


Withholding the letter: Transgender asylum seekers, legal gender recognition, and the UNHCR mandate

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Abstract

In the absence of legal gender recognition (LGR), transgender people carry documents that misrecognize them. The link between LGR's absence and exposure to violence and exclusion—experiences that often force transgender people to flee—is clarified by scholarship. However, when a trans person seeks asylum, they are often provided with documents that, rather than unambiguously recognizing their bearer, repeat this misrecognition. This incongruence often exposes transgender asylum seekers to greater risk. Previously, I have argued that, at the moment in which they seek international protection, transgender asylum seekers experience a form of statelessness due to the absence of LGR. In this paper, I build on this argument, drawing on a range of empirical studies to suggest that conditions of statelessness already exist prior to fleeing. As a result, I argue that the UNHCR is under obligation to provide documents recognizing their holder, even if this runs counter to state legislation.

Keywords: transgender refugee; legal gender recognition; transgender citizenship; transgender asylum; statelessness

1. Introduction

In 2016, Linda Rafi,¹ a transgender woman² from Egypt, arrived in Greece via Turkey seeking asylum. In the same manner as she was registered by the United Nations Refugee Agency (UNHCR) in Turkey, Rafi was registered in Greece using the information on her passport. To her frustration, the authorities in both Turkey and Greece refused to acknowledge her gender identity, labelling her simply as a 'single male'. As Rafi explains, 'they didn't even write I'm a trans woman'. In both Turkey and Greece, when Rafi protested, she was informed that the only way she could modify the marker on her application was by ensuring a corresponding change in her Egyptian passport. However, modifying the gender marker on this passport would have required Rafi to

¹ This is a pseudonym.

² I use *trans* and *transgender* interchangeably throughout this paper.

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first attain official adjustment of the gender marker on her Egyptian birth certificate: a paradoxical task for someone having just fled Egypt due to persecution partly facilitated by the mismatch between Rafi and her documents. Open to greater scrutiny and accusations of fraud due to her migrant status, Rafi now dreads leaving her apartment in Athens. Fearful of the violence she escaped, she worries that she may be required to present a document that still does not accurately correspond to its holder. As she explains, 'no one considers the vulnerability ... the UNHCR said "this is not our job"'.

Gender is one of the last 'state-assigned, and supposedly stable and permanent, "characteristics" of a person that remains explicitly registered as a key element of one's *legal* "identity" in most countries around the world' (Baars 2019: 17). Most identifying documents commonly include a gender marker, also referred to as a 'sex marker'. These documents serve as indicators of citizenship or recognition by a specific state, granting access to the associated rights and responsibilities. When these documents contain a mistake, such as the incorrect gender marker, name, or image, they misrecognize their holder and become challenging, if not impossible, to use. The obvious solution would be to correct the error with the relevant state authority. However, in most countries, this is impossible or made nearly so by invasive administrative procedures and medical requirements. In the absence of access to legal gender recognition (LGR), an apparent severing of the state's ability to recognize the individual occurs. Trans people globally thus carry documents that actively misrecognize or misclassify them. As a result, they experience overwhelming exposure to violence, harassment, discrimination, and economic exclusion (Spade 2011; Josephson 2016). These experiences are increasingly so brutal that, for a growing number, few options remain but to seek asylum (Hermaszewska et al. 2022). Rafi's case underscores the common experience of trans individuals seeking asylum, wherein the documents provided not only fail to unambiguously recognize their holder but perpetuate the misrecognition. Asylum, however, is a system premised on heightened surveillance. In the continued absence of LGR, or the ability to change, update, or correct gender markers to correspond with one's identity, this incongruence between the document and its holder results in a repetition of the persecution experienced in the country of origin. Furthermore, as alluded to by Rafi's fears, it exposes transgender people seeking asylum to greater risk, thus diminishing access to the international protection sought.

An expanding body of scholarship focusing on the experiences of transgender people has increasingly recognized the interconnections between documentation, asylum, detention, and statelessness or potential statelessness (Bhaumik 2015; De La Garza 2019; Sharma 2019; McGee 2020). Drawing on Hannah Arendt (2000), I have previously argued that for people such as Rafi, misidentified and registered according to the name and gender on their country-of-origin documents, asylum facilitates a form of statelessness (Camminga 2018, 2019). For Arendt (2000), the world, mediated by passports and identity documents, functions as a delicate web of treaties and international agreements, allowing a person to take their legal status as a full rights-bearing subject with them wherever they go. Whoever is no longer enclosed within this web finds themselves 'out of legality all together' (Arendt 2000: 35). My arguments in this regard have previously related to those who have *already* sought asylum, understanding statelessness as a direct result of the combination of being transgender, fleeing one's country of origin, and seeking asylum. I have been challenged to expand this thinking by a concerning literature that describes transgender people without access to LGR in their countries of origin, those whom we would consider citizens, as 'refugees in their own land' (Jain and Kartik 2020: 3) or 'like a refugee without citizenship ... without basic human rights' (Bird 2002: 366). Discussing the hurdles faced by transgender individuals in Turkey attempting to accessing LGR, Judith Lorber (1999: 359) observes that, 'in a returned social order, rebellious transgenders [sic] are stateless'.

Returning to this question of statelessness and protection for transgender people, I have been further challenged by Lindsey Kingston's (2017: 217) argument that 'statelessness is both a cause of marginalization, as well as a symptom of it'. If a person, as Arendt suggests, takes their legal status with them wherever they go, then it is quite possible that this is also true for those

persons lacking in legal status. Therefore, this paper explores what understanding trans people as 'like refugees' prior to seeking asylum might reveal about transgender citizenship and conditions of statelessness in the absence of LGR. With specific reference to the UNHCR, I consider what impact understanding trans people as effectively stateless prior to seeking asylum might have on how international protection is conceptualized and extended. To put it another way, I consider whether it is, in fact, the 'job' of the UNHCR to extend LGR to trans asylum seekers under its protection.

Drawing on a range of studies, including my previous work with transgender refugees and media coverage of transgender asylum experiences, I begin by outlining the current global landscape of LGR. Subsequently, I propose that, in the absence of LGR, we might consider transgender people as existing in an 'amputated relationship' (Agier 2011: 15) with the state. Consequently, this paper reframes statelessness for transgender people as not merely an outcome of seeking asylum but as a condition existing prior to fleeing. I then explore the development of the right to LGR concerning international human rights and treaty bodies, along with the implications of the right to protection beyond the nation state. Finally, given the UNHCR's specific global mandate to prevent statelessness³ (Seet 2016) and its frequent role as the first point of contact for transgender individuals seeking asylum (Camminga and Marnell 2022), I conclude by suggesting that there is both an obligation and precedent for the UNHCR, in the absence of states doing so, to provide LGR to transgender people seeking international protection.

2. Living in a legal vacuum and seeking asylum

LGR is the official recognition of a person's gender identity, including gender marker and name, most often through key documents such as passports and birth certificates and in population registers or public registries. Most of the world's transgender population live in a legal vacuum without access to LGR. Most countries do not have accessible legal or administrative measures to facilitate LGR beyond the first instance of assignment at birth (Madrigal-Borloz 2018a). In countries that do offer access to LGR, a medical diagnosis often accompanied by proof of medical treatment is generally required.⁴ Medical interventions, in the form of hormones or surgery, are increasingly controversial as a prerequisite to recognition. Considered deeply pathologizing and exclusionary for many trans people, these requirements, rather than facilitating access, often function as barriers to LGR. From a human rights perspective, it is increasingly understood that 'psycho-medical requirements, such as a psychiatric assessment/diagnosis and forced medical treatment in order to obtain legal gender recognition, violate the individual's right to personal autonomy and/or physical integrity' (Cannoot 2019: 15). As highlighted by the UN Independent Expert on Sexual Orientation and Gender Identity (SOGI), stigma and prejudice foster climates which not only allow but encourage and reward 'with impunity the acts of violence and discrimination against' trans people, 'lead[ing] to a situation of *de facto* criminalization' (Madrigal-Borloz 2018a: 9).

Many trans people in these situations are eventually compelled to flee for survival. Existing literature on transgender asylum seekers suggests a direct correlation between the lack of or limited access to LGR and instances of persecution in their countries of origin (Fedorko and Berredo 2017; Muntarborn 2017; Avgeri 2021). As one participant in a study documenting stress among transgender Latinx immigrants in the USA explains, about the lack of LGR:

In [my country of origin], these kinds of things are what make life difficult for us, because [we] cannot find work, [we] do not have an ID—[we] are undocumented in [our] own country— and people can mistreat [and] discriminate against [us], and the law ... does not protect [us]. Even the

³ This applies to both *de jure* and *de facto* statelessness. As noted by Guy S. Goodwin-Gill (2011), the UNHCR mandate prescribes that *de facto* stateless people should, to the greatest extent possible, be treated as *de jure* stateless to facilitate their acquisition of an effective nationality.

⁴ According to Outright International (2023) as of February 2023, eighteen countries have extended LGR based on self-determination.

police... want to extort [us] or want [us] to prostitute [ourselves] for them. There is no lack of asshole police officer that pick up transwomen [sic] [that also] abuses [us]. So, life is difficult as a Trans person, and [we] do not know when the 'lethal game of chance' will play [us]. (Salas 2019: 72, emphasis added)

The 1951 Refugee Convention lists no specific categories of persecution on the basis of gender identity. In recent years, as jurisprudence has developed, transgender people have generally been granted refugee status as members of a particular social group (UNHCR 2012). It is widely reported that asylum adjudicators have trouble believing lesbian, gay, bisexual, and transgender (LGBT) refugee claims and often ask invasive questions or expect particular performances of gender (Luibheid 2002; Murray 2016; Mudarikwa et al. 2021). Because 'the doing and determining of gender are intertwined' (Vogler 2019: 455), in a system where 'questions of credibility and stereotyping dominate' (Gartner 2015), for trans people, 'proving trans' often necessitates expressing gender or 'outward transitioning' (Bach 2013: 35) in incontrovertible ways—the most obvious means perhaps being dress. Indeed, in the case of transgender claimants, the adage 'seeing is believing' seems to hold sway.⁵

In a system such as that of asylum, however, adjudicators are not the only ones 'seeing' gender, and the misrecognition carried over from passports to asylum seeker documents can and does have devastating implications. In 2012, Fernanda Milan, a trans woman from Guatemala, was raped while interned in the male wing of a Danish asylum seeker camp. Though claiming asylum as a trans woman, she was placed in the male section of the camp because her asylum documents indicated 'M' (Brocklebank 2012). This was hardly an isolated incident, with reports from the USA (Costantini et al. 2014), UK (Savage 2019), and Sweden (Wimark 2021) indicating similar practices and experiences.

Once refugee status is awarded, misrecognition also often carries over onto refugee documents. This can lead to difficulty in registering for various services, not least of which is securing 'legal residency, which, in turn, places [trans refugees] at further risk of exploitation and sexual and gender-based violence' (HIAS 2014: 36). It is increasingly accepted that, as asylum seekers, transgender people are at extremely high risk of violence and persecution and that the transphobia that exists in countries of origin does not simply disappear in countries of asylum (Quintero et al. 2015; Gowin et al. 2017). Lack of access to LGR in asylum only exacerbates this, exposing transgender people to ongoing violence and harassment while navigating a system in which documentation holds continued if not increased importance (Rosenberg et al. 2016; Fisher 2019).

3. Transgender citizenship: identification and statelessness

Broadly defined, citizenship can be understood as a collection of civil, political, and social rights and responsibilities linked to resource access, protections, and benefits (Turner and Hamilton 1994). Surveillance studies scholar David Lyon (2009: 136) notes that modern citizenship 'assumes identification'. He describes identity documents as 'the tissue linking citizens to their rights and entitlements' (Lyon 2009: 132). A host of scholars suggest that in the absence of LGR, trans people are excluded from citizenship's basic rights and protections (Cabral and Vitturo 2006; Bach 2013; Sosa 2020). Scholars have also noted a distinct failure on the part of present models of citizenship, reliant as they are on gender as a critical indicator of legal identity, to account for transgender people (Monro 2005; Hines and Sanger 2010).

Issuing identity documents that 'match' their holder is the cornerstone of how states confer legal citizenship status, 'guarantee[ing] state protection of individual rights, and affirm[ing] citizens' equality' (Balaton-Chrimes 2014: 17). Trans people experience social and political conditions that force them to carry and use erroneous documents, resulting in the *de facto* denial of citizenship. This mismatch creates many issues that can and do block access to rights and benefits while also filtering transgender people out of state protection.

⁵ A Greek asylum tribunal recently rejected the asylum claim of a trans woman because she crossed the Mediterranean dressed as a man (see Meaker 2017).

Not only are documents meant to unambiguously identify their carrier as a citizen and therefore in possession of certain rights and protections, they also act as a form of social sorting. Identity documents work to separate citizens from those cast as strangers, 'desirables' from 'undesirables,' and those who are valued by the state from those who are not. As a result, they are a critical tool in 'determining membership and excluding unwanted others' (Balaton-Chrimes 2014: 18). Most obviously, those with and without documents are sorted from one another. However, social sorting also occurs via the information contained in documents, including, but not limited to, information relating to gender (Lyon 2009). In this way, citizenship is restricted. Trans people effectively outline the limits of citizenship for a given state. Without formal recognition through verifiable documents, 'eligibility for rights and for legal personhood' (Bloom et al. 2017: 2) or the legal bond between an individual and the state comes into question. Arendt (1978) reminds us that citizenship is the means through which human beings are granted the right to protection from deprivation and violence. The more distant from citizenship a person finds themselves, 'the weaker the capability (or the will) of institutions to provide them human rights protection' (Pieri 2016: 108).

As countless studies from around the world have begun to elucidate, trans people globally and particularly low-income trans women of colour, in part due to a lack of LGR, experience disproportionately higher degrees of sexual violence (Stocks 2015), abuse (Davis 2014), harassment (Doan 2007), prosecution (Knight and Ghosal 2016), and humiliation (Kohler and Ehart 2016). The outcome of a lack of LGR is, in effect, a cascade of social and economic exclusion (Cray and Harrison 2012). Trans people struggle to open bank accounts, rent cars, and apply for jobs, and are often denied voting rights (Herman and Brown 2018). Trans people are also more likely to have diminished access to education. This can lead to diminished health literacy and diminished access to employment. This lack of access to employment often results in poverty (Spade 2008). Employment marginalization often leads to increased participation in criminalized work, such as sex work, 'to survive, which, combined with police profiling, produces high levels of criminalization' (Spade 2011: 89).

Discrimination, poverty, and criminalization further impact adverse health outcomes. Sex work also leads to a higher risk of violence and exposure to sexually transmitted infections. Discrimination also impacts family life and the ability to find housing (European Union and Agency for Fundamental Rights 2014). A large proportion of trans people experience homelessness in their lifetime. Trans people are more likely to come into contact with shelters, which further discriminate by placing them in sex-segregated facilities based on identity documents (Outright International 2007), thus exposing them to further risk, violence and sexual exploitation (Wipfler 2016). While the importance of recognition may be difficult to quantify, Richard Juang (2013) suggests it can be measured by the consequences which arise from its absence. An 'unvalued person readily becomes a target or a scapegoat for the hatred of others' (Juang 2013: 706).

The 1954 Convention Relating to the Status of Stateless Persons provides a relatively narrow legal definition of statelessness as the absence of legal bonds between a state and individuals. Increasingly, statelessness has come to be read by some, in the tradition of Arendt, as a 'broad descriptor for a lack of belonging or situation of rightlessness' (Rahman 2020: 277–8). This includes all those 'superfluous individuals ... who are disconnected from any political system able to offer them a place and protect them' (Agier 2011: 17–18). Kingston (2017: 9) adds that exclusionary citizenship laws that block registration and the inequalities connected to these are among the many ways in which a person might become stateless. Laws that do not allow for or facilitate LGR can be considered exclusionary, particularly the violence and deprivation they engender. We might also include here laws that rely on medicalization to access LGR as an obstruction to registration. In instances where documents carried by trans people are incoherent, the legal bond between a state and citizen 'can be considered ineffective' (McGee 2020: 79). For Kingston (2017: 17), echoing Juang, statelessness does not occur in a vacuum:

Certain people are stateless because they were deemed unworthy of membership and rights in a given community. Statelessness and the human rights consequences that result are symptoms of deeply embedded systems of discrimination.

Cisnormativity, or the expectation that gender corresponds to sex assigned at birth for all people, whether expected by the law or society more broadly, is one such system of deeply embedded structure/culture of discrimination. When people become, in the words of Dean Spade (2011: 12), 'administratively impossible', it becomes easy to deny rights. Incongruity or misrecognition perpetuated by documents in the absence of LGR 'fosters the idea that such a being is somehow less than human and may be treated accordingly' (Wenstrom 2008:157).

Statelessness allows for inequality before the law, fostering the denial of access to health; exclusion from economic rights, shelter, and livelihood; and unsafe working conditions. Indicating a clear overlap with transgender experience in the absence of LGR, Kingston (2017: 17) outlines three critical obstacles linked to statelessness: 'inequalities related to recognition and membership, denied educational opportunities, and serious impediments to employment and livelihoods'. Serena Parekh (2008: 27) suggests that for Arendt, the stateless person is 'precisely the figure who has become ... different with nothing to make him equal, or to make him recognizable to the public world'. In the absence of LGR, there is no link between trans people, the state, and citizen entitlements. This is not to suggest that the recognition of trans people by the state through LGR would be an immediate panacea to the cascade of systemic oppressions experienced. However, it cannot be denied that there are material, social, and economic benefits to being recognized as a citizen and accessing the rights of nationality without barriers or limitations facilitated by coherent documentation.

4. The longstanding human right

The suggestion that LGR is a right is not without controversy.⁶ However, as Holning Lau (2018) notes in a cogent overview of human rights principles and treaty development, the right to gender recognition is not new.⁷ Rather, it is newly recognized as an aspect of already existing rights. States have essentially implemented a form of LGR for as long as they have issued documents containing gender markers. Of course, it is by no means a given that documents should indicate gender, or that registering gender is a useful way to verify identity. Many argue in favour of the complete abolition of gender registration (see, e.g. Braunschweig 2020). In the case of IDs that do contain gender markers, however, 'longstanding human rights principles support the proposition that ... individuals have the right to obtain markers that match their gender identity' (Lau 2018: 194). In this sense, LGR is generally linked to the broader right to personal autonomy. On this basis, the psycho-medical requirements still practiced by some states are increasingly considered human rights violations.

Marjolein van den Brink (2017) tracks the expanding recognition of LGR as a human right, noting its increasing mention by UN human rights treaty bodies such as the Human Rights Committee (HRC), Committee on the Elimination of Discrimination Against Women (CEDAW), and the Committee on Economic, Social, and Cultural Rights (CESCR), indicating its increasing pertinence. Notably, both the HRC and CEDAW have urged states to eliminate barriers to

⁶ In many contexts, LGR is fiercely resisted, especially by those who oppose it on religious grounds and/or regard it as a threat to so-called traditional or family values. It is beyond the scope of this paper to unpack these debates, given its focus on international human rights norms and treaties. For an analysis of opposition to LGR, see Case (2019), Pearce et al. (2020) and Zanghellini (2020).

⁷ Lau (2018) also presents and refutes some of the prevalent arguments against expanding LGR, especially those related to safety and concerns about fraud. Critically, Lau argues that changing a gender marker is an enormous undertaking. In a system of heightened surveillance, such as asylum, it is unlikely that a male fugitive trying to evade the law would take this route. Doing so would commit the man to being perceived as a woman every time ID is shown. As trans experience makes clear, the outcome of a mismatch between ID and holder is often violence. Peter Dunne (2018) argues that allowing for LGR actually inhibits fraud by fostering consistency between documents and their holders.

recognition, such as medicalization.⁸ The most unambiguous indication of the importance of LGR among the major international human rights bodies has been its unequivocal endorsement, referencing the Yogyakarta Principles +10, by the Inter-American Court of Human Rights (IACtHR). In the Court's 2017 advisory opinion on *Gender Identity and Equality and Non-Discrimination of Same-Sex Couples*, the IACtHR clarified that all individuals should have access to documents reflecting their gender identity based on self-determination. This should be facilitated without medical requirements or 'without obstacles or abusive requirements that may constitute human rights violations' ([Inter-American Court of Human Rights 2017](#)).

The UN High Commissioner for Human Rights has also recommended that states facilitate LGR for transgender people 'and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights' ([UN High Commissioner for Human Rights 2011:25](#)). Perhaps the most important intervention on this front has been the voice and findings of the UN Independent Expert SOGI in his 2018 report on *Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity* ([Madrigal-Borloz 2018b](#)). Not only does the report link the absence of LGR to lifelong experiences of violence and discrimination, it also makes explicit that how 'data reflects the identity of the individual is a fundamental consequence for the enjoyment of the right to equal recognition' ([Madrigal-Borloz 2018b: 18](#)).

The European Court of Human Rights has also made some impactful decisions regarding the right to LGR, not least for refugees. In 2017, Rana, an Iranian trans man awarded refugee status in Hungary, applied to change his marker from 'F' to 'M'. Much like Rafi, Rana had been told when he applied for the change to his refugee documents in Hungary that he would need to return to Iran to seek recognition first. The Court found that after being awarded refugee status on the basis of persecution he experienced in Iran, he could not 'reasonably have been expected to seek recognition of his gender change in Iran' ([Registrar of the Court 2020](#)). Organizations who supported the claimant added that the decision also confirmed LGR as a 'fundamental right of trans persons deriving from the principle of human dignity' ([Cikkek 2018](#)). In the absence of LGR, the Court also noted, echoing Rafi's account, that a person might well experience 'feelings of vulnerability, humiliation and anxiety ... stress and alienation [... amounting to] a serious interference with private life' ([Transgender Europe et al. 2017: 14](#)).

Speaking directly to the co-constitution of gender and citizenship and the impacts of 'institutional gender determinations' ([Vogler 2019: 444](#)), LGR was recognized by the court as a critical gateway to accessing rights and protections, as provided for by any given state. Notably, this assertion of the right to LGR by international human rights and treaty bodies is reliant on the state. In essence, it is states who are consistently called on to make LGR a reality. In the absence of states responding to these calls, might there be another possibility?

5. Mandates, precedence, and the UN Refugee Agency

Principle 23 (G) of the Yogyakarta Principles +10 outlines that the 'self-identification of a person seeking asylum on the basis of sexual orientation, gender identity, gender expression, or sexual characteristics' should be accepted as the 'starting point for consideration of their asylum claim' ([International Commission of Jurists 2017: 22](#)). Considered soft law instruments, the Principles 'draw their force from widely accepted obligations states must follow under international law' ([Thoreson 2016: 1](#)). Though the Principles appeal directly to states to implement human rights protections, it is possible to read into 23(G) that there exists an obligation to recognize self-identification at the point of a transgender person's asylum claim. In the absence of states fulfilling this responsibility, and given the statelessness that transgender people experience, this obligation might fall to the body mandated to extend international protection and prevent statelessness: the UNHCR.

⁸ For a complete breakdown of these and other decisions affirming the right to LGR taken by Committee bodies (see: [UN Human Rights Office of the High Commissioner 2019: 67–9](#)).

Primarily understood as the supervisory body of the 1951 *United Nations Convention Relating to the Status of Refugees*, since 1974, the UNHCR has also been the designated organization to which stateless persons may apply to have their claims examined. In 1995, the UN General Assembly entrusted the UNHCR with a global mandate to identify, reduce, and prevent statelessness as well as protect stateless persons (Betts 2012). The principle focus of the UNHCR mandate on statelessness is prevention. Encompassing the challenges for transgender people outlined thus far, the UNHCR *Action to Address Statelessness—Strategy Note* (2010a) unpacks prevention as:

[A]nalyzing and addressing such issues as gaps in nationality legislation, State succession, arbitrary deprivation of nationality (e.g. on discriminatory grounds), administrative obstacles, birth registration, issuance of identity documentation, and determination of nationality status. It needs to be kept in mind that although the apparent causes of statelessness are often legal and technical, discrimination on racial, ethnic, religious, linguistic, and other grounds is frequently a key factor (9).

Thus, the Agency is explicitly expected to ‘identify stateless populations, determine how they became stateless, and understand how the legal, institutional, and policy frameworks relate to those causes and offer possible solutions’ (UNHCR 2008a: V). As noted by several scholars, norm development is a crucial prevention tool at the UNHCR’s disposal (Goris et al. 2009; Loescher and Milner 2011; Betts 2012). Arguably, the UNHCR already, to some degree, acknowledges the connection between LGR, persecution, and displacement. Published in 2008, the *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* explicitly acknowledges much of the persecution and exposure to harm outlined thus far for transgender people. The Note also distinctly links this persecution and exposure to harm to instances when a transgender individual may be ‘asked by the authorities to produce identity documents and his or her physical appearance does not correspond to the sex as indicated in the documents’ (UNHCR 2008b: 9).

The Note was followed by the 2010 *Discussion Paper on the Protection of Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*. Highlighting LGR, the Discussion Paper also clarifies that when seeking asylum, transgender people experience difficulties at borders and in transit due to misaligned documents, making transgender people vulnerable to abuse and detention. Crucially, the Discussion Paper acknowledges that, too often, the abusive conditions that transgender people experience in countries of origin, those that I have argued facilitate statelessness by disrupting the bond between state and individual, ‘are replicated in the country in which they are resettled’ (UNHCR 2010b: 14). The 2012 *Guidelines on International Protection No. 9* reiterate this point, highlighting that when self-identification and physical appearance ‘do not match the legal sex on official documentation and identity documents, transgender people are at particular risk’ (UNHCR 2012: 4).

The UNHCR faces the challenge of preventing statelessness and extending international protection in the absence of state-based LGR. The UNHCR is clear that it is state parties who are obliged to issue identity documents. However, in situations of statelessness, the ‘UNHCR Field Offices may issue a document to that effect which may help the individual in his or her dealings with authorities’ (UNHCR 2010a: 19).⁹ If transgender asylum seekers are understood as having unusable documents and experiencing statelessness, then, as with other asylum seekers who do not have and cannot obtain documents, they should be provided with replacement documents to help in ‘dealings with authorities’. The challenge remains navigating the UNHCR’s mandate while juggling the sovereignty and politics of host states (Camminga 2024), especially when states do not extend LGR. This situation, however, is not without precedent, especially concerning LGBT claimants. In countries such as Kenya (Marnell 2023), Morocco (Hersh 2019; Gouyon

⁹ For instance, stateless Rohingya people fleeing Myanmar do not possess identity documents. Once they arrive in neighbouring Malaysia, they are provided with a ‘UN card’ by the UNHCR. The card functions as ID and is the only means through which Rohingya in Myanmar can ‘protect their rights and fulfil the basic requirements of life’ (Rahman and Dutta 2023: 2). For many, the UN card is the first document to ever acknowledge their existence. Without it, Rohingya in Malaysia would be unable ‘to avoid harassment in the hands of the police,’ nor ‘to access public healthcare facilities’ (Rahman and Dutta 2023: 10).

2022), and Senegal (Menetrier 2022), the UNHCR acknowledges and extends international protection to LGBT asylum seekers even though they are criminalized under the domestic legislation of the host state. Elsewhere, I have described such a situation in which criminalization and protection work alongside one another as a ‘parallel legal regime’ (Cammenga 2024).¹⁰ In these instances, not only does the UNHCR acknowledge and afford rights and protections in the absence of the host state doing so, but the UNHCR’s actions are explicitly counter to the framework of criminalization extended by these host states. This situation, though not without its problems and challenges, suggests that the UNHCR can extend protection not only in the absence of states but also in direct contradiction to host state policy.

Guided by international law but funded and mandated by states, the UNHCR cannot substitute for states. The extension of LGR may pose challenges, particularly in light of apparent political upheaval and resistance from anti-gender advocates in some of the major donor states for the UNHCR, such as the USA. While funding certainly constrains the UNHCR, it is not merely an instrument of states. Its mandate extends unique authority in the humanitarian field, and because of this, it has often been able to exercise power and influence despite resistance (Loescher 2017). As Alexander Betts (2012) explains, the UNHCR mandate has always expanded and adapted, and this has not ‘been exclusively state-directed’. Indeed, ‘change has sometimes taken place in spite of the absence of a clear demand for change by powerful donor states [... It] has even taken place in areas in which core donor states have explicitly expressed opposition’ (Betts 2012: 119). The UNHCR can be incredibly effective, as several scholars note, in using its power, legitimacy, and political advocacy tools to develop and disseminate (new) norms (Loescher and Milner 2011), even if that means ‘defying or bypassing powerful states in order to adapt in particular ways’ (Betts 2012: 137).

6. Conclusion

At the Opening Plenary of the 2021 UNHCR Global Roundtable on LGBTQI+ People in Forced Displacement,¹¹ the former UN Independent Expert on SOGI Victor Madrigal-Borloz noted that, in his experience, trans people are subject to harassment and abuse that leads to displacement precisely because their self-determined gender is not recognized on their official documents. This has even more significant ramifications, I have argued in this paper, when seeking access to emergency care services and protection systems. Madrigal-Borloz further noted that the accuracy with which data, including documents, reflect a person’s identity is fundamental to rights access and recognition. The question is: who should provide this rights access and recognition?

Legal scholar Nicole LaViolette suggests that though the UNHCR has acknowledged the ‘distinctness’ of transgender persecution, it has failed to fully develop the link between gender and the experiences of transgender claimants (LaViolette 2010: 9). In the absence of fully developing this link, as both Pratima Narayan (2006) and Mengia Tschalaer (2021) independently note, gender is understood by UNHCR as pertaining only to cisgender women, ‘one homogenous group’ (Tschalaer 2021: 4). In contrast, gender identity and expression are understood by the same groups as pertaining to transgender people, ‘another homogenous group’ (Tschalaer 2021: 4). Combined, these two understandings of gender work to maintain a reductive cisgender/transgender regulatory binary (Narayan 2006). The outcome of this delineation has meant that the violent acts, exclusion, and the subsequent statelessness transgender people experience as ‘practiced by nation-states’ remains pervasive, unaccounted for, and ‘unchecked’ (Affan 2019). As suggested by McGee (2020), the field of statelessness studies has faced a comparable challenge in establishing this link, resulting in a shortage of scholarly attention to the intersections

¹⁰ This protection is extended with the explicit aim of resettling these refugees. Increasingly, people have refugee status for their whole lives, primarily due to two interrelated trends: a decline in resettlement opportunities, and the increased difficulty in transitioning from refugee status to citizenship status imposed by host states. This prolonged, and at times seemingly indefinite, state of being a refugee underscores the heightened urgency for LGR.

¹¹ This paper reinforces demands articulated by participants of the roundtable, within one of the thirteen working table discussions, specifically addressing LGR, alternatives to detention, and protection from refoulement. The author of this paper was actively involved as the invited co-convenor of this particular session.

of gender, sexuality, and statelessness. I have argued that if we take seriously the misrecognition of transgender people carrying incoherent documents and the attendant consequences, we might think of transgender people as experiencing a form of statelessness. Indeed, we might think of transgender people as living in an 'amputated relationship' with the state and struggling to access the rights and protections associated with recognized and acknowledged citizenship. Of course, other factors, including race, class, and nationality, can mitigate this experience. For those who experience the full impact of statelessness, however, the only available option is typically to flee and seek asylum elsewhere—and increasingly so. In these instances, it seems nonsensical, given the links made by various international bodies and human rights instruments between persecution and LGR, that the same misrecognition is repeated on asylum documents at the point of asylum. Moreover, this often carries over to refugee documents.

I have suggested that the UNHCR, often the first point of contact for many transgender asylum seekers the world over, has an obligation to begin providing documents that recognize their holder. This should be done as a matter of principle to extend the international protection that forms part of their mandate. It should also be done in order to prevent the statelessness that is only compounded rather than alleviated through seeking international protection. In the absence of LGR, statelessness and rightlessness are maintained. As an Iraqi trans asylum seeker in Greece explains:

In Iraq they kill you, here in Greece you live but you die slowly ... life does not exist ... To my own interest the first thing would be changing my identity ... That is I am a woman but my identity remains male. When I go to public services the employee looks at my identity, looks at me, mocks me or laughs, asks what is it, what is it, what is it, a man or a woman ... I want a job, I want to live my life like every human ... How do I win my rights? (Avgeri 2019)

Understanding statelessness as something that exists for trans people before migration makes it easier to comprehend the rightlessness that manifests in the moment of the asylum application. Here, we see acutely 'how lack of legal nationality serves as a symptom of existing discrimination and marginalization' (emphasis added) and how this cycle is perpetuated (Kingston 2017: 60). This existing discrimination is both a cause of statelessness and an outcome that highlights the link that scholars make to trans people being 'like refugees' (Jain and Kartik 2020: 3), or 'stateless' (Lorber 1999: 359), even before fleeing. Indeed, for the UNHCR, a 'lack of national protection places stateless persons in a position analogous to that of refugees ... one means of overcoming refugee status is the realization of an effective nationality' (Seet 2016: 21).

Paisley Currah (2009: 254) notes that 'the most important difference between transgender and non-transgender people is that non-transgender people have already achieved ... legal gender recognition'. If states and other institutions place gender markers on documents, including on documents belonging to transgender people, they are already practicing LGR. However, how LGR is currently practiced—with transgender people typically being officially misidentified—has adverse consequences for citizenship access or the legal bond between the state and an individual, and often violent outcomes for specific segments of the global population. It is also a cause for concern that discussions surrounding LGR begin and end with tools of citizenship such as birth certificates and population registers. Examining LGR through the lens of statelessness may open up new avenues for activism. It could also attract the involvement of actors and stakeholders, like the UNHCR, who have declared their stance in principle, if not yet in action. Of course, providing trans asylum applicants with usable documents which accurately recognize them in an effort to address statelessness would, in some countries, be ahead of state-based LGR laws. However, influencing and socializing states in its principles and mandate, the UNHCR has 'the power of their expertise, ideas, strategies, and legitimacy to alter the information and value contexts' in which policy is made by states (Loescher and Milner 2011: 194). Mitigating many of the challenges outlined in this paper, extending LGR to trans asylum seekers would go some way towards establishing LGR as a norm not just in asylum but more broadly. This would work towards not only fulfilling the UNHCR mandate on international protection but also acting within their

mandate to prevent statelessness by making explicit the link between LGR, transgender people, and asylum. There may well be resistance to this, but as Indira Goris et al. (2009: 6) note:

Wider acknowledgement of existing normative gaps relating to nationality should prompt the articulation of new and stronger norms that will require states both to grant citizenship and to refrain from arbitrarily depriving individuals of citizenship. States may well be reluctant to accept yet another principle that constrains their actions—but so it has been with every human right.

I have proposed that there is precedent for this approach given the provision of international protection to LGBT asylum applicants, even in countries where LGBT citizens are subject to active criminalization and lack such recognition. The UNHCR already runs parallel legal regimes in several countries, and its guidelines explicitly emphasize the consequences of the absence of LGR for transgender people. While there may be challenges in implementing LGR from the application stage, the present approach, which diminishes rather than extends access to international protection, is not only paradoxical but, as the experiences of trans asylum seekers indicate, dangerous.

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