

# ‘RAINBOW STATELESSNESS’ — BETWEEN SEXUAL CITIZENSHIP AND LEGAL THEORY: EXPLORING THE STATELESSNESS–LGBTIQ+ NEXUS

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*This article responds to the literature gap within both discourses on ‘sexual citizenship’ and statelessness studies on the nexus between statelessness and sexual orientation, gender identity and expression, and sex characteristics (‘SOGIESC’). It explores the intersectional experiences of stateless lesbian, gay, bisexual, transgender, intersex and queer plus (‘LGBTIQ+’) individuals as well as circumstances in which discrimination on SOGIESC grounds can cause statelessness for LGBTIQ+ persons or their children. In addition to rare reports of arbitrary deprivation of citizenship from LGBTIQ+ persons, the non-recognition of post-transition statuses and intersex realities may lead to situations of statelessness. Finally, complex legislation and administrative practices around assisted reproductive technology — and especially international commercial surrogacy — can leave children born within ‘rainbow families’ at particular risk of statelessness. In arguing that a global nexus does indeed exist between SOGIESC and statelessness, this article calls for further empirical research in order to provide greater nuance and context-specific understandings of the intersectional experiences and causes of statelessness for LGBTIQ+ individuals around the world.*

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## I INTRODUCTION: A NEXUS UNEXPLORED?

Obviously, some percentage of immigrants and stateless persons are sexual minorities. Whether one names this fact ‘intersectionality’ or ‘multiple oppressions’ or simply common sense, it is important to remind ourselves that noncitizens and sexual minorities are not mutually exclusive groups.<sup>1</sup>

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<sup>1</sup> Ruthann Robson and Tanya Kessler, ‘Unsettling Sexual Citizenship’ (2008) 53 *McGill Law Journal* 536, 560.

Given the stated ‘obvious-ness’ of this assertion, and the fact that its authors made their point more than a decade ago, it is both striking and surprising that there remains scarce academic work published on statelessness relating to ‘sexual minorities’. This article considers the reasons for the lack of critical attention to such a nexus, and studies the implications for individuals not considered as citizens of any state who simultaneously identify as lesbian, gay, bisexual, trans, intersex or queer plus (‘LGBTIQ+’).<sup>2</sup> In addition to the possible ‘intersectional’ marginalisation or double vulnerability associated with such profiles, the article also explores (risks of) statelessness arising from discrimination on the basis of sexual orientation, gender identity and expression, and sex characteristics (‘SOGIESC’) including for children born within the context of ‘rainbow families’.<sup>3</sup>

This article uses ‘LGBTIQ+’ as an inclusive umbrella term for various sex/gender/sexuality identities and expressions that differ from heterosexual, cisgender, binary norms, and considers it as an effective synonym for ‘sexual minorities’ as used by Ruthann Robson and Tanya Kessler above. The term ‘rainbow family’ refers to a non-traditional, non-heteronormative family unit that ‘consists of at least one parent (to-be) who identifies *themselves* as lesbian, gay, bisexual, trans, intersex or queer [plus]’.<sup>4</sup> Statelessness, for the purpose of this study, is understood according to the established legal definition contained within the 1954 *Convention Relating to the Status of Stateless Persons* (‘1954 Convention’): that is when a person ‘is not considered as a national by any State under the operation of its law’.<sup>5</sup> However, determining the application of this definition can be challenging in practice, leading to complicated grey areas where individuals are potentially ‘stuck in a situation where they cannot prove their nationality and equally cannot prove their statelessness’.<sup>6</sup> As such, this article considers cases that appear to fit the spirit of the 1954 *Convention* definition, notwithstanding the possible evidentiary challenges in definitively proving the application of this status.

Besides intermittent — and sometimes sensationalist — media coverage of a small number of particularly compelling cases,<sup>7</sup> alongside limited reporting by advocacy campaign groups,<sup>8</sup> little has been written about statelessness for

<sup>2</sup> While using the acronym LGBTIQ+ as a convention, the author acknowledges the existence of, and diversity in individual preference for, other variants of the acronym. It is also recognised that identification with any of the signifiers included within the acronym may be fluid and/or overlapping, eg some intersex or trans individuals may identify as gay, lesbian, bisexual or queer while others may not. As such, the terms are here employed in a manner inclusive of the variety of identities and expressions associated with each category.

<sup>3</sup> The author recognises the inclusive evolution of the concept of sexual orientation and gender identity from the original Yogyakarta Principles published in 2007 to SOGIESC in the 2017 supplement. See ‘The Yogyakarta Principles’, *Yogyakarta Principles Plus 10* (Web Page) <<https://yogyakartaprinciples.org/>>.

<sup>4</sup> Network of European LGBTIQ\* Families Associations, ‘Rainbow Families: Myths and Truths about LGBTI\* Parenting’ (Presentation, European Economic and Social Committee, 20 May 2019) 2 <<http://nelfa.org/inprogress/wp-content/uploads/2019/05/NELFA-presentation-20052019-shorter.pdf>>.

<sup>5</sup> *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 1 (‘1954 Convention’).

<sup>6</sup> Laura van Waas, ‘Unpacking Statelessness’ in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *Understanding Statelessness* (Routledge 2017) 57.

<sup>7</sup> Many of these cases are cited within the later Parts of this article.

<sup>8</sup> See, eg, the work of Network of European LGBTIQ\* Families Associations in the European context: ‘Projects’, *Network of European LGBTIQ\* Families Associations* (Web Page) <<http://nelfa.org/what-we-do/projects/>>.

LGBTIQ+ persons. In academia, a scoping of the issue has been noticeably absent. Indeed, as a researcher attending conferences on statelessness over the last decade, I have observed how consideration of SOGIESC has repeatedly been left off the agenda. This was further noted at an expert roundtable on ‘statelessness, gender and intersectionality’ at the 2019 World Conference on Statelessness in The Hague.<sup>9</sup> The absence of critical consideration of the connections between SOGIESC and statelessness has left the question of a possible nexus unexplored.

I think there is so little attention to this intersection because we are taboo everywhere. Yet it is a chronic violation of human rights that is not even being discussed.<sup>10</sup>

This article argues that a SOGIESC–statelessness nexus does very much exist, with LGBTIQ+ stateless persons experiencing the resultant complexities across the world’s continents. The effects manifest variously as individuals navigate administrative and judicial processes, security apparatuses and their everyday lives within and across legal jurisdictions. Before delving into an exploration of the nexus itself, this article first considers possible reasons for the relative lack of academic attention that has to date been shown to ‘rainbow statelessness’ — that is, statelessness intersecting with SOGIESC. It proposes a two-part explanation linked to the respective focuses of the main disciplinary areas that might have been expected to cover such an issue: namely the discourses around ‘sexual citizenship’ on the one hand and the relatively new discipline of statelessness studies on the other.

These two fields of academia have operated largely in isolation, with each generating its own body of literature discrete from the other. The non-intersection between the two fields has resulted in: i) a lack of consideration of statelessness by those working outside disciplines dominated by legal approaches; and ii) a lack of intersectional approaches that go beyond the legislative frames dominant within statelessness studies. In contrast, there is a comparatively rich literature emerging at the intersection between queer theory/sexual citizenship and refugee studies, with growing attention now being paid to the intersectional experiences of LGBTIQ+ asylum seekers and refugees in various contexts around the world.<sup>11</sup> The four-year research project ‘Sexual Orientation and Gender Identity Claims of Asylum (SOGICA): A European Human Rights Challenge’, which is run by the University of Sussex (United Kingdom), has also produced a significant number of academic outputs exploring LGBTIQ+ experiences within the European asylum process.<sup>12</sup>

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<sup>9</sup> ‘Statelessness, Gender and Intersectionality: Towards a More Nuanced Understanding of Who Is Stateless, Why and What This Means for Our Work’ (Roundtable, World Conference on Statelessness, 26–28 June 2019). This roundtable was proposed by the European Network on Statelessness: *World Conference on Statelessness Report 2019: Building a Global Movement* (Report, Institute on Statelessness and Inclusion 10 December 2019) 12 <[https://files.institutesi.org/World\\_Conference\\_on\\_Statelessness\\_Report\\_2019.pdf](https://files.institutesi.org/World_Conference_on_Statelessness_Report_2019.pdf)>.

<sup>10</sup> Interview with Eliana Rubashkyn (Thomas McGee, 8 January 2020), an intersex person from Colombia who spent years as a stateless person.

<sup>11</sup> See, for example, the special issue entitled: ‘Queer Migration, Asylum, and Displacement’ (2016) 17(8) *Sexualities*. See also Emily Kofoed, ‘Queering Images of Citizenship: Rhetoric, Representation and LGBTI Refugees’ (PhD Dissertation, Georgia State University, 8 December 2016); Senthoran Raj, ‘A/Effective Adjudications: Queer Refugees and the Law’ (2017) 37(4) *Journal of Intercultural Studies* 453.

<sup>12</sup> Project website: *SOGICA* (Web Page) <<http://www.sogica.org/en/>>.

After further examination of the literature gaps within each of the fields of ‘sexual citizenship’ discourse and statelessness studies, this article goes on to present an exploratory review of the SOGIESC–statelessness nexus. It consults existing relevant literature from academic, media and advocacy sources, including where the issue is framed outside the terms of SOGIESC and/or statelessness, as well as providing a small number of case study examples to highlight the intersecting and causal nature of the relationship between SOGIESC and statelessness. This sample of personal experiences is included to highlight real-life situations and give an indication of possible constellations of circumstances in which the nexus might be manifested. Nonetheless, given the variation in legislations, administrative procedures and social perceptions relating to different issues of recognition (eg family composition, sex/gender transition, surrogacy) across jurisdictions for different profiles of LGBTIQ+ persons according to ethnicity, race, social class etc, further empirical work on nuanced intersectional experiences is certainly needed. Fieldwork is therefore necessary to flesh out case-specific contextual understandings of the nexus in practice.

### A Sexual Citizenship

Developing out of the intersection between citizenship studies and queer theory, the concept of ‘sexual citizenship’ has emerged as a ‘burgeoning field’ over the last two decades.<sup>13</sup> In 1993, David Evans introduced and popularised the term to highlight how prevalent models of citizenship are constructed on heterosexist, patriarchal principles.<sup>14</sup> Use of the term has evolved within social and political theory as a tool to situate — or insert — sexual politics within the dominant understandings and experiences of citizenship. The birth of the ‘sexual citizen’, argues Jeffery Weeks, was necessary ‘because of the new primacy given to sexual subjectivity in the contemporary world’.<sup>15</sup>

Drawing on Marshallian foundations,<sup>16</sup> proponents of ‘sexual citizenship’ discourse have tended to utilise citizenship as a frame for discussing identity-based claims for rights and recognition. Thus, broadening the scope of established citizenship models has led to the production of feminist, sexual and queer variants that reinscribe subjectivities excluded by the hegemony of presumptively masculine heteronormativity.<sup>17</sup> As such, they have conceived of citizenship in somewhat abstract terms, often conflating it with broader notions of membership, participation and belonging than the strict legal definition of being formally recognised as a citizen of a particular state. Indeed, Weeks refers to citizenship as ‘a useful metaphor, condensing a range of cultural and political practices that embrace a whole set of new challenges and possibilities’.<sup>18</sup> In this sense, citizenship has become a contested space. It is thus a site for inclusionary claim-making (eg rights to same-sex marriage, recognition of LGBTIQ+ relationships); simultaneously, however, it is also the focus for resistance against losing radical

<sup>13</sup> Diane Richardson, ‘Rethinking Sexual Citizenship’ (2017) 51(2) *Sociology* 208, 209.

<sup>14</sup> David Evans, *Sexual Citizenship: The Material Construction of Sexualities* (Routledge 1993).

<sup>15</sup> Jeffery Weeks, ‘The Sexual Citizen’ (1998) 15(3–4) *Theory, Culture & Society* 35.

<sup>16</sup> Thomas Humphrey Marshall, *Citizenship and Social Class* (Cambridge University Press 1950).

<sup>17</sup> Leti Volpp, ‘Feminist, Sexual, and Queer Citizenship’ in Ayelet Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 153.

<sup>18</sup> Weeks (n 15) 37.

difference and being assimilated into mainstream structures since ‘[d]e-gaying gayness [can] fortify homophobic oppression’.<sup>19</sup>

Concepts of ‘sexual citizenship’ — or as Ken Plummer prefers it, ‘intimate citizenship’ — reconfigure the public/private divide, focusing on

the decisions people have to make over *the control (or not) over one’s body, feelings, relationships; access (or not) to representations, relationships, public spaces, etc.; and socially grounded choices (or not) about identities, gender experiences, erotic experiences.* It does not imply one model, one pattern or one way.<sup>20</sup>

Citizenship, with this expanded and more figurative meaning, advances a symbolic, rather imprecise, notion that is largely synonymous — or intertwined — with the social institutions of marriage and family, as well as reproduction and consumption practices. Following the Butlerian doctrine in queer theory,<sup>21</sup> many have considered citizenship as socially constructed and performed: something that we *do* rather than *have*.<sup>22</sup> This perhaps explains the lack of attention within ‘sexual citizenship’ discourses towards those who do not possess it in the formal, legal sense.

Indeed, sexual citizenship has been understood in many ways, but rarely has it dealt with the question of the official absence of the legal bond to any state *per se* — ie statelessness. The prominent discourses around the concept preoccupy themselves with marginalisation and assimilation of certain subjectivities within the structures of citizenship without sufficiently considering those who are excluded outside its confines: ie stateless persons. One further explanation for the absence of interest in statelessness within studies of ‘sexual citizenship’ may be that ‘its development has remained mainly outside of law’, as observed by pioneer in the field and sociologist, Diane Richardson.<sup>23</sup>

In their review of Brenda Cossman’s 2007 work,<sup>24</sup> Ruthann Robson and Tanya Kessler critique her and other sexual citizenship theorists for using metaphorical concepts of citizenship that are ‘too elastic to be useful in legal theorizing’.<sup>25</sup> They argue that ‘failing to address formal legal status erases individuals who do not have access to even the basic rights of citizenship’, adding that sexual citizenship ‘must be grounded in the legal consequences of sexual minorities’ access and denial of access to citizenship’.<sup>26</sup> More recent work on ‘trans citizenship’ has also recognised the need to ‘focus on the *legal* aspects of citizenship when considering the policy implications of gender diversity’, arguing that aspects of social citizenship are, for trans people, ‘intertwined with legal citizenship’.<sup>27</sup> Sharing Robson and Kessler’s concern about conceptions of sexual citizenship that

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<sup>19</sup> Leo Bersani, *Homos* (Harvard University Press 1995) 5.

<sup>20</sup> Ken Plummer, *Telling Sexual Stories: Power, Change, and Social Worlds* (Routledge 1995) 151 (emphasis in original).

<sup>21</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990).

<sup>22</sup> Engin Isin, ‘Performative Citizenship’ in Ayelet Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 500.

<sup>23</sup> Richardson (n 13) 210.

<sup>24</sup> Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulations of Sex and Belonging* (Stanford University Press 2007).

<sup>25</sup> Robson and Kessler (n 1) 535.

<sup>26</sup> *ibid* 535, 539.

<sup>27</sup> Roman Kuhar, Surya Monro and Judit Takács, ‘Trans\* Citizenship in Post-Socialist Societies’ (2018) 38(1) *Critical Social Policy* 99, 108 (emphasis added).

naturalise formal legal citizenship and presume it as always present, it is important to undertake study of statelessness in the legal sense, which has thus far been left out of the analysis of sexual citizenship.

### B Statelessness Studies

Meanwhile, the relatively recently ‘arrived’ academic discipline of statelessness studies has been dominated by the endurance of legal approaches. Leading scholars and practitioners have described how it ‘initially emerged as the study of nationality law, leading over time to the exploration, interpretation and annotation of international standards and of domestic norms relevant to statelessness’.<sup>28</sup> Pioneering work on statelessness focused on the legislative origins of the problem,<sup>29</sup> while later statelessness research has continued to take nationality laws as its starting point, considering their compatibility with the international standards set out by the two *Statelessness Conventions*.<sup>30</sup>

This legalistic focus has naturally led to critical concern about the persistence of gender-discriminatory provisions embedded within the nationality laws of 25 countries around the world. A body of literature has consequently developed focusing on gender-discriminatory nationality laws (‘GDNL’) that prevent mothers from being able to pass on their nationality to their children on an equal basis with fathers.<sup>31</sup> In 2014, the Global Campaign for Equal Nationality Rights was established as a coalition between local, regional and international actors to conduct concentrated advocacy on this issue.<sup>32</sup> Recently published research, however, has highlighted the lack of feminist, queer and intersectional attention to statelessness, and that gendered consideration has been largely limited to the single issue of GDNL, resulting in the ‘compartmentalization of gender’ in statelessness scholarship.<sup>33</sup> More generally, the ‘(non)emergence’ of statelessness as a recognised international campaigning issue compared to other world problems may have limited attention from those working in other relevant fields.<sup>34</sup>

<sup>28</sup> Mark Manly and Laura van Waas ‘The State of Statelessness Research: A Human Rights Imperative’ (2014) 19(1–2) *Tilburg Law Review* 3, 5.

<sup>29</sup> Paul Weiss, *Nationality and Statelessness in International Law* (Kluwer 1979).

<sup>30</sup> 1954 Convention (n 5); *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975). See also Carol Batchelor, ‘Statelessness and the Problem of Resolving Nationality Status’ (1998) 10(1) *International Journal of Refugee Law* 156; David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press 2008); Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2008); Katia Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons across EU States* (Brill Nijhoff 2018).

<sup>31</sup> Laura van Waas, Zahra Albarazi and Deirdre Brennan, ‘Gender Discrimination in Nationality Laws: Human Rights Pathways to Gender Neutrality’ in Niamh Reilly (ed), *International Human Rights of Women* (Springer 2018) 193; Radha Govil and Alice Edwards, ‘Women, Nationality and Statelessness: The Problem of Unequal Rights’ in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 169.

<sup>32</sup> *Global Campaign for Equal Nationality Rights* (Web Page) <<https://equalnationalityrights.org>>.

<sup>33</sup> Deirdre Brennan, ‘Statelessness and the Feminist Toolbox: Another Man-Made Problem with a Feminist Solution?’ (2019) 24(2) *Tilburg Law Review* 170, 172.

<sup>34</sup> Lindsey Kingston, ‘“A Forgotten Human Rights Crisis”: Statelessness and Issue (Non)Emergence’ (2013) 14(2) *Human Rights Review* 73–87. I note that keyword searches for ‘stateless/ness’ on leading LGBTIQ+ non-governmental organisation websites tend to return no relevant hits. This was the case for Stonewall, OutRight Action International, UKLGIG and The Kaleidoscope Trust among others when surveyed in January 2020.

Given the above, and the failure of statelessness ‘to break free from its legal origins’,<sup>35</sup> the dearth of work around SOGIESC within statelessness studies is perhaps unsurprising. Besides passing references to the issue of SOGIESC within the wider context of statelessness for children born by surrogacy,<sup>36</sup> which has itself attracted increased attention within statelessness studies in recent years,<sup>37</sup> the literature barely touches on (risks of) statelessness for LGBTIQ+ individuals. As statelessness studies has recently begun to incorporate more interdisciplinary and intersectional approaches, researchers have considered the respective nexuses between statelessness and other phenomena, such as human trafficking<sup>38</sup> and displacement,<sup>39</sup> and it is high time to add the SOGIESC–statelessness nexus to the agenda. Indeed, a recent blog post by the European Network on Statelessness advocates for the need to bring intersectional feminist analysis to statelessness work, as well as ‘to find common ground and build coalitions with activists working on intersecting issues like child rights, women’s rights, LGBT+ rights, and others’.<sup>40</sup>

Further reasons for the absence of including SOGIESC within statelessness studies may relate to the limited visibility of the issue. Unlike ethnic or religious communities significantly affected by statelessness (such as the Kurds of Syria or Rohingya of Myanmar), LGBTIQ+ individuals experiencing (risk of) statelessness are likely to be much more dispersed throughout society. Individuals affected by the SOGIESC–statelessness nexus may further choose not to come forward and readily disclose their status of double marginalisation — in public or with those working on either issue. This has been demonstrated to be the case in studies of undocumented LGBTIQ+ individuals (within the ‘UndocuQueer’ movement) who have had to contend with ‘being in the shadows and the closet simultaneously’.<sup>41</sup> There may be pressure to identify with one oppressed identity over the other, as well as stigmatisation and marginalisation of each issue within movements focused on the other.

Discrimination on SOGIESC grounds that could result in statelessness can also be somewhat invisible given that it is unlikely to feature explicitly in nationality laws in the way of gender discriminatory (that is, anti-mother) provisions on passing citizenship onto children. Rather, it may take more ad hoc forms of

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<sup>35</sup> Jason Tucker, ‘Why Here? Factors Influencing Palestinian Refugees from Syria in Choosing Germany or Sweden as Asylum Destinations’ (2018) 6 *Comparative Migration Studies* 1, cited in Brennan (n 33) 170.

<sup>36</sup> See, eg, Sanoj Rajan, ‘International Surrogacy Arrangements and Statelessness’ in Institute on Stateless and Inclusion (ed), *The World’s Stateless: Children* (Wolf Legal Publishers 2017) 380.

<sup>37</sup> See, eg, Claire Achmad and Sanoj Rajan, ‘Statelessness and Surrogacy’ (Panel, UNHCR and Tilburg University, Global Forum on Statelessness, 15 September 2014) <<https://www.unhcr.org/537c6e269.pdf>>. See also Claire Achmad, ‘2014: The Year International Surrogacy Came to the Fore’, *The Conversation* (Blog Post, 26 December 2014) <<https://theconversation.com/2014-the-year-international-surrogacy-came-to-the-fore-35495>>.

<sup>38</sup> Laura van Waas et al, *The Nexus between Statelessness and Human Trafficking in Thailand* (Wolf Legal Publishers 2015).

<sup>39</sup> Zahra Albarazi and Laura van Waas, *Statelessness and Displacement: Scoping Paper* (Report, Norwegian Refugee Council and Tilburg University 2016).

<sup>40</sup> Nina Murray, ‘Join the Feminist Revolution in Work to Address Statelessness’, *European Network on Statelessness* (Blog Post, 18 July 2019) <<https://www.statelessness.eu/blog/join-feminist-revolution-work-address-statelessness>>.

<sup>41</sup> Jesus Cisneros and Christian Bracho, ‘Coming Out of the Shadows and the Closet: Visibility Schemas Among Undocuqueer Immigrants’ (2019) 66(6) *Journal of Homosexuality* 715, 716.

discrimination (at the hands of individual officials) or manifest itself at the interface of complex constellations of different regimes of recognition/non-recognition (eg of non-traditional family units, sex/gender transition and surrogacy). Finally, the fact that LGBTIQ+ persons are not referenced in the literature as profiles at risk of statelessness may — in self-fulfilling fashion — further compound the lack of attention received. For example, both statelessness and SOGIESC are separately reported as being missed or misunderstood during the process of assessing asylum claims.<sup>42</sup>

## II INTERSECTIONAL EXPERIENCES

As a #stateless #LGBT #immigrant of South African descent I have many aspirations sadly having no protection is inconvenient. #IBelong (USA, 2016)<sup>43</sup>

I'm just so tired of being #stateless in Lebanon. Queer, in love, stateless, and unheard from all nations. What can tears and melancholy do in this case? [...] When a stateless LGBT tells you the world is too much, that's when you have to check the privilege of belonging. #IBelong (Lebanon, 2019)<sup>44</sup>

The term ‘intersectionality’ was coined by black feminist scholar Kimberlé Williams Crenshaw in 1989 as an approach to challenge ‘the conceptual limitations of the single-issue analyses’ for multiply-burdened subjectivities.<sup>45</sup> While the UndocuQueer movement mentioned in the previous section emerged as a term and community-based advocacy movement to represent the intersection of undocumented individuals identifying as queer in the United States of America, (to the knowledge of the author) no analogous representation exists anywhere in the world for LGBTIQ+ individuals who are stateless. Exploring the factors behind the emergence of UndocuQueer — or indeed the non-emergence of a ‘StatelessQueer’ movement — is an exercise far beyond the scope of the present article. That said, and despite their different non-citizen statuses, the body of academic work on UndocuQueer is helpful in framing some of the broader issues that also impact stateless LGBTIQ+ persons. As one scholar conducting field work in San Francisco states:

Most of UndocuQueers ... do not fall into the reified category of mobile humans who cross physical borders ... due to their undocumented status [they] are not able to move freely.<sup>46</sup>

<sup>42</sup> *Addressing Statelessness in Europe's Refugee Response: Gaps and Opportunities* (Report, European Network on Statelessness and Institute on Statelessness and Inclusion May 2019) 3; *Missing the Mark: Decision Making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims* (Report, UK Lesbian & Gay Immigration Group September 2013).

<sup>43</sup> VB Giovanni (Twitter Post, 28 June 2016) <[https://twitter.com/bruna\\_giovanni/status/747577611560361985](https://twitter.com/bruna_giovanni/status/747577611560361985)>.

<sup>44</sup> Joey (Twitter Post, 22 August 2019) <<https://twitter.com/monkeyduped/status/1164525565573050368>>.

<sup>45</sup> Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ [1989] *The University of Chicago Legal Forum* 139, 149.

<sup>46</sup> Mara Pieri, ‘Undoing Citizenship, Undocumented Queer Activism and Practices of Rights’ (2016) 24 *Revista Interdisciplinar da Mobilidade Humana* 105, 109.



Stateless LGBTIQ+ persons are generally in a similar position, and likewise ‘find themselves at the intersection of two already marginalized groups’.<sup>47</sup> The Williams Institute at University of California, Los Angeles, which researches sexual orientation and gender identity law and public policy, published an estimate in 2013 of at least 267,000 LGBT-identified adult undocumented immigrants living in the United States<sup>48</sup> — some of whom may in fact be considered stateless. This figure is likely a significant under-estimate. Indeed, more recent data shared with the author by researchers on the same project has documented over 317,000 self-identifying LGBT non-citizens in the state of California alone.<sup>49</sup>

Further, a Center for American Progress report highlights challenges faced in terms of health insurance gaps,<sup>50</sup> employment insecurity and workplace discrimination,<sup>51</sup> as well as the current lack of roadmap to citizenship for UndocuQueer individuals.<sup>52</sup> It presents evidence of marginalisation and measured disadvantage (eg income disparity) experienced by each of the LGBTIQ+ and undocumented demographic groups as a logical basis for the additional hardships in the intersectional context.<sup>53</sup> In a study of statelessness across four states, it has elsewhere been found that statelessness lowers a household’s per capita income by 33.7 per cent and reduces house ownership by 59.7 per cent.<sup>54</sup> In the absence of sufficient data specifically surveying experiences of stateless LGBTIQ+ individuals, we are left to infer that their intersectional hardships might be similar to those recorded among the UndocuQueer profile. Indeed, a number of reported anecdotal experiences of LGBTIQ+ stateless individuals appear to confirm the above assumptions. For example, Ghadeer, a 22 year old working class transsexual stateless Bidun from Kuwait informed Human Rights Watch that she was ‘unable to find and keep a job due to her gender identity and lack of citizenship’.<sup>55</sup>

Similarly, a 24 year old stateless trans woman told human rights organisations in Lebanon about the challenges in finding suitable accommodation:

My experience with housing has been a struggle ... . You have to give your ID when you’re renting, so that makes things much more difficult for me [because my ID says male]. I did something clever and used my friend’s ID (she’s a cisgender

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47 Crosby Burns, Ann Garcia and Philip E Wolgin, *Living in Dual Shadows: LGBT Undocumented Immigrants* (Report, Center for American Progress March 2013) 1 (‘*Living in Dual Shadows*’).

48 Gary J Gates, *LGBT Adult Immigrants in the United States* (Report, The Williams Institute March 2013) 2.

49 Unpublished data shared with the author through personal correspondence with Kerith Jane Conron, the Williams Institute, January 2020.

50 *Living in Dual Shadows* (n 47) 9.

51 *ibid* 8.

52 *ibid* 12.

53 See *ibid*.

54 Brad Blitz, ‘The Cost of Statelessness’, *Kingston University London* (Expert Opinion Post, 2 October 2011) <<https://www.kingston.ac.uk/news/article/931/02-oct-2011-the-cost-of-statelessness/>>.

55 Interview with Ghadeer, (Human Rights Watch, Kuwait City, 14 February 2011), cited in ‘*They Hunt Us Down for Fun*’: *Discrimination and Police Violence against Transgender Women in Kuwait* (Report, Human Rights Watch January 2012) 29 (‘*They Hunt Us Down for Fun*’).

woman) to rent the apartment. I haven't disclosed my identity to any landlords, so I won't get into trouble with them. I try my best to hide it.<sup>56</sup>

LGBTIQ+ stateless persons may encounter challenges in both the job market and the accommodation hunt due to the combination of lacking official papers that would be expected for a citizen and the prevalence of social stigma in some locations.

On the more psychological level, the 'UndocuQueer stress' emanating from the cumulative effect of constantly feeling unsafe, and compounded security risks triggered by the double marginalised identity, also translate well to the experiences of the stateless LGBTIQ+ based on the selection of cases available to inform current understandings.<sup>57</sup> The experiences of fear, anxiety and rejection that have been recorded by researchers working with the UndocuQueer movement are reflected in the accounts of stateless LGBTIQ+ persons reproduced below. Firstly, in reporting the story of the transsexual stateless Bidun from Kuwait mentioned above, Human Rights Watch writes that:

The combination of Ghadeer's gender identity, statelessness, and poverty has amplified her vulnerability at the hands of the police and society at large. The dual stigma attached to being Bidun [stateless] and transsexual greatly increased her vulnerability to extortion and violence. ... Since 2008 Ghadeer said that police had arrested her nine times for allegedly violating article 198 [of the Kuwaiti *Penal Code*] and detained her each time between four and twelve days. In 2009, a Kuwaiti court fined her 1000 KD (\$3000) for 'imitating the opposite sex'.<sup>58</sup>

The mutually exacerbating security risks of being both LGBTIQ+ and stateless are likewise highlighted through the below narrative of Joseph in Lebanon, who was interviewed by the author for the purpose of this research.<sup>59</sup>

Identifying as a stateless person who is also a LGBTIQ+ activist, Joseph was born to a Lebanese mother and Armenian father from Syria. When his parents got married, his father was 'wanted' by the Syrian government for not having completed his military service so when Joseph and his brother were born, they were only issued baptism certificates without the parents being able to complete the full birth registration process in Syria. Also, Lebanese women cannot pass on their citizenship to children due to gender discriminatory provisions within the nationality law. When his father was ultimately exempted from military service, Joseph's mother sought to regularise the children's status by issuing the necessary paperwork from Syria. However, around this time the Syrian conflict began and the city of Aleppo (where Joseph should have been registered) was the site of major atrocities. After a difficult year of undocumented displacement in Lebanon, he managed to acquire a *laissez-passer* to facilitate his movement across the ubiquitous checkpoints on Lebanon's roads.

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<sup>56</sup> Interview with Selena (Human Rights Watch, Beirut, 12 November 2018), quoted in '*Don't Punish Me for Who I Am*' *Systemic Discrimination against Transgender Women in Lebanon* (Report, Human Rights Watch 2019) <<https://www.hrw.org/report/2019/09/03/dont-punish-me-who-i-am/systemic-discrimination-against-transgender-women-lebanon>>.

<sup>57</sup> Jesus Cisneros and Christian Bracho, 'Undocuqueer Stress: How Safe are "Safe" Spaces, and for Whom?' (2019) *Journal of Homosexuality* 1.

<sup>58</sup> *They Hunt Us Down for Fun* (n 55) 29; *Kuwaiti Penal Code* (Kuwait) Law No 16 of 1960, art 198.

<sup>59</sup> Interview with Joseph Poladoghly (Thomas McGee, 11 January 2020). Interviewee consented to have his name known.

I'm currently in a relationship with a human rights student who lives in Paris. I had a love story with this man, and it was all too great, up until he had to leave. Those airport trips are the nastiest, especially when you want to say goodbye to the person that you love, but you can't show too much affection. Being stateless and queer makes it a whole different experience: there's a constant fear, persistent anxiety. Once, I was held at a checkpoint and my phone was illegally checked. They found a photo of me and my partner. The matter was exacerbated with my being stateless. Too many things for a bored officer who wants someone to prey on. The thing is, I not only have to live with sequestered rights as a human being, I also have to compromise my sexuality, my physical presence, it goes beyond paperwork. It goes without saying that being stateless can also make any problem I encounter due to my sexual orientation and gender identity much worse. Imagine if one day I am taken to Hobeish police station because of an 'act of public immorality'<sup>60</sup> and I do not have enough documents to get myself a defence. ... You cannot be yourself. You can only compromise to a certain degree. There are many ways the impact takes its full effect, but I'm not sure I'll be able to explain it at the moment. It needs a clear mind.

Joseph's narrative here adds to the evidence that statelessness and SOGIESC having intersectional impacts upon the lived experiences of LGBTIQ+ individuals affected by statelessness. The remaining part of this article focuses on establishing a body of cases where SOGIESC and associated discrimination may play a causal role in putting LGBTIQ+ persons or their children at risk of statelessness.

### III SOGIESC-DISCRIMINATION AS A CAUSE OF STATELESSNESS

The possibility of becoming, or being made, stateless as the result of SOGIESC has not been adequately examined in academic literature. Perhaps this is because affected individuals are geographically dispersed and presumed to be in relatively small numbers compared with other causes of statelessness. However, based on a review of existing literature (mostly media reports) and documentation of individual cases (largely identified through contact with actors working on statelessness and/or LGBTIQ+ rights), it is apparent that discrimination against LGBTIQ+ individuals resulting in (risks of) statelessness can take many forms. In the main part, the risks of becoming stateless are exacerbated by regimes of non-recognition of LGBTIQ+ realities, legislative disparity and prevalent structures/cultures of discrimination. The possibility of statelessness as the result of sex/gender transitions abroad or for children born to 'rainbow families' will be explored in further sections of this article.

Below is a presentation of situations in which LGBTIQ+ individuals might be rendered stateless through SOGIESC-discrimination, or through specifically homo-, trans- or intersex-phobic forms of discrimination. The various circumstances surveyed in the accompanying case studies suggest that LGBTIQ+ persons may be vulnerable to arbitrary deprivation of citizenship at all stages of life.

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<sup>60</sup> Hobeish police station traditionally handles all 'morality/*adab*'-related arrests in Beirut and is notorious for harsh treatment towards LGBTIQ+ individuals. See *'It's Part of the Job': Ill-Treatment and Torture of Vulnerable Groups in Lebanese Police Stations* (Report, Human Rights Watch 2013): <[https://www.hrw.org/sites/default/files/reports/lebanon0613\\_forUpload\\_1.pdf](https://www.hrw.org/sites/default/files/reports/lebanon0613_forUpload_1.pdf)>.

## A Arbitrary Deprivation of Citizenship

### 1 At Birth

For those born intersex in certain parts of the world, statelessness can be a life-long reality. Within a report on statelessness in East Africa, the United Nations states that intersex children often face difficulties in being issued with birth certificates in Kenya.<sup>61</sup> The 2014 landmark decision in which the Kenyan court ruled positively on the right to citizenship in the case of intersex child ‘Baby A’ is a significant development.<sup>62</sup> Another study covering Uganda, Kenya, and Rwanda similarly records that there has been some progress on the issue, with cases ‘successfully advocated ... for amendments around the legal recognition of intersex children — even without a definite sex assignment — as citizens’, yet it notes that ‘[t]here is, however, a lot of work needed to shift social attitudes to meet with legal progression. In all the three East African countries under this study, there is still a huge sense of statelessness for intersex people’.<sup>63</sup> While further research is needed to map out the nuances relating to this persistent ‘sense of statelessness’, the report suggests that children not easily identified as either male or female at birth continue to be at risk of statelessness.

On the issue of civil registration, lessons might be drawn from legal reforms that have taken place in Nepal to recognise transgender *meti* persons as belonging to a ‘third gender’. Prior to a 2007 Supreme Court ruling, many of this community were unable to obtain citizenship cards and were effectively stateless.<sup>64</sup> Their marginalisation was accompanied by targeted persecution from law enforcement officials. The change in the law, which was brought about through a petition from Nepalese non-governmental organisation ‘Blue Diamond Society’ has reportedly also led to a decrease of up to 98 per cent in police violence against members of the *meti* group.<sup>65</sup>

### 2 Through Marriage/Civil Partnership

Statelessness can also be triggered by the entry into a same-sex marriage or non-traditional civil partnership when not recognised by the country and society of citizenship. The story of Ghanaian citizen Stephen Kabutey Ofoi Caesar, who held a civil union with his American boyfriend in the USA, is a case in point. In

<sup>61</sup> Bronwen Manby, *Statelessness and Citizenship in the East African Community* (Study, UNHCR September 2018) <<https://data2.unhcr.org/en/documents/download/66807>>. On intersex children, see also United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Third to Fifth Periodic Reports of Kenya*, CRC/C/KEN/CO/3-5 (21 March 2016) [29]–[30].

<sup>62</sup> See *Baby ‘A’ (EA) v Attorney General*, Constitutional Petition No 266 of 2013 [2014] eKLR (Kenya).

<sup>63</sup> *Baseline Survey on Intersex Realities in East Africa: Specific Focus on Uganda, Kenya and Rwanda* (Report, Support Initiative for People with Congenital Disorders 2016) 25.

<sup>64</sup> Michael Bochenek and Kyle Knight, ‘Establishing a Third Gender Category in Nepal: Process and Prognosis’ (2012) 26(1) *Emory International Law Review* 11. See also *Pant v Nepal Government* [2007] Writ No 917 of the year 2064 BS (Supreme Court Division Bench of Nepal), translated in Yadav Pokharel (tr), ‘*Sunil Babu Pant and Others v Nepal Government*’ (2008) 2(1) *National Judicial Academy Law Journal* 261.

<sup>65</sup> Jean-Sébastien Blanc, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide* (Guide, Association for the Prevention of Torture 2018) 102–3.

response to a video of the ceremony circulating online, controversial Ghanaian lawyer, Dr Maurice Ampaw, launched a campaign calling for Caesar to be stripped of his citizenship.<sup>66</sup> Ampaw wrote on social media:

Ghana’s laws are against gay marriage and anal sex is illegal so if he as a Ghanaian has married a gay partner then he must be forced to renounce his citizenship or we have to denounce his citizenship in entirety because he is an illegality and ought to be refused visa at the embassy ... . He even ought to go ahead and denounce his Ghanaian citizenship because we would not allow someone who is gay and has married under gay laws to come and contaminate our people here.

It is unclear whether Caesar is in possession of another citizenship (noting that Ghanaian law does permit dual citizenship). That said, the actions of Ampaw and the reaction of the Ghanaian public have effectively rendered Caesar *persona non grata* in his home country. Should the government be susceptible to the pressure, they have potentially also turned Caesar into a stateless persons under international law.

### 3 *Ad Hoc Deprivation*

There have also been occasional reports of further cases of arbitrary deprivation based on SOGIESC discriminatory grounds where LGBTIQ+ persons have been targeted for their actual or perceived sexual orientation, gender identity/expression or sex characteristics. This is largely due to the state in question, or its representative officials, appearing to consider the LGBTIQ+ individual’s actions or existence as an existential threat to principles of national security or prescribed morality. A preliminary review of such cases suggests that generally SOGIESC-based discrimination leading to (risk of) statelessness takes place without such discrimination being formally embedded within nationality law, even when other anti-LGBTIQ+ provisions exist. Further research is required to examine the extent to which civil documentation officials or national intelligence services might be more likely to (abuse their authority to) deny LGBTIQ+ persons citizenship in jurisdictions where particular forms of SOGIESC are otherwise criminalised (eg through an anti-homosexuality bill). Presumably, however, LGBTIQ+ persons arbitrarily deprived of citizenship in socially conservative societies lacking legal protections against such discrimination would be practically challenged in appealing such decisions.

In view of the above, it is difficult to assess how widespread such cases might be. However, social media indicates, as with the Caesar case above, how calls for stripping citizenship from sexual minorities can be a popular conservative trope in certain parts of the world. For example, in 2012 Ugandan religious leader Joseph Sserwada called for Chris Mubiru, administrator of the national soccer team, to be declared stateless when the latter was convicted of sodomy.<sup>67</sup> This case highlights how incitement to deprivation of citizenship is framed as a punishment for deemed immoral sexual behaviour. Although lacking concrete case information,

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<sup>66</sup> Devin Randall, ‘Ghanaian’s Gay Wedding Ignites Uproar and a Lawyer Calling for Revoked Citizenship’, *Instinct Magazine* (online, 5 September 2017) <<https://instinctmagazine.com/ghanaians-gay-wedding-ignites-uproar-and-a-lawyer-calling-for-revoked-citizenship>>.

<sup>67</sup> Godfrey Olukya, ‘Ugandan Pastor Seeks to Make Homosexual Stateless’, *Africa Report* (online, 31 December 2012) <<https://www.theafricareport.com/6244/ugandan-pastor-seeks-to-make-homosexual-stateless/>>.

established journalist of the Middle East, Brian Whitaker, posted an interesting blog entry back in 2014 touching on links between arbitrary deprivation of citizenship and homophobia. Referring to well documented cases of denationalisation by the government, he states:

Homosexuality is working its way into the list of transgressions that can render someone undeserving of the social and legal title ‘Bahraini.’ Government loyalists often proclaim that opposition activists and political leaders ‘don’t represent me and don’t represent Bahrain.’ Occasionally, they finish with a quick note about how such people ‘represent the gays,’ firmly locating ‘the gays’ (and thus, the opposition) in direct contrast with ‘Bahrain.’ In many Twitter attacks, homosexuality is positioned as antithetical to the state itself.<sup>68</sup>

The prominent LGBTIQ+ activist and sociologist, Evgeny Shtorn, presents a case where statelessness may be considered to have resulted from discrimination against an individual for engaging in political advocacy on SOGIESC rights. Shtorn worked as researcher on LGBTIQ+ rights in Russia ‘where Putin [was] actively promoting anti-gay propaganda and where “state-sponsored homophobia” ha[d] become the norm’.<sup>69</sup> Originally from the Kazakh Soviet Socialist Republic, he moved to St Petersburg in 2000. After some years, he obtained a Russian passport. Later, however, and after renouncing his Kazakh citizenship, Shtorn discovered that his Russian passport had been cancelled without explanation. He lived in a stateless limbo for five years awaiting clarification and an opportunity to re-apply for Russian citizenship. During subsequent interrogation at the hands of the secret police as part of a crackdown on the LGBTIQ+ community in Russia, it became clear that the delays and ultimate refusal to resolve his citizenship problem were linked to Shtorn’s LGBTIQ+ activism. He told media that ‘[i]t was punishment for being an actor in the field of human rights’.<sup>70</sup> Eventually having to leave Russia, Shtorn now lives as a recognised refugee in Ireland, where he runs a community group for LGBTIQ+ asylum seekers for which he received the National LGBT Federation’s 2020 GALAS Person of the Year award.<sup>71</sup>

#### 4 On Vulnerable Ground

In addition to the good practice highlighted in the case of Nepal’s recognition of citizenship rights for third gender persons, South Asia also presents cause for concern in the present situation of neighbouring India. There, LGBTIQ+ individuals are reported to be fearful of losing their citizenship and are at risk of becoming stateless.<sup>72</sup> The names of most of the 20,000 members in the transgender community in the region of Assam have not been recorded in the controversial

<sup>68</sup> Brian Whitaker, ‘Homophobia and Nationalism: “Too Gay to Represent Bahrain”’, *Al-Bab* (online, 16 December 2014) <<https://al-bab.com/blog/2014/12/homophobia-and-nationalism-too-gay-represent-bahrain>>.

<sup>69</sup> Sorcha Pollak, ‘I’m 35 Years Old and I Feel Like My Life Is Turning into Nothing’, *The Irish Times* (online, 28 November 2018) <<https://www.irishtimes.com/life-and-style/people/i-m-35-years-old-and-i-feel-like-my-life-is-turning-into-nothing-1.3707162>>.

<sup>70</sup> *ibid.*

<sup>71</sup> *Queer Diaspora* (Web Page) <<http://queerdiaspora.com/>>; ‘LGBT+ Activists and Everyday Heroes Celebrated at 2020 GALAS Awards’, *GCN* (Web Page, 9 February 2020) <<https://gcn.ie/lgbt-heroes-celebrated-2020-galas-awards/>>.

<sup>72</sup> ‘India’s Transgender Protesters Fear Stateless Future’, *Agence France Press* (online, 31 December 2019).

recent updating of the National Register of Citizens.<sup>73</sup> This is largely due to an inability to present the necessary legacy documents to prove ancestry, since many transgender persons have lost regular contact with their families because of social stigma around their identity and lifestyles.<sup>74</sup> Similar challenges of acquiring documentation from estranged family members have been highlighted in the case of Gulalai, a transgender refugee from Afghanistan living in Pakistan.<sup>75</sup> These narratives demonstrate the further vulnerability of citizenship for LGBTIQ+ persons living in contexts of stigma and family rejection.

### B Post-Transition and Intersex Statelessness

In addition to the cases of arbitrary deprivation of citizenship outlined above, gaps and grey areas in legislation can present particular risks of statelessness for individuals undergoing transitions in their sex and gender identity/expression. In many states, the legal gender recognition of the post transition status is restricted to cases where surgery has taken place. It is often left to medical expert opinion to recognise whether or not transition has been completed, requiring the submission of medical and/or psychological/psychiatric evaluations to support the decisions.<sup>76</sup> This may be contrary to the self-identification of trans individuals themselves. In other countries, there is no legal mechanism to recognise such a transition at all.

Non-recognition of post-transition status may result in statelessness when the present (chosen) name, gender and physical appearance do not correspond with those included on the individual’s civil documents. One transsexual activist and asylum seeker from the Middle East now living in a western country where she has undergone surgery and received hormone therapy noted that the documents proving her citizenship from her home country no longer relate to her current appearance and identity:

I cannot use my passport as valid identification for any purpose because nobody would believe it is me. I think I am in theory still a citizen but my country doesn’t know about, and would never accept, my current status. The holder of that citizenship no longer exists, and I have no passport nor citizenship document in my current name, and am awaiting my asylum claim to be processed. I guess this makes me stateless in practice.<sup>77</sup>

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<sup>73</sup> Ditlekha Sharma, ‘Determination of Citizenship through Lineage in the Assam NRC Is Inherently Exclusionary’, *Engage: Economic & Political Weekly* (online, April 2019) <<https://www.epw.in/engage/article/determination-citizenship-through-lineage-assam-nrc-exclusionary>>.

<sup>74</sup> Ratnadip Choudhury, ‘Transgenders Find It Hard to Make It to Assam Citizens’ List’, *NDTV* (online, 14 August 2018) <<https://www.ndtv.com/india-news/assam-nrc-transgenders-find-it-hard-to-make-it-to-assam-citizens-list-1900280>>; Daman Kaur Sethi, ‘The NRC: Why, How and What Next?’ (Conference Paper, The State of the Global Protection System for Refugees and Migrants, Calcutta Research Group, 25–30 November 2018).

<sup>75</sup> Umer Ali, “‘I Don’t Want to Go Back to Afghanistan to Get Butchered’”, *News Deeply: Refugees Deeply* (online, 18 January 2017) <<https://www.newsdeeply.com/refugees/articles/2017/01/18/i-dont-want-to-go-back-to-afghanistan-to-get-butchered>>.

<sup>76</sup> Zhan Chiam, Sandra Duffy and Matilda González Gil, ‘Trans Legal Mapping Report: Recognition before the Law’ (Report, 2<sup>nd</sup> Ed, International Lesbian, Gay, Bisexual, Trans and Intersex Association November 2017).

<sup>77</sup> Interview with Anonymous (Thomas McGee, 8 January 2020), via electronic communication. Details have been anonymised according to interviewee wishes.

Citizenship for trans individuals can be considered ineffective when their post-transition personal identity does not correspond with pre-transition legal identity. In some instances, reactions to hormone treatment can accentuate the physical disparity. Likewise, some intersex individuals who are born with characteristics of both sexes may be particularly reactive to hormones, resulting in dramatic changes in physical appearance such that — even without surgery — they may no longer correspond physically to their pre-hormone appearance. This was the case for Eliana Rubashkyn, whose story received high levels of press coverage after she was detained in Hong Kong International Airport.<sup>78</sup> Moreover, she became the first birth-assigned male intersex person to be legally recognised as a woman through a UN resolution under the international refugee statute. Originally from Colombia, Eliana was assigned as male despite being born as a variant of intersex usually raised as female. After being stabbed by violent militia groups engaging in social cleansing practices back in Colombia, Eliana received a scholarship to study in Taiwan. There, she says, ‘I finally felt safe to explore my self-identity. I met a doctor who could help me with my intersex condition and realising my gender expression’.<sup>79</sup>

When she began treatment, the hormones reacted aggressively with her body, resulting in a striking transformation in Eliana’s physical appearance. Her university in Taiwan required her to update her Colombian passport identification picture to more accurately resemble her current appearance. She therefore travelled to Hong Kong in order to visit the Colombian embassy yet on arrival at the airport, Eliana reports, ‘officials did not accept my identification and I was issued with a deportation notice’. The Colombian authorities refused to acknowledge and assist her. In order to change her name and gender on documents, Eliana would need to return to Colombia, but cannot re-enter Colombia because the country does not recognise anything about her current existence except her fingerprints. Also, while Colombia permits dual citizenship, it is illegal for a Colombian to enter the country on a non-Colombian passport, making it impossible for Eliana ever to update her documents once outside the country.

Unable to benefit from her citizenship due to the incongruence between her physical appearance and image on legal identity documents, Eliana opted to renounce her citizenship entirely in order to avoid deportation to Colombia, becoming officially stateless. ‘For me’, she says,

statelessness was initially a protection mechanism as I was desperate not to return to the dangers I had faced in Colombia, particularly after media had highlighted the links to the militia groups who had already targeted me in reporting on my situation in Hong Kong.<sup>80</sup>

Having succeeded in avoiding deportation, Eliana was mistreated while stranded in Hong Kong. As well as suffering physical abuse at medical facilities, authorities housed her alone in a shipping container: ‘this shows on many levels that they didn’t know where to put me ... with the men or the women? ... They

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<sup>78</sup> ‘Misunderstood and Stateless in Hong Kong: A Transgender [sic] Woman's Nightmare’, *CNN* (online, 5 September 2014) <<https://edition.cnn.com/2014/09/05/world/transgender-asylum-hong-kong/>>. The article incorrectly identifies Eliana as a transgender woman, while she identifies as an intersex woman.

<sup>79</sup> Interview with Eliana Rubashkyn (Thomas McGee, 8 January 2020). Interviewee consented to have her name known.

<sup>80</sup> *ibid.*



viewed me as less than human'.<sup>81</sup> Since Hong Kong is not a signatory to the 1951 *Convention Relating to the Status of Refugees*,<sup>82</sup> she was unable to claim asylum there. Eventually, she was accepted for resettlement to New Zealand through the United Nations High Commissioner for Refugees and was naturalised as a citizen of the country in 2018 in recognition that she was stateless.

Eliana's case highlights the complexities that LGBTIQ+ individuals, particularly trans and intersex persons seeking to realise their gender expression, might experience when their appearance does not match with identity documents. With the disputed sovereignty status of Taiwan and the special administrative status of Hong Kong sub-state authorities, her story further underscores the important impacts that grey areas between different regimes of governance and international regulation can have upon the rights of citizenship, leading in the most extreme case to an individual being forced to self-declare as stateless. Eliana concludes:

I blame everyone ... all the countries involved. I blame my government for refusing to support me. I blame Taiwan for not doing more to help me fix my situation locally, or warn me about the risks in going to Hong Kong, where I was treated so badly.

Eliana confirmed with the author that she knows several other LGBTIQ+ individuals who have similarly renounced their only citizenship in order to prevent deportation to their country, having previously been persecuted on SOGIESC grounds. These are clear-cut cases of statelessness caused by the realities specific to LGBTIQ+ individuals. Also, she states that she is aware of other intersex and trans individuals who have been denied recognition and assistance from their embassies due to their changed physical appearance and gender identity/expression. Such cases might be considered as occupying a grey area that may constitute statelessness.

### *C Statelessness for Children of Rainbow Families*

Children born within the context of rainbow families may be at particular risk of becoming stateless. In some cases, this is related to the explicit non-recognition of relationships between LGBTIQ+ persons and their 'illegality' in certain jurisdictions; in others it is the result of falling through the gaps in complex sets of legislation and procedures that create grey areas where a child may be left de facto unable to acquire the parents' citizenship counter to the state's nationality law. Different legal regimes and official approaches to definitions of family and parenting further complicate matters. Specifically, the patchwork situation with regards to recognition of non-heteronormative marriages, civil unions and relationships worldwide, alongside disparate practices of parental recognition in such cases, are likely to mean that children born in 'rainbow families' are at disproportionate risk of ending up stateless. The European Network on Statelessness has noted the 'emerging problem' of *jus sanguinis* conferral of nationality for children of same-sex couples.<sup>83</sup>

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<sup>81</sup> *ibid.*

<sup>82</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

<sup>83</sup> *No Child Should Be Stateless* (Report, European Network on Statelessness 2015) 20.

While the advent of assisted reproductive technologies ('ART') in the 1970s brought about new possibilities for human reproduction and parenting, it also generated unprecedented ethical and legal questions for individuals and states to deal with.<sup>84</sup> Although the risks of statelessness through artificial insemination, in-vitro fertilisation and (international) surrogacy arrangements are not limited to children of LGBTIQ+ parents,<sup>85</sup> they may be particularly vulnerable due to the intersections with non-recognition of rainbow family structures in certain jurisdictions — all the more so when an international dimension is involved. Although not exploring implications for statelessness per se, Scott Titshaw considers the challenges that children born through ART within same-sex co-parenting relationships may face to secure citizenship.<sup>86</sup> Interestingly, much of the work on risks of statelessness through international surrogacy arrangements cites cases of children born to LGBTIQ+ parents without sufficiently considering or commenting on the SOGIESC dimension of the examples in question. For example, in the case of baby Samuel Ghilain, scholars have acknowledged that the parents were 'a pair of married men from Belgium'<sup>87</sup> or 'a Belgian same-sex couple using the sperm of one "commissioning father" and anonymous donor eggs',<sup>88</sup> yet they have not fully explored this aspect of the parental profile in causing the statelessness, nor considered the possibility that children of 'rainbow families' constitute a profile at heightened risk of statelessness.

A recent blog entry on the European Network on Statelessness website has drawn attention to risks of statelessness for children born within same-sex — or 'rainbow' — families.<sup>89</sup> Authored by the Vice President of the Network of European LGBTIQ\* Families Associations ('NELFA'), it centres on the case of baby Sofia, the child of married Irish–Polish lesbian couple, conceived through an IVF arrangement in Spain: Ireland does not recognise the Irish mother as she is the non-biological mother of the child, and Poland does not recognise the birth certificate with both mothers' names on it, even though the birth mother is a Polish citizen.<sup>90</sup> While Spain has a safeguard against statelessness in the case that a child would otherwise be stateless, the authorities there have yet to give a decision, and the fact that Sofia arguably qualifies for both Polish and Irish citizenship according to those countries' respective nationality laws may result in prolonging her

<sup>84</sup> Laura Londra, Edward Wallach and Yulian Zhao, 'Assisted reproduction: Ethical and legal issues' (2014) 19(5) *Seminars in Fetal and Neonatal Medicine* 264.

<sup>85</sup> For the famous case of baby Manji, see Patrick Balazo, 'Cross-Border Gestational Surrogacy in Japan and the Spectre of Statelessness' (Working Paper No 2017/5, Statelessness Working Paper Series) 7.

<sup>86</sup> Scott Titshaw, 'Sorry Ma'am, 'Your Baby is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology' (2010) 12(1) *Florida Coastal Law Review* 47.

<sup>87</sup> Tina Lin, 'Born Lost: Stateless Children in International Surrogacy Arrangements' (2013) 21(2) *Cardozo Journal of International and Comparative Law* 545, 546.

<sup>88</sup> Claire Achmad, 'Children's Rights in International Commercial Surrogacy: Exploring the Challenges from a Child Rights, Public International Human Rights Law Perspective' (PhD Thesis, Leiden University, 2018) 180.

<sup>89</sup> Björn Sieverding, 'Even Where Countries in Europe Recognise Marriage Equality, Children Born to Same-Sex Families Remain at Risk of Statelessness' *European Network on Statelessness* (Blog Post, 7 November) <<https://www.statelessness.eu/blog/even-where-countries-europe-recognise-marriage-equality-children-born-same-sex-families-remain>>.

<sup>90</sup> For relevant case law, see *AD-K v Poland* (European Court of Human Rights, First Section, Application No 30806/15, 26 February 2019). Other research suggests that Poland takes a similar stance in cases of children born through surrogacy to same-sex couples: *Mapping Statelessness in Poland* (Report, UNHCR September 2019) 43.

statelessness. The story has been taken up by the Irish media,<sup>91</sup> and as the mothers continue to campaign for Sofia to return to Ireland, it has become a key case within wider advocacy for citizenship rights for children of rainbow families.<sup>92</sup> It highlights how the disparity in recognition of legal family ties can result in complications preventing access to citizenship as the authorities of one state may refuse to recognise the legal connection of non-biological LGBTIQ+ parents, even if their names are recorded clearly in the birth certificate issued in another state.

In 2018, NELFA began to collect and document cases where laws and regulations within the EU prevent the free movement of LGBTIQ+ people and their children. In compiling information about the profiles of parents (ie nationality, sex/gender and [marital] status) and the constellations of circumstances (ie place of marriage/civil ceremony/residency, mode and place of conception and birth), they have concluded that ‘many rainbow families lose fundamental rights when crossing borders and remain in legal limbo situations’.<sup>93</sup> Further they demonstrate cases where particular constellations of factors can lead ‘children [to] become half-orphans on paper or remain stateless, at least for a certain time’.<sup>94</sup> NELFA’s work in this area highlights the risk of statelessness for children of LGBTIQ+ parents in certain circumstances, particularly when born through ART with an international dimension. The fact that such cases are being documented within constellations that implicate only states belonging to the European Union — a super-state structure with joint legislative institutions and standards, as well as relatively harmonised governance processes — underlines the truly universal nature of the SOGIESC–statelessness nexus.

Additionally, in the context of international surrogacy arrangements, issues around harmonisation in laws — that is ‘differing principles of nationality, coupled with a lack of consensus on the legality of surrogacy’ — can also produce complications leading to statelessness in a number of circumstances.<sup>95</sup> Here, it is useful to consider the case of India as a key destination for international commercial surrogacy. India’s relatively accommodating surrogacy infrastructure had been attractive for many hopeful parents, but changes in the national regulations in 2013 suddenly limited applications to heterosexual couples who had been married for at least two years.<sup>96</sup> Those excluded, with same-sex couples significantly affected, were left in limbo by this policy, as the children born through the arrangements they had commissioned risked becoming stateless. Such was the case for Paul Taylor-Burn and his partner Josh from Australia, who signed

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<sup>91</sup> See, eg, Sorcha Pollak, ‘Getting IVF Abroad: “Our Daughter is Stateless, She Doesn’t Exist”’, *The Irish Times* (online, 14 October 2019) <<https://www.irishtimes.com/news/social-affairs/getting-ivf-abroad-our-daughter-is-stateless-she-doesn-t-exist-1.4049263>>.

<sup>92</sup> For the family’s blog and petition, see *Baby Sofia* (Blog) <<https://babysofia.info/>>; ‘Help Get Baby Sofia Home to Ireland’, *All Out* <<https://action.allout.org/en/m/934ac23d>>.

<sup>93</sup> *Freedom of Movement in the European Union: Obstacles, Cases, Lawsuits ...* (Report, Network of European LGBTIQ\* Families Associations 2020) <<http://nelfa.org/inprogress/wp-content/uploads/2020/01/NELFA-fomcasesdoc-2020-1.pdf>>.

<sup>94</sup> *ibid.*

<sup>95</sup> Lin (n 87) 549.

<sup>96</sup> Sandip Roy, ‘Surrogacy and Homophobia: India Bans Gay Parents’, *First Post* (online, 21 January 2013) <<https://www.firstpost.com/living/surrogacy-and-homophobia-india-bans-gay-parents-596203.html>>. See also *Unstarred Question No 3491 to Be Answered on the 19<sup>th</sup> of March 2013/Phalgun 28, 1934 (SAKA)* (Letter, Ministry of Home Affairs, India, 2013).

their surrogacy contracts after the cut-off date for the law change.<sup>97</sup> It was further reported that ‘surrogate babies born to gay parents have been unable to leave India because countries such as Germany, Italy and Japan have refused to grant infant citizenship’, presumably due to reluctance to grant citizenship in breach of Indian law.<sup>98</sup>

It is important to recognise that the problems in securing citizenship (and avoiding risks of statelessness) for children born to same-sex couples through surrogacy in India did not begin with the 2013 changes in law.

Already, children born by Indian surrogacy to other same-sex couples (including from France and Israel) had also encountered (risk of) statelessness due to their own countries’ restrictive positions on the use surrogacy. In the case of France, ‘[t]he laws [were] particularly stringent for homosexuals who want to become parents through surrogacy’,<sup>99</sup> while in Israel a family court denied the gay couple to undertake a DNA test in order to confirm that the biological father was an Israeli citizen.<sup>100</sup> In both cases, the children were left in a stateless limbo while the intentional parents sought to resolve the cases. After the possibility of surrogacy in India was closed for same-sex couples in 2013, Thailand emerged as the new prime destination. However, the 2015 *Protection of a Child Born by Medically Assisted Reproductive Technology Act* there similarly excluded same-sex couples from surrogacy, resulting in ‘dozens of gay Israeli couples whose children were rendered stateless while Thailand and Israel negotiated an agreement’.<sup>101</sup>

The challenges described in the above paragraph highlight how, in the context of surrogacy (or other forms of ART) for same-sex couples, ‘[b]irth certificates are evidence of parentage but not conclusive proof thereof’.<sup>102</sup>

Several of the examples cited within this article underline what can be described as a ‘heteronormative parental presumption’ — that is assuming without questioning that a heterosexual cisgender ‘intentional’ parental couple are necessarily the biological parents of the child, while simultaneously requiring ‘intentional’ parents of rainbow families to prove the genetic connection to the child. This heteronormative logic is clearly reinforced by conventional conceptions of nuclear family structures that have become naturalised within law and administrative practice in many jurisdictions. While the USA’s limited interpretation of legal parentage based on biology rather than ‘intent’ in

<sup>97</sup> ‘Aust Fears over India Surrogacy Changes’, *The Sydney Morning Herald* (online, 4 March 2013) <<https://www.smh.com.au/national/aust-fears-over-india-surrogacy-changes-20130304-2fhcp.html>>.

<sup>98</sup> Kerry Brewster, ‘Surrogacy Laws May Leave Australian Babies Stateless’, *ABC News* (online, 5 March 2013) <<https://www.abc.net.au/news/2013-03-05/surrogacy-laws-could-leave-australian-babies-stateless/4552460>>.

<sup>99</sup> Sumitra Debroy, ‘French Gay Dad May Lose Surrogate Kids’, *The Times of India* (online, 9 June 2010) <<https://timesofindia.indiatimes.com/india/French-gay-dad-may-lose-surrogate-kids/articleshow/6025936.cms>>.

<sup>100</sup> Tomer Zarchin, ‘Gay Father of Twins Born to Indian Surrogate Denied Permission to Bring His Sons Home’, *Haaretz* (online, 9 May 2010) <<https://www.haaretz.com/1.5117649>>.

<sup>101</sup> Linda Khan and Wendy Chavkin, ‘Assisted Reproductive Technologies and the Biological Bottom Line’ in Yasmine Ergas, Jane Jenson and Sonya Michel (eds), *Reassembling Motherhood: Procreation and Care in a Globalized World* (Columbia University Press 2017) 38. See also *Protection of a Child Born by Medically Assisted Reproductive Technology Act* (Thailand) BE 2558 (2015).

<sup>102</sup> Elizabeth Schwartz, ‘LGBT Issues in Surrogacy: Present and Future Challenges’ in Eric Scott Sills (ed), *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues* (Cambridge University Press 2016) 57.

international ART cases has been argued to put children at risk of statelessness,<sup>103</sup> there is growing evidence that LGBTIQ+ parents have recently been subject to greater levels of scrutiny to determine biological parenthood than applies to heteronormative married couples.

The most high-profile cases of children born to rainbow families being denied US citizenship have been represented by legal defence actors, Lambda Legal and Immigration Equality.<sup>104</sup> The Department of State has ruled in contradiction of the principle of ‘birth-right citizenship’ where any child born to a US citizen automatically becomes a citizen also, on the argument that since one of the parents is not biologically related to the child, the child has been ‘born out of wedlock’.<sup>105</sup> Immigration Equality has referred to this as ‘a new double standard for citizenship: one for the children of gay couples and one for the children of straight couples’.<sup>106</sup> It is noted that most of these children have not in fact been at risk of statelessness since the surrogacy or other assisted reproductive arrangements took place in countries where *jus soli* nationality laws operate (eg Canada) and safeguards against being born stateless are in place. That said, the practices of insisting on biological rather than intentional interpretations of parentage in cases of same-sex relationships have the potential to result in statelessness in cases where the constellation of circumstances is different.

While far from an exhaustive survey of cases where children born within the context of rainbow families have been (at risk of becoming) stateless, the above selection presents a strong basis for considering that LGBTIQ+ parents face particular vulnerability in securing citizenship for their children when using ART within an international dimension. Given that same-sex couples are known to be a key demographic within the clients for international surrogacy, further research is needed to better understand the unique risks that might affect this profile of parents.

#### IV CONCLUSION

The testimonies and situations presented in the above sections provide support for the argument that a SOGIESC–statelessness nexus does indeed exist. The identification of cases relating to all world regions — that is Asia and the Pacific, the Middle East and North Africa, the Americas, Africa and Europe — demonstrates the global scope of this nexus. This is perhaps unsurprising given

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<sup>103</sup> Brittany M Nichol, ‘A Child Without a Country: Dissolving the Statelessness of Children Born through Surrogacy’ [2016] (3) *Michigan State Law Review* 907.

<sup>104</sup> ‘Children Born Abroad to Married US Same-Sex Parents Are US Citizens, Lambda Legal Tells Courts’, *Lambda Legal* (Blog Post, 16 January 2020) <[https://www.lambdalegal.org/blog/20200116\\_kiviti-and-mize-gregg-msj-filing](https://www.lambdalegal.org/blog/20200116_kiviti-and-mize-gregg-msj-filing)>; ‘Fight for Families! Update’, *Immigration Equality* (Update, 2020) <<https://www.immigrationequality.org/fightforfamilies/#.XiQ9BFMzY1i>>. See also Jennifer Hansler, ‘Trump Admin is Denying Citizenship to Some Children of Same-Sex Couples’, *CNN* (online, 18 May 2019) <<https://edition.cnn.com/2019/05/17/politics/kiviti-child-us-passport/index.html>>.

<sup>105</sup> Susanna Heller, ‘The Trump Administration is Denying Citizenship to the Children of Same-Sex Couples Because They Were Born “Out of Wedlock”’, *Insider* (online, 15 May 2019) <<https://www.insider.com/trump-state-department-denied-citizenship-to-same-sex-couples-children-2019-5>>.

<sup>106</sup> Scott Bixby, ‘State Department Continues Fight to Strip Gay Couple’s Two-Year-Old Son of Birthright Citizenship’, *Daily Beast* (online, 8 May 2019) <<https://www.thedailybeast.com/state-department-continues-fight-to-strip-gay-couples-two-year-old-son-of-birthright-citizenship>>.

the established global nature of both statelessness and SOGIESC-based discrimination as respective problems.<sup>107</sup> Furthermore, this nexus is one that is both intersectional through the everyday experiences of affected individuals and causal in cases where discrimination on SOGIESC grounds can render LGBTIQ+ persons or their children stateless.

The particular causes and risk factors of statelessness for LGBTIQ+ persons range from arbitrary deprivation of citizenship based on SOGIESC discrimination grounds to legal frameworks that do not account for LGBTIQ+ subjectivities and relationships (another form of discrimination). The global patchwork from recognition to non-recognition of LGBTIQ+ identities, statuses and relationships, and the prevalence of legislation that is not sensitive to such lived realities, also presents many grey areas that further complicate the process of considering certain LGBTIQ+ individuals or their children as citizens of the state in question. This may occur particularly in situations where multiple legal systems are involved (eg when sex/gender transition or surrogacy take place in another country).

This article has compiled and reviewed existing academic, media and advocacy references relevant to SOGIESC and statelessness, including in cases where the narrative was not (explicitly) framed within these terms. Based on surveying this literature and examining a number of individual case studies, it has established a series of contexts and circumstances in which statelessness may occur in relation to SOGIESC. Given the broad exploratory nature of the research presented within this article — focused on a complex legal issue with a global scope — there is clearly a need for more focused research attention in this area. It is hoped that the results of the scoping research conducted for this article can provide a preliminary basis for more detailed examination of the SOGIESC–statelessness nexus in specific contexts. Mapping of the issue on country and regional levels would certainly provide additional valuable insight into understanding the local nuances important to social, legal and political discourses on the issue. Further research as well as advocacy work bridging the interdisciplinary gaps around statelessness for LGBTIQ+ persons could result in effective coalitions to ensure the place of the SOGIESC–statelessness nexus within the agenda of future work on both LGBTIQ+ and statelessness issues.

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<sup>107</sup> On Statelessness, see UNHCR’s Global Campaign to End Statelessness by 2024: ‘#IBelong Campaign to End Statelessness’, *United Nations High Commissioner for Refugees* (Web Page) <<https://www.unhcr.org/en-au/ibelong-campaign-to-end-statelessness.html>>. See also Institute on Statelessness and Inclusion, *The World’s Stateless* (Wolf Legal 2014). On highlighting discrimination on SOGIESC grounds as a global issue, see the work of International Lesbian, Gay, Bisexual, Trans and Intersex Association. Additionally, see *Information Paper on Protection against Sexual Orientation, Gender Identity and Expression and Sexual Characteristics (SOGIESC) Discrimination* (Report, International Labour Organisation 2017) 2.