it has steadily added tiles with a view to set out the criteria that need to be fulfilled to ensure that: i) the assessment of credibility is truly individualized; ii) such assessment steers away from subjectivity; and iii) the reasoning on adverse credibility findings is solidly built, in accordance with legal criteria, and not motivated merely by minor inconsistencies or assumptions.<sup>86</sup>

In addition, it is important to bear in mind that the Supreme Court is a court of law;<sup>87</sup> as such, it cannot carry out credibility reasoning on individual cases – that is left to the first instance courts. It is however important to highlight what the Court can do and is actually attempting to do; it crystalizes relevant guidance on credibility assessment, affirming its particular relevance for SOGIESC cases – and it is being consistent in overturning decisions that do not adequately incorporate these principles, by stating that the reasoning was void, insufficient, and contrary to the rules of adequate decision-making. Thus, first instance courts must conform to these principles and take into account individual circumstances in the assessment of credibility especially in SOGIESC cases, also in their multi-layered dimension; and this reasoning needs to be outlined in the decision.<sup>88</sup> This approach can lead to the betterment of credibility

84 *F.O. v Ministero dell’Interno, Commissione Territoriale per il Riconoscimento della Protezione Internazionale di Firenze – Sezione di Perugia* [2020] No. 2458/2020 (Corte di Cassazione, Sez. I), para. 11.

85 *Ibid.*

86 *Ibid.*, para. 12.

87 As such, it cannot rule on the merits of the case. The Court of Cassation is the Supreme Court in the Italian judiciary system.

88 See also Marchetti and Palumbo (n 75) 71, on case law concerning trans persons survivors of trafficking in human being for the purpose of sexual exploitation.

assessment, namely by progressively looking at SOGIESC-related narratives through the lens of the compounded effects of individual circumstances, as required by the legislation and in accordance with the soft law instruments mentioned before. The VULNER research highlighted, in particular, two judicial decisions in SOGIESC asylum cases where Italian in-merit Courts attempted to follow ‘an approach in line with an intersectional perspective.’<sup>89</sup> These cases concerned a trans woman from Colombia and a lesbian woman from Nigeria, who both left their respective countries of origin due to SOGIESC-based persecution and ended up being victims of trafficking for the purposes of sexual exploitation. Although the intersectionality-informed reasoning in those judicial decisions is at an initial stage, both rulings paid attention to the impact of multiple gendered forms of persecution endured by the applicants.

Against this backdrop, it is worth focusing on a decision of an Italian Court of First Instance issued in 2022, as it upholds a more explicit stance towards intersectionality and demonstrates the significant contribution this approach can bring to SOGIESC asylum cases.<sup>90</sup> The case concerned a boy from Mali, who applied for asylum in Italy when he had just turned 18. Before the administrative eligibility body,<sup>91</sup> the applicant narrated he had left Mali fearing persecution at the hand of the people in the village because of his sexual orientation. The applicant declared he had been discriminated against and had received death threats, while two other boys he was dating had been beaten and banned from the community. The claim was rejected as not credible, mainly because the applicant was deemed “confused” regarding the alleged death threats received because of his sexual orientation. Moreover, the negative decision was motivated by the fact that the applicant had not identified himself as gay but had only spoken of having had some relationships with men, notably “trans men”. Hence, his declarations were deemed too vague regarding the awareness of his own sexual orientation.

The appellate Court overturned this decision and, contrary to the administrative eligibility body, found the applicant’s narrative to be credible. In reaching

89 Ibid.

90 This is the same judgement indicated in (n 1) and issued by the Court of First Instance of Bologna – cf. (n 1) for details.

91 At first instance, the “Territorial Commissions” (*Commissioni Territoriali per il Riconoscimento della Protezione Internazionale*) are the Italian administrative authorities tasked with interview and assessment of asylum applications in the Italian RSD system. Decisions of the Territorial Commissions can be appealed before the Courts of First Instance, which are civil courts in the judiciary system. The appeal against decisions of First Instance Courts can be lodged before the Supreme Court but only for matters of law (n 87). See further Marchetti and Palumbo (n 75) 39 and Danisi, Dustin, Ferreira, Held (n 8) 106.

this conclusion, the First Instance Court relied on the principles expressed by the Supreme Court, as illustrated above, and carried out an assessment of credibility that was individualized and mindful of how the individual circumstances had impacted the applicant's ability to talk (or not) about his sexual orientation. The judgement indicated that the applicant's personal conditions at the time of the first instance interview played a significant role in this regard. According to the judgment, during the interview before the administrative eligibility body, the applicant was not in the condition to fully understand what was needed from his side to substantiate his application, due to a concurrent series of factors, amongst which his young age, having left Mali when he was only 13; the low level of education; his social-economic background; the abuses he had endured in transit countries (namely having survived sexual violence in Libya). In light of this, the judgement indicated that it should have not come as a surprise that the applicant had not been able to self-identify as a gay person, and that his narrative appeared incoherent and inconsistent at first. Moreover, the First Instance Court observed that, during the administrative stage, the applicant had not been assisted by a properly trained interpreter, since the latter made confusion between terms and translated "trans men" instead of "gay men".<sup>92</sup> On the contrary, the applicant's circumstances had considerably improved when he was heard in appeal, including because, at that point, he could benefit from the support of a specialized NGO and of an expert interpreter. Thanks to these changed circumstances, the applicant had been finally put in a position to properly articulate his account, which was deemed credible by the appellate Court, which recognized him as a refugee.

This case demonstrates, in practical terms, the difference that adopting an intersectional perspective can make. The judgement read sexual orientation, and how the applicant talked about it, in light of the other individual circumstances – including factors related to the asylum procedure and how they hindered the applicant's ability to substantiate his claim. Contrary to the appealed decision, this judgement did not consider sexual orientation in isolation, but it scrutinized the applicant's narrative around his sexual orientation through an intersectional perspective that allowed unpacking those factors and barriers that were hindering the applicant's ability to provide a consistent and coherent narrative. This approach goes beyond the mere acknowledgment of the importance of taking into account the applicant's individual circumstances and shows what a multi-layered and attentive analysis can achieve. To close

92 Judgement of the First Instance Court of Bologna (n 1). 8.

the circle – Abocar, whom we met at the beginning of this paper, has been recognized refugee status thanks to this reasoning.<sup>93</sup>

## 5 Embracing Complexity through Intersectionality

In the face of one case that has been successful thanks to an intersectionality-informed reasoning, there are other similar stories that are not deemed credible including because they are being only read through the single lens of sexual orientation, without realizing that this individual circumstance is influenced by other elements. Issues pertaining to SOGIESC may be difficult to disclose and elaborate on the applicants' side. The asylum-seekers I interviewed during my fieldwork in Italy talked about the challenges they faced in sharing the details about their stories and experiences. For example, one interviewee referred that they talked 'out loud'<sup>94</sup> about their sexual orientation for the very first time during their RSD interview. Others referred to the obstacles they faced in talking about topics that are 'taboo' to them; and a decision-maker, in particular, acknowledged the 'shyness' many LGBTIQ+ applicants experience when narrating their story.<sup>95</sup> Other research on this topic supports this point, as it clearly emerges from the findings of the VULNER project too.<sup>96</sup> With specific regard to the Italian context, VULNER researchers highlighted the hurdles LGBTIQ+ applicants had encountered when seeking refuge – including misgendering, homophobia, isolation and lack confidentiality experienced in Italy, as well as violence and sexual exploitation endured in transit.<sup>97</sup> As pointed out by VULNER researchers, such circumstances 'can expose individuals belonging to sexual minorities to further forms of traumatization'<sup>98</sup> which, as a result, may impinge on the applicants' ability to narrate their story. Therefore, accounting

93 A similar reasoning, although centred more on the applicant's socio-economic background and culture, and how they hindered his ability to narrate about his sexual orientation, can be traced in another decision of an Italian First Instance Court, see – *v Ministero dell'Interno*, 24 October 2022 (Tribunale dell'Aquila).

94 Interview with an asylum-seeker conducted by the Author in Italy in 2018.

95 The issues related to taboo and shyness emerge, in particular, also from an interview with an asylum-seeker conducted by the Author in Italy in 2022 and from another one with a decision-maker (judge) in 2023.

96 Danisi, Dustin, Ferreira, Held (n 8) 183.

97 Carnassale, D. and Marchetti, S., 2022. 'Vulnerabilities and the Italian Protection System: An ethnographic exploration of the perspectives of protection seekers', *Vulner Research Report 2*, pp. 40–41 <[https://www.vulner.eu/117843/VULNER\\_WP4\\_Report-2.pdf](https://www.vulner.eu/117843/VULNER_WP4_Report-2.pdf)> accessed 2 October 2023.

98 Ibid.



for the challenges that SOGIESC applicants deal with during the asylum procedure appears crucial to appropriately read and understand their narrative of SOGIESC-based persecution. These elements can help explain, for example, inconsistencies and silences in the applicants' narrative – and thus, they warrant due consideration by decision-makers when assessing credibility.

In this regard, an intersectional perspective helps bring these elements to the fore and provides an analytical tool to better approach and examine SOGIESC-based asylum applications. More specifically, an 'intersectionality gaze'<sup>99</sup> requires looking at how the applicants' background and their lived experience, also in the country of asylum, may play a crucial role to fully grasp how SOGIESC is – or is not – disclosed and narrated in the context of the asylum interview. Although SOGIESC issues may be the main determinants behind an asylum application, decision-makers cannot be oblivious to other elements that may intersect with them – amongst which the applicant's background and mental make-up – and therefore may impact on credibility. The case illustrated in Section 4 is a proper illustration of this line of reasoning and of the usefulness of adopting an intersectional approach to credibility assessment, which has been favoured by a consistent reference, in the Court of Cassation's case law, to the relevance of weighing in individual situations and circumstances.

However, although encouraging, this approach is still far from being mainstreamed in the legal reasoning at judicial level. These initial and promising results call for a more consistent deployment of intersectionality, which would help unpack the multiple layers pertaining to SOGIESC-related asylum applications.

## 6 Conclusion

This paper started with Abocar's story, which is similar to that of many people claiming asylum due to persecution based on SOGIESC. Thanks to an intersectional approach to credibility assessment, Abocar has been eventually recognized as a refugee. The judges behind Abocar's case are indeed to be praised for going beyond the single dimension of sexual orientation and for proactively looking at the other layers characterizing the applicant's situation to better read through his account.

However, this should not be an isolated and lucky case. As this paper illustrated, the need to adopt an intersectional approach to credibility assessment

99 Ibid., 49.

and legal analysis in asylum cases in general, and in SOGIESC cases is particular, can be traced in EU asylum legislation and it is also supported by soft law instruments – particularly, UNHCR’s authoritative guidance, stemming from its role as guardian of the Refugee Convention. Moreover, this paper also discussed how implementing an individualized approach to asylum applications, as required by EU Asylum Law, cannot but call for the adoption of an intersectional perspective. Notably, taking into account the impact of intersecting factors is unavoidable in order to ensure that the approach is truly individualized. Finally, by focussing on Italy as a case study, this paper has demonstrated the difference that mobilizing intersectionality in the assessment of SOGIESC asylum cases can make. Thus, there are indeed arguments to advocate for a more consistent use of intersectionality in SOGIESC cases, as it can allow unpacking their complexities.

The present analysis has focused chiefly on credibility assessment, and how intersectionality may be a useful analytical tool in this regard. Nonetheless, this approach can also be fruitfully deployed in the legal analysis and notably in the assessment of the risk of persecution – and specifically to establish when a treatment may amount to persecution based on a thorough and comprehensive evaluation of the applicant’s circumstances and specific situations in case of return.<sup>100</sup> More generally though, as the findings of the VULNER project elucidate, intersectionality is an important lens to read through the whole displacement experience of LGBTIQ+ persons, hence beyond the asylum interview – e.g. regarding access to services, particularly health care, information on the asylum procedure, and reception conditions.<sup>101</sup>

Future avenues of research and practical interventions should start from acknowledging that the key to a fair treatment of LGBTIQ+ applicants, and to the assessment of SOGIESC asylum claims, does not lie in ‘models’ to carry out interviews and assessment,<sup>102</sup> but rather in accepting their complexity – which can be unpacked and analysed. Intersectionality can provide the tools to do so, and decision-makers would need to be adequately trained in this respect. Capacity building initiatives in this regard could focus on theoretical foundation of intersectionality, together with more practical insights on how

100 See Danisi, Dustin, Ferreira, Held (n 8) 317.

101 Junghans, J. and Kluth, W., 2023. Exploring Asylum Seekers’ Lived experiences of Vulnerability in Germany, *Vulner Research Report 2*, pp. 26–27 <[https://www.vulner.eu/130952/Second-Research-Report\\_GER\\_final\\_.pdf](https://www.vulner.eu/130952/Second-Research-Report_GER_final_.pdf)> accessed 2 October 2023; Nakueira, S., 2022. Lived Vulnerabilities under Constraints: An Empirical Account of how Refugees Experience Uganda’s Protection System, *Vulner Research Report 2*, pp. 31–32 <[https://www.vulner.eu/125726/VULNER\\_WP8\\_Report-2.pdf](https://www.vulner.eu/125726/VULNER_WP8_Report-2.pdf)> accessed 2 October 2023.

102 UNHCR (n 43) 17.

to identify relevant elements that can intersect with SOGIESC aspects and, as a result of such connection, impact on how applicants may experience the asylum procedure, provide their account during the asylum interview, as well as examine the risk they may face in case of return. Such training initiatives would need to involve not only legal practitioners, but be interdisciplinary and include, for example, gender experts, anthropologists, country of origin experts and refugees themselves, who could provide an empirical outlook on the challenges LGBTIQ+ applicants may face.