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Article

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'Forced' Refugees versus 'Voluntary' Migrants: Deconstructing a Binary through SOGIESC Claims of Asylum

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ABSTRACT

This article addresses the consequences that SOGIESC claims of asylum have on international refugee law and its fundamental distinction between 'forced' refugees and 'voluntary' migrants. Namely, this research focuses on this binary (forced-refugee/voluntary-migrant) and explores how SOGIESC asylum can be deployed as a critical tool to deconstruct it.

The article proceeds in three steps. The first one is concerned with the analysis of the binary 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. It argues that while SOGIESC asylum challenges traditional interpretations of refugee law, some of the solutions adopted in the past decade reveal the absurd effects of the forced/voluntary divide and point towards the substratum of non-legal normative paradigms that are necessary for the refugee/migrant binary to work. Finally, delving into the analysis of these 'external' normative paradigms, the third step suggests that the concept of homonationalism helps to understand SOGIESC asylum and some of its contradictory dynamics.

This article concludes that the differentiation between 'forced' refugees and 'voluntary' migrants should not be naturalized as a 'neutral' legal fact: this legal differentiation is neither preordained nor indisputable nor necessary. Conversely, it should be deconstructed through the historical and political genealogies that steer its current application. To this end, SOGIESC asylum offers a privileged position to cast such a critical sight onto the binary inasmuch as it constitutes a symbolic negotiation field for the continuous redefinition of the scope of international protection and the reinforcement of the exceptionalism of Western citizenship based on discourses of human rights and sexuality.

Such a critical posture towards the current refugee system does not entail its utter refusal. Nonetheless, it is proposed that there can be no space for the imagination of new solutions if scholars, in the first place, do not start by rejecting their 'categorical fetishism'.

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1. INTRODUCTION

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.[1] Recently, scientific research has also witnessed a rising interest in the issue of gender and sexuality in migration and asylum, leading scholars to analyze the features of the so-called SOGIESC[2] claims of asylum.[3] From a legal point of view, these claims present lawyers with interesting challenges when interpreting international refugee law and some of its categories, such as well-founded fear of persecution, grounds of persecution, and credibility.[4]

1 See early debates on the topic: Elen Vagelos, 'The Social Group That Dare Not Speak Its Name: Should Homosexuals Constitute a Particular Social Group for Purposes of Obtaining Refugee Status? Comment on Re: Inaudi' (1993) 17 Fordham International Law Journal 229; Brian J McGoldrick, 'United States Immigration Policy and Sexual Orientation: Is Asylum for Homosexuals a Possibility' (1994) 8 Georgetown Immigration Law Journal 201; Jenni Millbank, 'Fear of Persecution or Just a Queer Feeling' (1995) 20 Alternative Law Journal 261; 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. See especially UNHCR Guidelines intervening on these cases: 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', HCR/GIP/02/01 (7 May 2022); 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', HCR/GIP/02/02 (7 May 2002); UNHCR, 'Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity', HCR/GIP/12/09 (23 October 2012). As far as caselaw is concerned, the Dutch Council of State already confirmed in 1981 that it would consider asylum applications for reasons of sexual orientation under the particular social group Convention ground (Afbeelding Rechtspraak (Judicial Commission of the Council of State) Judgment of August 13 1981 No A-2.1113 Rechtspraak Vluchtelingenrecht No 5 1981). Later in 1988, a homosexual asylum applicant was first recognized as a refugee on sexual orientation grounds by a high instance court in Western Germany (Bundesverwaltungsgericht (Federal Administrative Court), Judgment of 15 March 1988, 9 C 278.86). Two years later, the United States followed with the well-known *Toboso-Alfonso* case of the Board of Immigration Appeals (*Matter of Toboso-Alfonso* (1990) 20 I&N Dec 819, 822-23). In the mid and late 1990s, most countries started to recognize asylum on sexual orientation grounds, which was, in any case, the first SOGIESC element to be considered and accepted in this sense. In more recent times, the Court of Justice of the European Union (CJEU) has also dealt with the matter by recognizing that homosexuality can be considered as an element constituting membership of a particular social group in the landmark *X, Y, and Z* case (Joined Cases C-199/12 to C-201/12 *Minister voor Immigraties en Asiel v X and Y and Z v Minister voor Immigratie en Asiel* [2013] ECLI:EU:C:2013:720). For an exhaustive overview of the evolution of the judicial protection of LGBTIQ+ refugees and SOGIESC asylum seekers see 'ELENA Research Paper on Sexual Orientation as a Ground for Recognition of Refugee Status' (European Council on Refugees and Exiles 1997) < https://www.refworld.org/reference/research/ecre/1997/en/32011> accessed 11 June 2025; Karin Åberg, 'A Requirement of Shame: On the Evolution of the Protection of LGB Refugees' (2023) 35 International Journal of Refugee Law 37.

2 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 I suggest that SOGIESC is the most appropriate term to use in pursuance of goals of inclusion and exhaustiveness. Importantly, SOGIESC and LGBTIQ+ do not mean the same thing. While the latter acronym is used to refer to the group of individuals that are part of a particular 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 file SOGIESC asylum claims and not all SOGIESC asylum seekers are LGBTIQ+ individuals. This circumstance has multiple origins: non-LGBTIQ+ individuals can be persecuted after being (wrongly) imputed some SOGIESC characteristics; LGBTIQ+ individuals can ask for international protection on different grounds than SOGIESC ones; SOGIESC asylum seekers can refuse to recognize themselves as members of the LGBTIQ+ community; non-LGBTIQ+ asylum seekers may decide to refer to SOGIESC elements to obtain asylum strategically. Given these circumstances, this article adopts the term SOGIESC when referring to asylum procedures and their legal implications or the characteristics regrouped by the acronym. By contrast, this article uses the acronym LGBTIQ+ when referring to individuals who are members of this minority. It bears anticipating that the mere definitional distinction between LGBTIQ+ and SOGIESC is not per se relevant to the enforcement of the binary between forcedness and voluntariness to which this contribution is dedicated. However, it is exactly on the features that distinguish the first acronym from the second, which eventually revolve around the divide between identity and acts, that the (forced) refugee/(voluntary) migrant divide is established in SOGIESC cases.

3 See, by way of example, some of the most relevant research outputs in this field: 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); Arzu Güler, Maryna Shevtsova, and Denise Venturi (eds), *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration* (Springer International Publishing 2019); 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).

4 See more below (text to nn 78-81). The heated scholarly debates featured in the following articles are one of the many testimonies of the challenging nature of the legal interpretation of SOGIESC claims: James C Hathaway and Jason M Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 New York University Journal of International Law and Politics 315; Deborah Anker and Sabi Ardalan, 'Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law' (2012) 44 New York University Journal of International Law and Politics 529; David Frank, 'Making Sense of LGBT Asylum Claims: Change and Variation in Institutional Contexts' (2012) 44 New York University Journal of International Law & Politics 485; Ryan Goodman, 'Asylum and the Concealment of Sexual Orientation: Where Not to Draw the Line'

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 divide distinguishing (or distributing along a purposedly bipolar continuum) 'forced' refugees from 'voluntary'[5] migrants.[6] Considering the different levels of legal protection accorded to these categories, scholars have begun to cast a critical look at this divide.[7] Accordingly, several studies have examined 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 if one simultaneously considers the increasing tightening of borders, especially in Global North countries.[8] 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. First, 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'. Second, 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.[9] 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 the current refugee system is built.

Starting from these provocations, this article aims to deconstruct refugee law by trying to understand whether there is something more behind it apart from its ostensibly 'neutral', non-political 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 article does not seek to offer a doctrinal reflection upon the legal tenets

(2012) 44 New York University Journal of International Law and Politics 407; 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; 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.

5 It bears clarifying that the use I make of the terms forced, refugees, voluntary, and migrants—the very target of the deconstructive effort of this research—is not uncritical. I adopt the terms refugee and migrant whenever the provisions of the current legal system require them. Nonetheless, I prefer migrant to refer to people involved in migration paths. Drawing from the existing literature, I also use the expression 'people on the move' sometimes. Additionally, this article adopts the dichotomic terms 'forced' and 'voluntary' to mark the normative dimension which commonly burdens the differentiation between refugees and migrants. While scholars, practitioners, and lawmakers have alternatively used many other terms as well, as I argue later in the text, the fundamental normative distinction between these two categories lies in the contrast between the undesired and forced nature of the condition of victim-refugees in need of protection and the voluntariness of the unnecessary but desired choice to seek more favourable living conditions typical of migrants.

6 Cf. David Bartram, 'Forced Migration and "Rejected Alternatives": A Conceptual Refinement' (2015) 13 Journal of Immigrant & Refugee Studies 439; Marta Bivand Erdal and Ceri Oeppen, 'Forced to Leave? The Discursive and Analytical Significance of Describing Migration as Forced and Voluntary' (2018) 44 Journal of Ethnic and Migration Studies 981; Etienne Piguet, 'Theories of Voluntary and Forced Migration' in Robert McLEman and François Gemenne (eds), *Routledge Handbook of Environmental Displacement and Migration* (Routledge 2018).

7 See especially Rebecca Hamlin, *Crossing: How We Label and React to People on the Move* (Stanford University Press 2021); Oliver Bakewell, 'Unsettling the Boundaries between Forced and Voluntary Migration' in Emma Carmel, Katharina Lenner and Regine Paul (eds), *Handbook on the Politics and Governance of Migration* (Edward Elgar 2021).

8 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, 154.

9 Working with the same debatable categories of the system, one can think about 'classic' political refugees who eventually left their country out of an authentically free choice versus so-called climate or economic migrants whose conditions of extreme hardship are not unproblematically, regularly recognized as instances of forcedness. For more on the impact of narratives of (un)deservingness on the forced/voluntary binary and the broader understanding of the refugee system, cf. below (nn 28, 129).

of SOGIESC asylum. On 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.

The research primarily addresses the 'Global North', especially Europe, as the primary geographical focus point. For this reason, this article holds no claim of exhaustiveness nor rigorous and detailed analysis of individual legal systems. Instead, this geographical reference is helpful to frame the entanglements between international protection and external non-legal normative paradigms, allowing the singling out of the critical junctures that reveal the genealogies of the refugee system.

Methodologically, the article draws first and foremost from the tradition of critical legal studies.[10] With the aims of this contribution in mind, a critical legal approach consists of three main components. First, a critical legal methodology is concerned with the deconstruction and denaturalization of (apparently) preordained, neutral/natural concepts and categories in the pursuance of emancipatory aims. A deconstructive intervention is supposed to trace the genealogies of such concepts and categories, unveiling their origins, their evolution, and their current formation in relation to power relations.[11] In order to sustain and implement this deconstructive engagement, a critical legal methodology relies on two further components. The first one is intersectionality, understood as a lens to radically question the formation and subsequent position of legal subjects when invested by multiplied, connected, interacting systems of oppression.[12] The second one is positionality, understood as an epistemological-methodological practice that privileges marginality and partiality as an elected site of knowledge production and simultaneously underlies the necessity of acknowledging one's situated perspective in order to recognize the relative, contextual, embodied nature of one's scientific contribution.[13] Building on these considerations and focusing on the subject of this research, the contributions of (critical) legal scholars working—and bridging—in the fields of asylum, gender, and queer studies play a fundamental role in supporting the critical, deconstructive endeavour.[14]

This article does not wish to offer a policy brief for decision makers or a toolbox for judges. On the contrary, it is especially addressed to society and scholars: its primary aim is to provide a critical account of the existing refugee system that can help to think about and through it from a different angle.

The article is divided into three sections that trace the development of the main argument through three distinct steps. The first focuses on a critical analysis of the binary between 'forced' refugees and 'voluntary' migrants. This section aims to understand why it is crucial to study the differentiation process of legal categories in migration and refugee law and why the binary between refugees and migrants exists in the first place. While a broader, more complex analysis of the history and politics of the use of categories in (migration and refugee) law would certainly

10 For an overview of critical legal studies from a methodological point of view, see in particular Emilios Christodoulidis, Ruth Dukes, and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar Publishing 2019).

11 For an authoritative example of this methodological practice, see first and foremost: Michel Foucault, *Histoire de la sexualité: Tome 1, La volonté de savoir* (Gallimard 1976).

12 Cf. Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] University of Chicago Legal Forum; but also: The Combahee River Collective, 'The Combahee River Collective Statement' (1977) <https://www.blackpast.org/african-american-history/combahee-river-collective-statement-1977/> accessed 11 June 2025.

13 Cf. Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14 Feminist Studies 575.

14 For exemplificatory purposes, see especially Calogero Giametta, *The Sexual Politics of Asylum: Sexual Orientation and Gender Identity in the UK Asylum System* (Routledge 2017); Thomas Spijkerboer, 'Gender, Sexuality, Asylum and European Human Rights' (2018) 29 Law and Critique 221; Nuno Ferreira and Carmelo Danisi, *Queering International Refugee Law* (University of Sussex 2021); Denise Venturi, 'Beyond the Rainbow? An Intersectional Analysis of the Vulnerabilities Faced by LGBTIQ+ Asylum-Seekers' (2023) 25 European Journal of Migration and Law 474; Senthorun Raj, 'Legal Hostilities: Navigating Queerness, Emotion, and Space in Asylum Law' [2024] Crime, Media, Culture.

be enticing, the aim of this section is not to dispute that categories are currently necessary to understand, implement, as well as improve the refugee system. For this reason, the first step of the argument focuses more on the way in which the legal categories we use change: in what moments in time do the content and significance of legal categories change? Why do we change the way we interpret legal categories depending on the historical, geographical, and political context? And, most importantly, why do these changes occur? The underlying hypothesis of this section is that, by analyzing when, how, and why legal categories in the field of migration and refugee law and their interpretation change, we can better understand how the refugee system works.

After elaborating on the reasons why SOGIESC cases offer a particularly fruitful example to address the issues raised in the first section, the second section introduces SOGIESC asylum from a legal perspective, providing an internal critique of refugee law in light of this recent evolution and its challenging features. If an internal critique can be understood as a critical review of existing law based on the law's own terms and commitments, in this section the research endeavours to identify which elements among the legal tenets of SOGIESC asylum are helpful to deconstruct the forced/voluntary binary. More specifically, and particularly by focusing on the elements of discretion reasoning and credibility/disbelief, the main contribution of this section to the broader argument consists of a realization that, from a purely internal point of view, the application of the law that regulates the refugee system in SOGIESC cases inevitably veers towards impasses and aporias that question both legal objectivity and certainty. Building on this finding, the second section importantly asks under what conditions, or thanks to what non-purely legal arrangements, the law of the refugee system still manages to operate notwithstanding the aforementioned impasses and aporias. Addressing the contrasted frame depicted by the first two sections, in the third and last section the main argument is enlarged in its analytical scope by considering normative paradigms whose origins and logics are (ostensibly) external to refugee law. Given the impasses and aporias encountered when deploying a purely legal understanding of the refugee system in SOGIESC cases, the argument does not claim that current categories, or even the current legal edification of refugeehood altogether, ought to be cancelled if one wants to make sense of the refugee system. Instead, this section serves to conclude that, even before imagining alternatives to the current system, a diagnosis of its entanglements with certain external/non-legal normativities is due and, relatedly, that a critical engagement with these other normative commitments offers a starting point to envision new legalscapes beyond the binary.

2. WHAT ABOUT THE BINARY?

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

Relying on the working definitions provided by UNHCR and IOM,[15] the difference between refugees ('forced' migrants) and other ('voluntary') migrants seems quite clear. In its official glossary,[16] IOM specifies that 'migrant' is an umbrella term that has yet to be defined under international law. Even though the organization clarifies that it takes an 'inclusivist' definitional approach in understanding the term migrant as referring to all forms of movement, the official glossary does not list asylum seekers or refugees in the exemplary categories of people who can fall under this umbrella term. At the same time, UNHCR has repeatedly stressed its convinced

15 See on this 'Who is a "refugee"' (*UNHCR*) <https://www.unhcr.org/about-unhcr/who-we-protect/refugees> accessed 11 June 2025; 'About Migration' (*IOM*) <https://www.iom.int/about-migration> accessed 11 June 2025.

16 IOM, 'International Migration Law. Glossary on Migration', 132-33 <https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf> accessed 11 June 2025.

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 who are forced to leave their country and would suffer deadly risks upon their return, while migrants are people who voluntarily choose to move for reasons other than severe risks to their lives.[17]

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 section will analyze 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.[18] Lama Mourad and Kelsey Norman seem to share the same concern regarding the blurring of refugee and migrant categories since they posit that, by conflating one category with the other, States would be facilitated in enforcing an undifferentiated restraint on migration flows.[19] It is also true that, in recent decades, even UNHCR has had to acknowledge the changing nature of migration flows, which are increasingly characterized as 'mixed'.[20] For the same reason, UNHCR has had to accommodate the developing reality by broadening the scope of its activities and enlarging its perspective on international migration.[21] 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' refugees and 'voluntary' migrants are not, in fact, two categories already blurred in reality, whether the persisting clear 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 protection framework. The same cannot be said for 'voluntary' migrants. As Rebecca Hamlin has put it,

> [t]he 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.[22]

17 'UNHCR Viewpoint: "Refugee" or "Migrant" – Which Is Right?' (*UNHCR Hong Kong*, 28 August 2015) <https://www.unhcr.org/hk/en/1088-unhcr-viewpoint-refugee-or-migrant-which-is-right-2.html> accessed 11 June 2025.

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

19 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.

20 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 < https://hdr.undp.org/content/managing-mobility-human-development> accessed 11 June 2025.

21 Jeff Crisp, 'Beyond the nexus: UNHCR's evolving perspective on refugee protection and international migration' (2008) New Issues in Refugee Research Paper No. 155 < https://digitallibrary.un.org/record/630551> accessed 11 June 2025.

22 Hamlin (n 7) 2. See also Feller (n 18) 28. Note that, in relation to what was stressed before regarding the non-existence of an internationally established legal definition of migrant, there is no single legal instrument, or autonomous and well-confined field of law, regulating international norms that concern migrants and migration. Conversely, international migration law can be understood as the system of norms concerning migration that can be derived by a series of other fields of international law including: international human rights law, international labour law, international refugee law, international criminal law, international humanitarian law, international consular law, and international maritime law. Considering that the ratification of legal instruments in each of these fields of law greatly varies, it is no small feat to understand and recollect a coherent legal framework applying to migrants at the international level. For dedicated contributions on this matter, see in particular Richard Perruchoud (ed), *Compendium of International Migration Law Instruments* (TCM Asser Pr 2007); Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press 2012); Vincent Chetail, *International Migration Law* (Oxford University Press 2019).

Beyond some regional peculiarities[23] influencing the interpretation of the Refugee Convention,[24] this means that 'voluntary' migrants have far fewer chances to be legally recognized by States. Even the residual protection from expulsion offered by the international standards of *non refoulement* cannot guarantee the conferment of a clear status.[25] Moreover, considering an instrument such as the 'Global Compact for Safe, Orderly and Regular Migration',[26] it is 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.[27]

The consequences of this binary are incredibly impactful, especially considering its narrative role, which provides for 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.[28] At this stage, however, it is interesting to observe how the different accessibility to legal status for 'forced' refugees and 'voluntary' migrants is especially relevant for the multi-faceted importance of legal categories and the politically marked dynamism of their interpretation and application.

First, 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'.[29] In this sense, categories have material consequences in the form of rights, State protection, and resources.[30] At a more systematic level, categorization processes produce 'hierarchical systems of rights'[31] that convey an 'extremely complex set of values and judgements which are more than just definitional'.[32] Finally, the consequences of categories affect media discourses, which can reinforce, trigger, and influence public opinions, host societies and, eventually, the legal system.[33]

23 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); Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 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, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council 2024 [2024] OJ L2024/1347 (Qualification Regulation). It should be acknowledged, in any case, that while these instruments intervene in differentiating the contextual application of refugee law in various regions, their fundamental legal rationales are not detached from the binaries and divides under investigation.

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

25 Alexander Betts, 'Survival Migration: A New Protection Framework' (2010) 16 Global Governance 361.

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

27 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.

28 On this point, see once again Feller (n 18). More generally, see how UNHCR constantly builds States and public opinions' support for refugees and its mandate by enforcing a differentiation from migrants which is also supposed to redirect all available resources to refugees, those truly in need ('UNHCR viewpoint: 'Refugee' or 'migrant' – Which is right?' (*UNHCR*, 11 July 2016) <https://www.unhcr.org/news/stories/unhcr-viewpoint-refugee-or-migrant-which-right> accessed 11 June 2025; 'Asylum and migration' (*UNHCR*) <https://www.unhcr.org/what-we-do/protect-human-rights/asylum-and-migration> accessed 11 June 2025). On deservingness and morality in the refugee system cf. Magdalena Kmak, 'Between Citizen and Bogus Asylum Seeker: Management of Migration in the EU through the Technology of Morality' (2015) 21 Social Identities 395; Colin Grey, 'Cosmopolitan Pariahs: The Moral Rationale for Exclusion under Article 1F' (2024) 36 International Journal of Refugee Law 201..

29 Hamlin (n 7) 7–8.

30 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).

31 Crawley and Skleparis (n 30) 51.

32 Roger Zetter, 'Labelling Refugees: Forming and Transforming a Bureaucratic Identity' (1991) 4 Journal of Refugee Studies 39, 40.

33 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.

The processes by which these categories are interpreted and applied are not static and independent. On the contrary, they are both dynamic and political.[34] Dynamic because host societies apply categories and labels differently in space and time according to their views and cultures.[35] 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.[36] This is why legal categories such as 'forced' refugee and 'voluntary' migrant should not be considered neutral.[37] Conversely, the processes through which they are interpreted and adapted to reality should be framed into bureaucratic procedures that turn them into instruments of power.[38] 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'.[39]

For this reason, reflecting upon the role of refugees in this system is useful. Their position as exceptions to the State's prerogative of border control is well known.[40] It is equally agreed that, according to various factors, the refugee system can be 'stretched'.[41] In this sense, however, the questions would be: why and how is this regime stretched? Why can 'forced' refugees 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 (re)negotiated, then the contested space between them and the motives supporting these negotiations are the focus of this research.[42] To clarify these elements and to explore the roots of the binary 'forced' refugee/'voluntary' migrant, it is necessary to delve into the history 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?

For decades, we have been proclaiming the crisis of international refugee law and the need for new solutions to make it effective again.[43] Considering what has 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 structure rather than merely linked to more superficial

34 Zetter (n 32) 45.

35 Nadine El-Enany, 'Who Is the New European Refugee?' (2007) LSE Legal Studies Working Paper No. 19/2007, 3 <https://papers.ssrn.com/abstract=1033334> accessed 11 June 2025.

36 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.

37 Crawley and Skleparis (n 30) 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.

38 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.

39 Zetter (n 37) 189–190.

40 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.

41 Betts (n 25).

42 Anticipating further reflections that are going to be developed in the article, it bears clarifying that the critical engagement with the constructedness and normativity of the categories of refugee and migrant does not directly and inexorably imply an outright refusal of their use in international refugee law. Conversely, even before venturing into proposing alternative tools for decision-making in international refugee law, an activity which would most certainly require further and broader discussion, this research aims at providing some elements that could support such and alternative-creating activity by unveiling a series of fundamental aspects that currently affect the acritical and undisputed application of available categories.

43 See for example 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; Catherine Dauvergne, 'Refugee Law as Perpetual Crisis' in Satvinder Singh Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar 2013); James C Hathaway, 'A Global Solution to a Global Refugee Crisis' (2016) 1 European Papers—A Journal on Law and Integration 93 <https://www.europeanpapers.eu/fr/e-journal/global-solution-global-refugee-crisis> accessed 11 June 2025; Eddie Bruce-Jones, 'Refugee Law in Crisis: Decolonizing the Architecture of Violence' in Mary Bosworth, Alpa Parmar and Yolanda Vázquez (eds), *Race, Criminal Justice, and Migration Control: Enforcing the Boundaries of Belonging* (Oxford University Press 2018); Rosemary Byrne, Gregor Noll, and Jens Vedsted-Hansen, 'Understanding the Crisis of Refugee Law: Legal Scholarship and the EU Asylum System' (2020) 33 Leiden Journal of International Law 871.

technical features or transitory circumstances. This section is inspired by this provocation and tries to understand the foundations of the binary between 'forced' refugees and 'voluntary' migrants. First, it focuses on a historical account of the progressive distinction between the categories of refugee and migrant. Second, it considers States' territorial control prerogatives and correlated border(ing) practices.

Numerous legal-historical studies have shown how the category of refugee has not always had the same meaning.[44] 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 the historical evolution of the relationship between the categories of 'refugee' and 'migrant'.[45] Her research has revealed how, until the 1950s, refugees were considered migrants and dealt with through the same legal instruments existing to address migration flows. Later on, the grave failures of the protection of refugees experienced during the Second World War triggered the separation of the first category from the second, detaching 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 a durable solution'.[46] At the same time, the 'humanitarian discourse intended to *protect* refugees has in fact strengthened many States' restrictionist migration agendas'.[47]

It is no easy feat to indicate a single historical event that marked the shift from fluid, interchangeable refugee and migrant categories to their net demarcation. Rebecca Hamlin has identified one significant step in the Evian Conference of 1938 because it 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.[48] Almost two decades later, the Refugee Convention represented another salient event, contributing to the singling out of the 'identity of refugee'.[49] Finally, Long has identified a third moment during the Cold War, specifically pointing to the US framing of Eastern European migrants as victims of communist regimes and not as impoverished economic migrants.[50]

According to these historical accounts, it took decades for the refugee/migrant binary to crystallize. This development, nonetheless, should not be naturalized or taken for granted: history could have been different.[51] 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'.[52]

44 Among many, see James C Hathaway, 'The Evolution of Refugee Status in International Law: 1920—1950' (1984) 33 International & Comparative Law Quarterly 348; Laura Barnett, 'Global Governance and the Evolution of the International Refugee Regime' (2002) 14 International Journal of Refugee Law 238; William Thomas Worster, 'The Evolving Definition of the Refugee in Contemporary International Law' (2012) 30 Berkeley Journal of International Law 94; Peter Gatrell, *The Making of the Modern Refugee* (Oxford University Press 2013); Guy S Goodwin-Gill, 'International Refugee Law in the Early Years' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021).

45 Katy Long, 'When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection' (2013) 1 Migration Studies 4.

46 ibid 4.

47 ibid 5.

48 Hamlin (n 7) 37.

49 Long (n 45) 5.

50 ibid 20.

51 In this sense, the re-historicization of the categories of refugee and migrant—understood as an antidote to the perils of their naturalization—reveals their 'non-neutral' nature: the legal differentiation between refugees and migrants is not preordained in the legal system, as it is not indisputable or necessary.

52 Hamlin (n 7) 40.

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

According to Long, the humanitarian character of refugee protection resulted from a 'politically crafted construction of Western states'.[53] Truth be told, as one can deduce from Hamlin's research, States from the Global South participated in drafting the Refugee Convention.[54] However, these States' points of view and their takes on the refugee definition do not appear in the final version of the Convention, as if bluntly elided from the *travaux préparatoires*.[55] In Hamlin's view, this circumstance should be accounted for in the broader framework of colonialism and State sovereignty.[56] Namely, the birth of refugeehood should be understood as deeply linked to border control and the 'uneven sovereignties' that regulated and still regulate the international community.[57] In Hamlin's words, '[h]istories of the refugee concept that ignore the role of colonialism perpetuate misunderstandings of early international law and make it seem more humanitarian and cosmopolitan than it was'.[58]

This analysis is necessary to understand why and how the current international refugee regime still serves the interests of States from the Global North,[59] a conclusion that can also be reached by looking at the liberal and limited definition of persecution, established to specifically protect political and civil rights.[60]

To better understand the substance of these States' interests, one should consider 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 rational that States reinforce this narrative in response to crises while pushing for harsher measures restricting migrants' access to their territory. The EU's recent 'New Pact on Migration and Asylum'[61] policy framework 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 the activities of Frontex'.[62]

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.[63]

53 Long (n 45) 6.

54 Hamlin (n 7) 97, 99. Cf. also Ulrike Krause, 'Colonial Roots of the 1951 Refugee Convention and Its Effects on the Global Refugee Regime' (2021) 24 Journal of International Relations and Development 599; Natasha Emma Yacoub, 'A New History of Refugee Protection in Post-World War Two Southeast Asia: Lessons from the Global South' (2023) 13 Asian Journal of International Law 220.

55 Hamlin (n 7) 97 ff.

56 ibid 27.

57 ibid 30.

58 ibid 34.

59 ibid 96.

60 ibid 45.

61 See the considerations advanced by the European Commission when proposing the new set of legislative instruments: Commission, 'Communication from the Commission on a New pact on Migration and Asylum' (Communication) COM (2020) 609 final.

62 El-Enany (n 40) 179. It bears clarifying that this list of bordering practices is specifically referred to the EU jurisdiction: while some of these practices resemble similar ones from other jurisdictions, others, such as the activities of Frontex and the deployment of safe country concepts, are peculiar to the EU. Overall, in any case, it is notable that this set of measures has even contributed to reconfiguring the concept of security, see in this sense Howard Adelman, 'From Refugees to Forced Migration: The UNHCR and Human Security' (2001) 35 The International Migration Review 7, 15.

63 Reference is especially made to the detrimental effects of externalization policies, increased border securitization, and acceleration of asylum procedures. See on this for example Thomas Spijkerboer, Jorrit Rijpma, and Maarten den Heijer, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 Common Market Law Review 607; Nevena Nancheva, 'The Common European Asylum System and the Failure to Protect: Bulgaria's Syrian Refugee Crisis' (2015) 15 Southeast European and Black Sea Studies 439; Roni Amit, 'No

Studying the European case, Nadine El-Enany has pointed out that, after dangerous migration paths, the individuals who reach European shores 'are by no means the most vulnerable refugees'.[64] Those even rarer individuals that manage to be recognized as refugees, eventually, are those very few 'deserving'[65] 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'.[66] 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'.[67]

Having laid the foundations of the binary, the discursive divide between 'forced' and 'voluntary' movements can finally be seen in a new light. Indeed, the effectiveness of this divide is ensured by the vicious normative burden associated with 'voluntariness' and, more specifically, migrants' agency.[68] 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.[69] For example, the functioning of the EU's 'Dublin system', which is tasked to distribute asylum claims among Member States, clearly shows through its allocating criteria how asylum seekers' preferences, plans, and desires are not considered.[70] 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'.[71] Unless one concludes that, reiterating how some 'forced' migrants will not be recognized as refugees while other 'voluntary' migrants will,[72] adequacy is not the criterion that States adopt to assess their policies in this case.

Refuge: Flawed Status Determination and the Failures of South Africa's Refugee System to Provide Protection' (2011) 23 International Journal of Refugee Law 458; Azadeh Dastyari, Amy Nethery and Asher Hirsch (eds), *Refugee Externalisation Policies: Responsibility, Legitimacy and Accountability* (Routledge 2022); Bradley Hillier-Smith, 'Does a State's Right to Control Borders Justify Harming Refugees?' (2024) 11 Moral Philosophy and Politics 195.

64 El-Enany (n 35) 1.

65 El-Enany (n 40).

66 Ruben Andersson, 'Europe's Failed "Fight" against Irregular Migration: Ethnographic Notes on a Counterproductive Industry' (2016) 42 Journal of Ethnic and Migration Studies 1055.

67 ibid 1065.

68 In this sense, it is interesting to analyze how States and international organizations (eg IOM) engage with the normativities of forcedness and voluntariness when they invest in so-called migration information campaigns in the framework of broader border and migration policies. A striking example of this discourse is reflected in Kamala Harris's famous 'do not come' addressed to Guatemalan migrants in 2021 ('Kamala Harris tells Guatemala migrants: "Do not come to US"' (*BBC*, 8 June 2021) <https://www.bbc.com/news/world-us-canada-57387350> accessed 11 June 2025). Cf. in this regard the burgeoning literature on migration information campaigns, for example: Raffaella Pagogna and Patrick Sakdapolrak, 'Disciplining Migration Aspirations through Migration-Information Campaigns: A Systematic Review of the Literature' (2021) 15 Geography Compass e12585; Antoine Pécoud, 'Informing Migrants to Manage Migration? An Analysis of IOM's Information Campaigns' in Martin Geiger and Antoine Pécoud (eds), *The Politics of International Migration Management* (Palgrave Macmillan UK 2010); Ceri Oeppen, '"Leaving Afghanistan! Are You Sure?" European Efforts to Deter Potential Migrants through Information Campaigns' (2016) 9 Human Geography 57; Sara Dehm and Jordana Silverstein, 'Film as an Anti-Asylum Technique: International Law, Borders and the Gendering of Refugee Subjectivities' (2020) 29 Griffith Law Review 425; Julia Van Dessel, 'Externalization through "Awareness-Raising": The Border Spectacle of EU Migration Information Campaigns in Niger' (2023) 11 Territory, Politics, Governance 749; Cécile Balty and others, 'The "Don't Come/Go Back Home" Continuum: The Use of Storytelling in Migration Information Campaigns' [2021] Revista da ABRALIN 93.

69 Valeria Ottonelli and Tiziana Torresi, 'When Is Migration Voluntary?' (2013) 47 The International Migration Review 783.

70 Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 2024 [2024] OJ L2024/1351. From this point of view, it would be interesting to analyze the (arguably) ironical terminological choice behind the instrument of 'voluntary' returns, justified precisely thanks to their agency component.

71 Ottonelli and Torresi (n 69) 790.

72 Cf. above (n 9).

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 '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'.[73]

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

Reflecting on the fact that the refugee system fosters the inclusion of a few to allow the exclusion of many, some questions arise: who is precisely included in this group of few? And why? If, from a general point of view, these fundamental enquiries point to a broader critique of migration control, it is not among the purposes of this contribution to expand on this specific aspect by further elaborating what this imbalance between inclusion and exclusion legally entails. Conversely, starting from the example of SOGIESC asylum claims, this research strives to understand why certain categories of individuals are 'let in' at a certain point in time and what the underlying dynamics and rationales leading to this shift in the inclusion/exclusion balance are.

Some researchers have already addressed this nexus by asking 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'.[74]

This research does not argue 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 suggests that, given the layered relevance of categories and legal statuses and considering the historical and political genealogies 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, it is possible to ask: if the divide can be strategically used to advance States' priorities and satisfy external normative logics, can SOGIESC asylum work as a 'political expedient' that enhances the binary by revitalizing 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 diverging historical progressions, namely those of LGBTIQ+ rights on the one side and of migrants' rights on the other? To try to start answering these questions, this section 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. In other words, if one understands an internal critique as a critical review of existing law based on the law's own terms and commitments, the following paragraphs will unveil to what extent a purely legal interpretation and application of the refugee system in

73 Sajjad (n 38) 40.
74 Giametta (n 8) 146.

SOGIESC cases pushes refugee law towards impasses and aporias that point, in turn, to the necessity of the contribution of non-purely legal normative elements for the refugee system to actually work.

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 1980s/90s.[75] 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.[76] 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'.[77]

Based on scholarly works, it is possible to pinpoint a series of challenges that SOGIESC asylum cases present to international refugee law. While some of these will be extensively addressed in the following paragraphs, it is useful to provide their general overview to grasp the relevance of the potential impacts of SOGIESC asylum claims on this branch of international law.[78] 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 and/or of LGBTIQ+ identities in the countries of origin. Moreover, if the inclusion of private actors in the plethora of actors of persecution is now consolidated, the assessment of SOGIESC cases seems to be still affected by a bias privileging the 'public' aspect of persecution compared to the 'private' one.[79] 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 will be further developed in the next paragraphs, SOGIESC asylum claims represent controversial cases concerning the application of the so-called discretion reasoning and the imposition of a qualified burden of proof to satisfy credibility requirements.

Some clear examples of the consequences of these controversial legal features can be found both in the US and the European context. In the first case, many legal scholars have widely discussed the evolution of the interpretation of persecution in SOGIESC cases, stressing the undesirable circumstance of contrasting positions of various courts across the country.[80] National inconsistencies in applying refugee law in SOGIESC cases appear to be even more striking in the European context if one considers the supposed homogenization 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

75 Giametta (n 8). See also (n 1).
76 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.
77 Fernandez (n 76) 197.
78 Cf. in this sense Millbank, 'Fear of Persecution or Just a Queer Feeling' (n 1); Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law' (n 4) 498–499; Fernandez (n 76) 202.
79 Danisi and others (n 3) 272.
80 See on this, among others, Bennett (n 1); McGoldrick (n 1).

highlighting significant variations across time and even within single States.[81] It is argued that both the US and the EU examples not only speak to the challenging nature of SOGIESC asylum as a matter of legal interpretation, but also show how frequent and systematic inconsistencies and uncertainties in the application of refugee law in this field can only increment the leeway that is left open for non-legal normative paradigms to intervene in determining the scope of categories and the contours of the forced/voluntary divide.

Insofar as it is interested in the construction of a binary between 'forced' refugees and 'voluntary' migrants, this article will focus on two SOGIESC challenges that can be read into the framework 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, entirely 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.[82] The broad consequences of this kind of reasoning in asylum decision making are 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 criminalization of SOGIESC behaviour, State persecution, persecution from non-State actors, and availability of State protection.[83] 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 some of their most intimate characteristics, thus violating their fundamental rights and eventually 'collud[ing] with homo- and transphobic actors in the country of origin in violating the expression of LGBTI rights'.[84]

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,[85] 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.[86] Discretion reasoning has also been rejected by both European supranational courts, the CJEU in its two cases *X, Y, and Z*[87] and *Y and Z*[88] and the ECtHR in its case *I.K.* against Switzerland.[89] Nonetheless, the two leading European comparative studies about SOGIESC asylum, 'Fleeing Homophobia' and 'SOGICA', found in 2011 and 2021 that discretion reasoning is still being applied in several European States.[90]

81 Spijkerboer and Jansen (n 3); Danisi and others (n 3).
82 For some definitions of discretion (reasoning/requirement) in SOGIESC cases see 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, 393; Spijkerboer and Jansen (n 3) 33; Janna Wessels, *The Concealment Controversy: Sexual Orientation, Discretion Reasoning and the Scope of Refugee Protection* (Cambridge University Press 2021) 14.
83 Millbank, 'From Discretion to Disbelief' (n 82) 394–395.
84 Spijkerboer and Jansen (n 3) 8.
85 Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law' (n 4) 507–508.
86 UNHCR, 'Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008) <https://www.refworld.org/policy/legalguidance/unhcr/2008/en/63725> accessed 11 June 2025; UNHCR, 'Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity' (n 1).
87 *X, Y, and Z* (n 1).
88 Joined cases C-71/11 and C-99/11 *Federal Republic of Germany v Y and Z* [2012] ECLI:EU:C:2012:518.
89 *I.K. v Switzerland* App No 21417/17 (ECtHR, 19 December 2017).
90 Spijkerboer and Jansen (n 3) 33–41; Danisi and others (n 3) 281–83.

As will be elaborated later, discretion reasoning is arguably hardly eliminable since it is deeply entrenched in the legal structure of international refugee law.[91] Given this premise, it is helpful to focus on one particular debate to better grasp the link between the configurations of discretion reasoning and the forced/voluntary divide.

In 2012, James Hathaway and Jason Pobjoy published an article titled 'Queer cases make bad law', which was interested in analyzing two significant cases of the Australian High Court and the UK Supreme Court.[92] Soon enough, their stances sparked a vigorous debate among refugee law scholars on the merits of discretion reasoning.[93] The two cases under scrutiny, both concerning gay asylum applicants who had decided to conceal their sexual orientation in their countries of origin and were faced with the authorities' rejection of their asylum claim based on the requirement to keep on hiding their sexual orientation upon return, authoritatively dismissed discretion reasoning in SOGIESC asylum claims. Analyzing the Courts' reasoning, Hathaway and Pobjoy contested two allegedly controversial conclusions deriving, according to them, from a misinterpretation of refugee law.[94]

First, 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 did, would allow judges to acknowledge a well-founded fear of persecution suffered by the applicants because of a (exogenous) harm that, in cases of concealment, is simply non-existent.

Second, the authors contested the over-inclusive interpretation of the 'for reasons of'[95] clause by the Courts because, according to them, the latter did not establish a boundary that selects the actions that are deemed fundamental for the individual and thus protected by refugee law. Drawing a parallel with asylum claims based on different grounds of persecution, the authors stated that, in the cases under scrutiny, the Courts did not demonstrate 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 argued that, by not excluding activities not fundamentally linked to the specific ground of persecution from the scope of international protection, the Courts erroneously interpreted refugee law and stretched its system to a politically dangerous extent.

The authors' positions are particularly relevant in the framework of the forced/voluntary divide and they provide fruitful ground to further dissect the underlying normativities and shadowed consequences of forcedness and voluntariness on SOGIESC asylum. Hathaway and Pobjoy basically ask why refugee law should protect LGBTIQ+ asylum seekers who either voluntarily choose to conceal their identity (and cannot prove the existence of any detrimental inner consequences of this choice) or could at least reasonably avoid performing 'non-fundamental'

91 Cf. Wessels (n 82). It bears stressing that in sections 1(2) and 3(1) of the book, Wessels shows that even those higher courts' cases that were welcomed as successful rebuttals of discretion reasoning actually failed to eradicate it completely.

92 *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.

93 Hathaway and Pobjoy (n 4); Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law' (n 4); Tobin (n 4); Anker and Ardalan (n 4); Wessels (n 82).

94 Hathaway and Pobjoy (n 4) 339.

95 Refugee Convention (n 24), art 1(A).

activities. Against this background, not only do the authors indirectly reaffirm and reimpose the requirement of discretion, but also they concur in reproducing and reinforcing a stark normative distinction between forcedness and voluntariness by eventually privileging the first as far as the scope of refugee protection is at stake. Building on these considerations and on the rich debate that followed Hathaway and Pobjoy's intervention, can 'Queer cases make bad law' be read as a well-construed, reiterated rejection of voluntariness from refugeehood? And what are the consequences of this intervention?

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 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 endogenous harm. In these terms, the authors' position would seem to offer a viable solution to reconcile the aforementioned paradox[96] according to which not all forced migrants are recognized as refugees and some voluntary migrants are nonetheless recognized as refugees. Imposing the forced/voluntary divide on SOGIESC asylum seekers in these terms, however, produces absurd consequences, revealing the political and normative nature of this divide.

As Millbank elaborates, '[d]iscretion logic is a particularly invidious form of victim blaming because it affirms the perspective, if not the conduct, of the persecutor'.[97] 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. First, the assumption that LGBTIQ+ people would eventually be spared from persecution by voluntarily concealing themselves is mistaken: the closet is an unsafe space.[98] Second, the focus on the choice to behave discreetly and, potentially, on the subsequent 'endogenous' harm is short-sighted since, upon return to a country where LGBTIQ+ individuals are exposed to 'exogenous' harm, the choice to be discreet would soon turn, in any case, into an inescapable requirement. Thirdly, the implicit suggestion that the choice to stay closeted can genuinely be 'free' is as flawed, or at least reductive, as the exclusionary understanding of voluntariness in the forced/voluntary divide.[99]

From this point of view, the *HJ and HT* case of the UK Supreme Court suffers from the same bias. Indeed, it infers diverging legal consequences from different reasons that would support an applicant's choice to stay concealed. Accordingly, the Court stated that discretion reasoning should not be applied if concealment is dictated by fear of persecution. Conversely, discretion reasoning should not be restricted if concealment results from other 'personal' reasons—that, one could fill in the Court's reasoning, would not forcefully determine a similar resolution.

Turning 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 the expression of 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 kinds of LGBTIQ+ behaviours that should be protected 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+ applicants voluntarily chose to perform non-fundamental activities that could have been avoided by respecting a discreet attitude and yet without resulting in forced concealment. Once again, if read in this light, Hathaway and Pobjoy's

96 See above (n 9).
97 Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law' (n 4) 504.
98 Spijkerboer and Jansen (n 3) 38; Wessels (n 82) 224.
99 See on this Wessels (n 82) 67.

argument could be seen as a further attempt to reconcile the forced/voluntary paradox mentioned above. Nevertheless, their position is ill-construed and subtly oversteps legal reasoning by carrying non-neutral, non-legal normative content.

On the one hand, Hathaway and Pobjoy bend the elements of the controversial acts/identity dichotomy[100] to draw an improper parallel with the boundaries of protected activities set in political or religious persecution cases. Referring to Millbank's clear explanation, '[t]his 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'.[101] Hathaway and Pobjoy try to argue that certain 'trivial' activities should not be protected because they are far removed from the conventional ground of particular social group, exactly as it happens in religious and political persecution cases. Implicitly, however, they recognize that those activities would lead to persecution as far as they would reveal one's SOGIESC: this is why they also posit that they can be avoided without causing an excessive violation of human rights. Ultimately, if the persistence of discretion reasoning in the authors' argument was not acknowledged, one should ask what the fundamental 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:[102] what consequences does this circumstance entail in this case? Hathaway and Pobjoy recognize the difficulty of drawing lines in this field but still they choose to provide an (unsatisfactory) solution by stating that

> 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 which (…) are not reasonably required to reveal or express an individual's sexual identity.[103]

Drawing lines in SOGIESC cases is particularly difficult considering that there is no 'organized hierarchy, no published doctrine, policy platform, text or foundational document'[104] to guide a fair, non-discriminatory and culturally sensitive assessment. For this reason, any line drawn between 'fundamental' and 'trivial' activities has to rely on external normative paradigms, which have little to do with the legal content of international refugee law.[105]

100 See on this ibid 22–23.

101 Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law' (n 4) 510.

102 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. See, The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity (Geneva, 2007) <https://yogyakartaprinciples.org/principles-en/> accessed 11 June 2025; 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) <http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf> accessed 11 June 2025).

103 Hathaway and Pobjoy (n 4) 382.

104 Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law' (n 4) 516–517.

105 See how Tamsin Paige and Joanne Stagg indeed retraced a 'tendency towards the implementation of heteronormative standards and logic' in international adjudication in the field of migration and asylum (Tamsin Phillipa Paige and Joanne Stagg, 'Queer Approaches to International Adjudication', *Max Planck Encyclopedia of International Procedural Law* (OUP 2019) <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3871.013.3871/law-mpeipro-e3871?prd=MPIL> accessed 11 June 2025).

It should be reminded that, notwithstanding progressive judicial developments rejecting discretion reasoning, its application has not yet been eliminated. As mentioned before, the English case of *HJ and HT*, rather than fully rejecting discretion reasoning, has 'reformulated [it] in a new, cumbersome test'.[106] Similarly, the CJEU judgments 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 (voluntarily) choose to behave discreetly, thus configuring the situation considered by Hathaway and Pobjoy.[107] More generally, as it has been shown by the SOGICA research

> [a]lthough 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.[108]

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'[109] and thus the 'site where the extent of the Convention grounds is negotiated in refugee law'.[110]

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 refugee protection, is yet another instrument to mould the discourses around the binary between 'forced' refugees and 'voluntary' migrants.

3.4 …To disbelief

Many scholars have highlighted how, quite recently and in different geographical contexts, the harsh Western scrutiny on SOGIESC asylum claims has increasingly availed itself of the new tool of 'disbelief', thus replacing 'discretion', which has been progressively dismissed by courts.[111] 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'.[112]

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, testifies to the influence of the external normative paradigms that influence asylum decision making.

The most recent empirical study on SOGIESC asylum claims detected a widespread and persistent culture of disbelief that continues to produce negative credibility assessments and subsequent refusals of asylum claims.[113] Additional studies extensively mapped different State practices concerning credibility, highlighting how much they can vary based on context and other variables.[114] Keeping an eye on the European context, for example, a significant event in

106 Danisi and others (n 3) 277.
107 Wessels (n 82) 75.
108 Danisi and others (n 3) 277.
109 Wessels (n 82) 243.
110 ibid 23.
111 Millbank, 'From Discretion to Disbelief' (n 82); Spijkerboer and Jansen (n 3) 47.
112 Fernandez (n 76) 204.
113 Danisi and others (n 3) 313.
114 Spijkerboer and Jansen (n 3); 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).

the CJEU's jurisprudence marks a general attitude of disbelief. In its *A, B, and C* case,[115] indeed, the Court refused to accept declared sexual orientation as an established fact and, conversely, considered it in the same way as any other piece of evidence that needs to be proved, assessed, and believed.[116]

The requirement to assess all instances of self-identification per se does not seem to differentiate SOGIESC claims from other asylum claims. However, 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 left some leeway for asylum authorities to make decisions partially based on stereotypes.[117] 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.[118] Such stereotypes are not sex-, gender-, and culture-neutral. Quite on the contrary, they have clear origins in heterosexual, cisgender paradigms and Western-based cultural understanding of sexual orientation and gender identity.

The authors of 'Fleeing Homophobia' showed 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.[119] The researchers of the SOGICA project, instead, reported how Western tropes of sexual orientation and gender identity are forced upon SOGIESC asylum seekers, making it even more challenging (on top of problematic) to fit into pre-determined categories.[120] The distinction between being closeted and being out and proud or the expectation of a thought-through emotional journey of self-discovery against feelings of shame, difference, exclusion, and guilt triggered by supposedly unbearable public and private situations in the countries of origin are good examples of Western cultural imperialism in these cases.[121]

Massimo Prearo took stock of these findings to highlight the moral and political dimension underlying SOGIESC asylum.[122] According to Prearo, 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:

> the categories of sexual orientation and gender identity (…) are produced by 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.[123]

The analysis of the evolution of SOGIESC asylum has shown how asylum decision making has progressively shifted from a discretion paradigm requiring concealment to a disbelief paradigm expecting 'new practices of *indiscretion*' and ''hyper-visible' public performances of sexuality'.[124] Concerning discretion, it has been argued that Hathaway and Pobjoy's position could be interpreted as an attempt to solve the paradoxical consequences of the forced/voluntary divide.

115 Joined Cases C-148/13 to C-150/13 *A, B, and C v Staatssecretaris van Veiligheid en Justitie* [2015] ECLI:EU:C:2014:2406.
116 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. Cf. on this aspect below (n 144).
117 *A, B, and C* (n 115) para 62. On this aspect, see also Spijkerboer and Jansen (n 3) 62.
118 For an exhaustive analysis of these stereotypes see ibid 47–65.
119 ibid 62.
120 Danisi and others (n 3) 312.
121 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.
122 Massimo Prearo, 'The Moral Politics of LGBTI Asylum: How the State Deals with the SOGI Framework' (2021) 34 Journal of Refugee Studies 1454.
123 ibid 1457.
124 Fernandez (n 76) 204.

However, it has been shown that such an understanding of discretion reasoning fosters absurd consequences and only leads to different re-configurations of exclusion. Similarly, the application of high standards of credibility can be read as an attempt to protect the forced/voluntary divide from 'bogus' asylum seekers and 'fake' LGBTIQ+ 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. Instead, 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.

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 has already unveiled the detrimental, even absurd consequences of the effort to enforce the binary and ensure that those migrants who cross borders voluntarily are not recognized as refugees. Before proceeding to the 'external' critique, however, and with a view to providing a full account of the impasses and aporias mentioned in the introduction, the full range of paradoxical outcomes of a purely legal, internal understanding of the refugee system should be completed by paying attention to the 'other side' of the consequences of the forced/voluntary binary, meaning 'effectively' forced migrants who are wrongly excluded from refugeehood.

Across past decades, numerous scholarly voices pointed out the controversial limits of international protection. Focusing more on the absence of State protection than the cause of persecution, authors such as Alexander Betts, Andrew Shacknove, and James Hathaway tried to unveil the undue constraints of the current refugee definition and, conversely, to re-elaborate broader and more consistent definitions of refugeehood.[125] For example, Hathaway argued that '[f]ear 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'.[126]

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.[127]

If one understands the primary threats from which an individual can suffer in the absence of State protection as divided into three categories, 'persecution, vital (economic) subsistence, and natural calamities',[128] 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.[129]

125 Betts (n 25); 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.

126 Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (n 124) 120.

127 Betts (n 25) 362.

128 Shacknove (n 125) 278.

129 Recalling some previous clarifications, the observation that the current refugee system falls short of protecting some ostensibly 'deserving' individuals does not serve per se the purpose of supporting a broader, outright refusal of existing refugee/migrant categories nor does it aim, in this contest, at stressing a more general discontent with the nature of migration control. Rather, the acknowledgement of pragmatic failures favours the understanding of underlying issues affecting the undisputed application of existing categories and of the reasons why the balance between inclusion and exclusion, far from being self-evident and historically unchanged, evolves in certain ways at certain moments in time.

A contemporary understanding 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 consequences triggered by climate change, including mass displacement.[130] 'Climate' migration seems particularly challenging for international refugee law insofar as it disrupts the classic interpretations of persecution, actor of persecution, absence of State protection and 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. Overall, and for now, the lack of substitute international protection for those migrants who, while being forced to leave their countries, are excluded from recognition of refugee status is a pragmatic failure that testifies to the paradoxical consequences of the forced-refugee/voluntary-migrant binary and its reliance on external normative paradigms.

Looking at the intersection between these pragmatic failures and the Western-driven genealogy of the refugee system, it finally becomes clear how one example of an external normative paradigm can be retraced in the limited definition of refugeehood, which bears the burden of a non-legal normative weight linked to the hierarchic differentiation between civil-political and socio-economic rights.[131] Keeping in mind the predominance of the first set of rights in the liberal, Western worldview, 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 article, however, the focus should turn to a further example to fully grasp the role of external normative paradigms.

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 governance has already been noted in the previous sections through the contribution of Calogero Giametta. In his research, Giametta tried to find explanations for the recent enlargement of refugee protection to SOGIESC asylum seekers, concurrent with 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.[132]

On another level, previous sections dealing with discretion reasoning and disbelief have shown that, following Wessels' argument,[133] not only discretion reasoning, but also disbelief cannot be fully eliminated from asylum decision making because they represent a field of

130 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 American*, 23 March 2018) <https://www.scientificamerican.com/article/wave-of-climate-migration-looms-but-it-doesnt-have-to-be-a-crisis/> accessed 11 June 2025; Gregory White, *Climate Change and Migration: Security and Borders in a Warming World* (Oxford University Press 2011). See also, specifically concerning the EU context, Chiara Scissa, 'The Climate Changes, Should EU Migration Law Change as Well? Insights from Italy' (2022) 14 European Journal of Legal Studies 5.

131 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. It seems appropriate to point out that, while it is necessary to acknowledge the Western-driven foundations of the current refugee system, it should not be implied that existing non-Western regional refugee systems are free and untouched by this very genealogy. Quite differently, as has already been mentioned (n 23), their fundamental rationales and categories are impacted by the same binaries and divides under investigation here.

132 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.

133 See above Wessels (n 91); Wessels (n 109).

negotiation of the scope of refugee protection. To unveil the absurd consequences determined by the deployment of discretion and disbelief as alleged solutions to the paradox of the voluntary/forced divide, this article has both highlighted 'internal' contradictions of the system and some of its 'external', pragmatic failures. Accordingly, the research has shown that there is no real legal way out of the binary and that, actually, the very working of the binary does not appear to be possible only based on legal foundations. It is starting from these premises that the article proposes that more resolutive answers should be sought beyond the legal, 'neutral' realm, thus turning to external normative paradigms.[134]

To try to make sense of all such circumstances and substantiate this external normative element, the conceptual framework of homonationalism offers a fruitful reference.

Various scholars already traced a shift in Western democracies towards their 'sexual' dimension, meaning elevating normative discourses associated with sexuality to a relevant role regarding the characterization of the democratic nature of the Nation-State.[135] 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 credited.[136] The establishment of this divide between progressive and retrograde nations has found an excellent discursive tool in the rights of certain minorities, such as women (hence the concept of femonationalism)[137] and the LGBTIQ+ community (hence homonationalism).[138] The latter conceptual framework can be beneficial in understanding certain dynamics of SOGIESC asylum.

The clear-cut distinction between an inclusive Global North and a homobitransphobic Global South can be retraced even in the introduction of Hathaway and Pobjoy's article insofar as the authors explain the flows of SOGIESC asylum seekers from the South to the North as the predictable consequence of this divide.[139] More importantly, however, the discursive application of this homonational divide can offer a clearer lens to read the paradoxical implications 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 narrated normality. On the other side, being out and proud and being legible from a gender and sexuality point of view are requirements imposed on those who want to participate in homonationalist citizenship.

Through this process, those few who eventually are accepted among the many, the queer refugees, transform into two things. First, 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'.[140] Second, 'trophies of the West', testaments to the success of the Western mission of universal civilization. Sadly, caught at the intersection of these sexual-nationalist dynamics, in the eyes of Western States queer refugees are left with no agency and no story to tell but one: that of homonationalism and its excluding narratives.[141]

134 See more on the articulation of the main argument in three steps and the key importance of this last one to reach the conclusive reflections at the end of part 1.

135 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.

136 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.

137 Sara R Farris, *In the Name of Women's Rights: The Rise of Femonationalism* (Duke University Press 2017).

138 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.

139 Hathaway and Pobjoy (n 4) 316–318.

140 Giametta (n 8) 154.

141 Francesca Romana Ammaturo, 'The "Pink Agenda": Questioning and Challenging European Homonationalist Sexual Citizenship' (2015) 49 Sociology 1151, 1155; Fernandez (n 76) 206.

Homonationalist discourse in migration and asylum does not go without adverse consequences. As Spijkerboer argued in relation to the European case, SOGIESC asylum threatens to destabilize the dichotomy between the sexual 'us' and 'others'. If it is true that '[a]sylum law functions through a dichotomy between an idealised notion of Europe as a site characterised by human rights, and non-European countries as sites of oppression',[142] then the European asylum dilemma arises because 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.[143]

Lingering on the European context, the tension arising from this dilemma can be retraced in various legal instances, especially in the judicial discourse of both the CJEU and the ECtHR. Spijkerboer identified two such instances in two issues of refugee law that have already been analyzed in this article: the criminalization of homosexuality and the assessment of a person's sexual or gender identity.[144] Francesca Romana Ammaturo retraced a broader homonationalist discourse intrinsic in the ECtHR judicial discourse.[145] In particular, Ammaturo analyzed the cases *F v UK* and *I.N.N. v the Netherlands*[146] in which, she argues, the Court reaffirms the 'discourse of 'homophobic versus homophile' countries'[147] and 'reinforces a concept of European Sexual Citizenship that is strongly homonationalist in nature'.[148] Inasmuch as, in the cases mentioned by Ammaturo, the ECtHR did 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 a homophobic country.

Ammaturo's contribution seems particularly striking since it highlights two aspects that are relevant to this article. 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.[149] The second is the deconstruction of the European agenda on LGBTIQ+ rights that also extends to SOGIESC asylum, which makes it possible 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.

142 Spijkerboer (n 14) 221.
143 ibid 223.
144 ibid 223, 234. More specifically, Spijkerboer refers to the *Norris v Ireland* and *Dudgeon v UK* ECtHR cases and the *X, Y, and Z* CJEU case (n 1) regarding the first issue and to the *Van Kuck v Germany* ECtHR case and the *A, B, and C* CJEU case (n 115) with respect to the second issue (*Norris v. Ireland* App No 10581/83 (ECtHR, 26 October 1998); *Dudgeon v. United Kingdom* App No 7525/76 (ECtHR, 22 October 1981); *Van Kuck v Germany* App No 35968/97 (ECtHR, 12 September 2003). As mentioned before (text to n 117), the tension inherent in the assessment of one's sexual or gender identity does not come per se from the probatory requirement imposed on self-identification in asylum law, but rather from the interconnectedness of this circumstance with the detrimental consequences of the stereotyped credibility standards affecting SOGIESC asylum claimants.
145 Ammaturo (n 141).
146 *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).
147 Ammaturo (n 141) 1156.
148 ibid 1151.
149 ibid 1151, 1162.

5. CONCLUSION: DECONSTRUCTING THE BINARY THROUGH SOGIESC ASYLUM

5.1 Recollecting the findings of the research

This article endeavoured to understand if and to what extent SOGIESC asylum can be used to deconstruct the binary between 'forced' refugees and 'voluntary' migrants.[150] It is now possible to answer the research question affirmatively: SOGIESC asylum constitutes a symbolic field where the internal contradictions of its legal tenets reveal the constructedness and arbitrariness of the 'forced' refugees/'voluntary' migrants binary.

By analyzing the multiple roles of categories, the research showed that there is much more than 'just law' at play behind being labelled as a refugee or a migrant. It also argued that the binary between 'forced' refugees and 'voluntary' migrants does not exist per se as an independent legal construct. Conversely, this binary should be framed and rooted in its Western historical origins and political binds. In light of these considerations, the article 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, the research elaborated both on an 'internal' and an 'external' critique. From an internal point of view, the article 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 triggered two considerations. On the one hand, the absurd consequences of discretion reasoning and disbelief 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 central tenets of refugee law, shifting, for example, the burden of international protection from receiving States to the 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 fostered the acknowledgement that the refugee system only works with the support of external normative paradigms.

Therefore, from an external point of view, this article considered homonationalism as a conceptual framework for reading SOGIESC asylum and its entanglements. Through this lens, the research demonstrated how the inclusion of the queer refugee is conditional upon the satisfaction of strict normative criteria but then valuable for the reinforcement of Western sexual citizenship which defines itself by excluding the homobitransphobic 'others'. While the analysis of external normative paradigms in relation to the working of the binary only offered a first, partial contribution to the debate, the article showed the relevance of this research trajectory inasmuch as it proved that solely legal, 'neutral' analyses of the refugee system are destined to result in unsatisfactory, inconclusive answers.

Observing some pragmatic failures of the current refugee system, which does not effectively realize its promise to offer substitute protection to those forced to flee, two final considerations can be proposed. First, the binary between 'forced' refugee and 'voluntary' migrant should not be essentialized and, on 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. Second, SOGIESC asylum adds a layer to this frame insofar as it constitutes a symbolic field of negotiation for the construction of Western sexual citizenship against homobitransphobic 'others', the ambiguous relation between the universalizing afflatus

150 See more on the premises, framework and research question of the article in part 1 and section 2(1).

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 since not only is it politically and morally heavily signified, but it is 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 article neither argues that protecting LGBTIQ+ individuals from persecution constitutes an undesirable evolution of international refugee law nor that there is no genuine interest in human rights underlying SOGIESC asylum. Quite differently, this contribution aims to show the complex entanglements of SOGIESC asylum with broader structures, dynamics, and narratives moving far beyond humanitarianism and refugee law. In this sense, then, the conclusions reached by this article 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—or at least neutral since legal as well as legal since neutral—boundaries of international protection.[151] Precisely in this spirit, this article concludes with some final thoughts and possible ways forward.

In light of the historical and politicized dimension of SOGIESC asylum, particular attention should be paid 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. To this end, the article already remarked on the controversial aspect of the enlargement of refugeehood to SOGIESC asylum seekers compared to the hostility against LGBTIQ+ individuals of certain domestic environments. The research also applied the framework of homonationalism 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 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 Western human rights exceptionalism, it seems clear that rising homobitransphobic movements pose at least a challenge to the integrity of the homonationalist discourse. Whether this challenge will be met by a gradual downgrading of the level of protection of LGBTIQ+ rights which serves as a demarcation line between 'us' and 'them' or instead by a shift in the normative substratum that allows the exclusion of the 'others' is yet to be seen.

Turning to some constructive considerations, the overcoming of the exclusionary force of the binary should be fostered both on a legal and 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'.[152] According to her, even at the stage of imagination and creativity, the refugee paradigm is so rooted that it is difficult for lawmakers and scholars to even think of a radically different, valid alternative. Worsening this circumstance is a widespread concern, both among those actively engaged with the binary and those who cautiously criticize it, that leaving the Refugee Convention behind would jeopardize even the narrow protection that the international community currently manages to offer.

This article does not submit that this concern is misplaced. Indeed, considering the political aims steering the working of the binary, the fear of losing even the minor exceptions to States'

151 On this note, Janna Wessels has already demonstrated that 'the scope of refugee protection is, in fact, utterly unclear' (Wessels (n 82) 247).

152 Jaya Ramji-Nogales, 'Moving Beyond the Refugee Law Paradigm' (2017) 111 AJIL Unbound 8, 11.

tight border control is understandable. However, it suggests that a critical and deconstructive approach to the binary is not bound per se to result in 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'.[153] Similarly, the fear of compromising refugee protection should not lead to the essentialization of the current definition of refugeehood, the reinforcement of the exclusion of those who do not fit into it, and the moral characterization of those who do as somehow 'deserving'.

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

> [r]egional 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.[154]

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.

Ultimately, the imagination and the development of additional alternatives cannot but pass through a consideration regarding scholars' role in their activity of knowledge production. While not foregrounding the idea that refugee law should get rid of categories, this article suggests that an attentive, critical approach to categories and the refusal of 'categorical fetishism'[155] are two necessary elements to allow the production of knowledge that aims to be unbound from the exclusionary logic of the current binary. Categories are indeed essential to the functioning of the current legal system. Nevertheless, their content and mutual relations should not be taken for granted: they should not be normalized. Conversely, legal categories should be accounted for through their genealogy and constructedness.[156] In this sense, scholars approaching refugee and migration law categories should be critical of moral superstructures attached to legal statuses. Accordingly, the scholar's role should be to debunk normative binaries that divide border crossers among deserving and undeserving, true and fake, forced and voluntary.

Beyond this, further reflections on the potential of queer approaches to re-imagine the relations between law and the use of categories are better left for future research.

153 Hamlin (n 7) 161.
154 ibid 161–162. See above (nn 23,131) for some *caveat* regarding the potential of such regional definitions.
155 Crawley and Skleparis (n 30) 60.
156 Cf. Crawley and Skleparis (n 30).