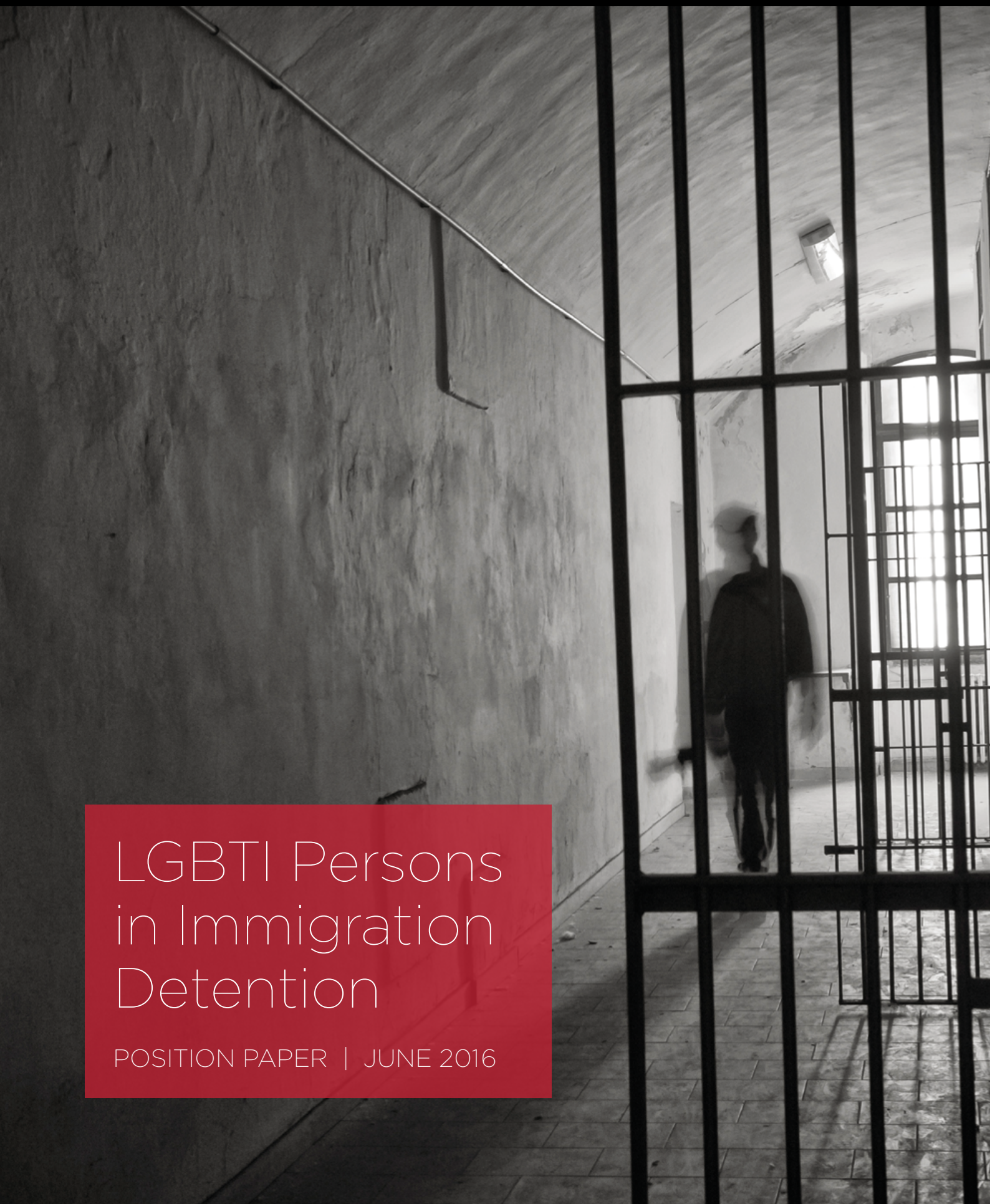
International Detention Coalition

Human rights for detained refugees, asylum seekers and migrants



LGBTI Persons in Immigration Detention

POSITION PAPER | JUNE 2016

CONTACT

International Detention Coalition (IDC)
Level 1, 112 Langridge Street
Collingwood, Victoria, 3066, Australia
Tel: +61 3 9999 1607
Fax: +61 3 9629 7213

Website: www.idcoalition.org
Follow us on twitter @idcmonitor

ABOUT THE IDC

The International Detention Coalition (IDC) is a unique global network of over 300 civil society organisations and individuals in more than 70 countries that advocate for, research and provide direct services to refugees, asylum seekers and migrants affected by immigration detention.

The IDC works to ensure that the human rights of refugees, asylum seekers and migrants impacted by immigration detention are respected, protected and fulfilled. The IDC aims to bring about changes in legislation, policy and practice that prevent, mitigate and respond to the harms associated with immigration detention and that promote alternatives to detention. The IDC does this through network and capacity building, advocacy, awareness raising and campaigns, research and reporting.

ACKNOWLEDGEMENTS

The International Detention Coalition (IDC) would like to thank Amy Frew, Aline Fausch and Kaleb Cox, whose research and writing form the basis of this Position Paper. Additionally, this Position Paper could not have been produced without the generous assistance of numerous IDC Members and Partners who provided invaluable feedback, including: Rachel Levitan, Shana Tabak, Leila Lohman, Janet Dench, Grusa Matevzic, Adam Frankel, Jean-Sébastien Blanc, Michael van Gelderen, Matías Matilda González Gil, Mariel Ortega, and Fanny Gómez Lugo.

The opinions and positions contained in this Position Paper—as well as the responsibility for any mistakes or omissions—belong to the International Detention Coalition.

Contents

Position Summary

Our Position

It is the position of the IDC that vulnerable individuals should never be placed in immigration detention. Immigration detention is particularly harmful to individuals who are already at a heightened risk of discrimination, abuse and exploitation, including lesbian, gay, bisexual, transgender or intersex (LGBTI) persons. Within places of immigration detention, LGBTI persons face heightened levels of harassment, discrimination, psychological abuse, physical and sexual violence by detention staff as well as other detainees. They are frequently segregated in conditions falling below those of the general detainee population and well-established international standards, or are subjected to policies of solitary confinement, which have been shown to have severe mental and physical health consequences. Almost universally, LGBTI persons in detention are in situations of extreme vulnerability. Given the pervasive and well-known harms to LGBTI persons in immigration detention, it is difficult to imagine a situation in which States would be justified in detaining them, especially as viable alternatives to detention exist.

Safe and Confidential Screening and Assessment

The best way to prevent harms to LGBTI persons in detention is to prevent them from ever being placed in immigration detention in the first place. This will require LGBTI-sensitive screening procedures that provide opportunities for safe, voluntary and dignified disclosure of sexual orientation and/or gender identity within regular migration and border governance processes. Forced disclosure of sexual orientation and/or gender identity not only violates rights to personal dignity, it also puts LGBTI persons at serious risk of harm within the detention environment. The lack of opportunities for safe, voluntary and dignified disclosure of sexual orientation and/or gender identity also frustrate efforts of LGBTI persons to pursue asylum or other protection claims. Given this reality, States should prioritise the implementation of LGBTI-sensitive screening procedures that allow LGBTI persons to promptly disclose their sexual orientation and/or gender identity in a safe, dignified and confidential manner.

LGBTI-Sensitive Alternatives to Detention (ATD)

Because vulnerable individuals should never be placed in immigration detention, alternatives to detention must be sought. States should work closely with LGBTI leaders and grassroots organisations to support and protect LGBTI persons in the community while their immigration status is being resolved. LGBTI-sensitive alternatives to detention should include community placement and support services uniquely designed to meet the needs of LGBTI persons.

Prohibition on the Use of Solitary Confinement

Under no circumstances should LGBTI persons be subjected to the practice of solitary confinement for purposes of regular immigration and border governance. The placement of LGBTI persons in ‘protective’ solitary confinement, whether temporarily or for prolonged periods, is recognised as physically and psychologically destructive and can lead to permanent mental and physical health issues. Instead, States should prioritise the implementation of LGBTI-sensitive alternatives as a matter of priority.

Glossary

Alternative(s) to immigration detention ('alternatives')
Any law, policy or practice by which persons are not detained for reasons relating to their migration status.[1]

Asylum seeker
A person who has made an application to be recognised as a refugee, but who has not yet received a final decision on that application.[2]

Bisexual
An individual who is physically, romantically and/or emotionally attracted to both men and women.[3]

Deprivation of liberty
Any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.[4]

Gay
A man whose enduring physical, romantic and/or emotional attraction is to other men.[5]

Gender identity
Each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.[6]

Gender non-conforming
A term used to describe some people whose gender expression is different from conventional expectations of masculinity and femininity. The term is not a synonym for transgender but is used if/when someone self-identifies as gender non-conforming.[7]

Intersex
Intersex is an umbrella term used to describe people who are born with sex characteristics that do not fit typical binary notions of male or female bodies. According to experts, between 0.05% and 1.7% of the population is born with intersex traits. Being intersex relates to biological sex characteristics, and is distinct from a person's sexual orientation or gender identity. An intersex person may be straight, gay, lesbian, bisexual or asexual, and may identify as female, male, both or neither.[8]

Irregular migrant
A migrant who does not fulfil or who no longer fulfils the conditions of entry, stay or residence within a State.[9]

Lesbian
A woman whose enduring physical, romantic and/or emotional attraction is to other women.[10]

LGBTI
An umbrella term used to encompass lesbian, gay, bisexual, transgender and intersex people.

1. Sampson, R., Chew, V., Mitchell, G., and Bowring, L. *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (Revised)*, ii78 (Melbourne: International Detention Coalition, 2015).
2. Ibid.
3. 'GLAAD Media Reference Guide – 9th Edition', *Gay & Lesbian Alliance Against Defamation*, (August 2014); see also, UNHCR, *UNHCR Resettlement Assessment Tool: Lesbian, Gay, Bisexual, Transgender and Intersex Refugees*, (UNHCR, 2013) 20.
4. Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), Art. 4(2).
5. 'GLAAD Media Reference Guide – 9th Edition', above note 3; *UNHCR Resettlement Assessment Tool*, above note 3, 20.
6. International Commission of Jurists (ICJ), *Yogyakarta Principles – Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007), fn 2.
7. 'GLAAD Media Reference Guide – 9th Edition', above note 3.
8. United Nations, 'Fact Sheet – Intersex', *United Nations for LGBTI Equality, Free & Equal Campaign*, available at: http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/FactSheets/UNFE_FactSheet_Intersex_EN.pdf.
9. *There are Alternatives* (Revised), above note 1, 78
10. 'GLAAD Media Reference Guide – 9th Edition', above note 3; *UNHCR Resettlement Assessment Tool*, above note 3, 20.

Migrant
A person who is outside of a State of which he or she is a citizen, national or habitual resident. Persons are migrants regardless of whether their migration is temporary, lawful, regular, irregular, forced, for protection, for economic reasons, or for any other reason.

Refugee
A person who fulfils the definition of a "refugee" in the 1951 Convention and 1967 Protocol relating to the Status of Refugees or any regional refugee instrument.

Sexual orientation
Each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.[11]

Stateless person
A person who is not considered as a national by any State under the operation of its law.[12]

Transgender
An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth.[13]

11. *Yogyakarta Principles*, above note 6, fn 1.; see also *UNHCR Resettlement Assessment Tool*, above note 3, 20.
12. *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.
13. 'GLAAD Media Reference Guide – 9th Edition', above note 3; *UNHCR Resettlement Assessment Tool*, above note 3, 20.

Background

The International Detention Coalition (IDC) began in 2003 as an informal network following discussions between civil society organisations during the United Nations High Commissioner for Refugees (UNHCR) Annual Consultations with NGOs held in Geneva. The IDC became an incorporated non-governmental organisation in 2009. Later in 2009, the IDC published its Core Position,[14] comprised of 10 central positions of agreement across the IDC network. These Position Papers intend to clarify and expand upon the principles set forth in the IDC Core Position. With regard to LGBTI persons, the IDC Core Position states:

> 2. Vulnerable individuals – including children, pregnant women, nursing mothers, survivors of torture and trauma, trafficking victims, elderly persons, the disabled or those with physical or mental health needs – should not be placed in detention.

Although not explicitly mentioned in the IDC Core Position, LGBTI persons are particularly vulnerable to abuse and neglect in detention environments. Recognising the increased vulnerability of LGBTI persons in places of immigration detention and to support global advocacy efforts to reduce unnecessary and arbitrary immigration detention, the IDC has chosen to issue this Position Paper on 'LGBTI Persons in Immigration Detention'.

14. 'IDC Core Position (2009)', *International Detention Coalition*, (2011), available at: http://idcoalition.org/publications/idc-core-position/.

Introduction

Globally, countless millions of refugees, asylum seekers, stateless persons and migrants[15] are at risk of immigration detention each year. The use of immigration detention is a widespread and expanding feature of migration policies worldwide, and represents a growing human rights challenge.[16]

The increase in immigration detention is often linked to concerns regarding national security and attempts to limit irregular migration.[17] For some States, detention has become the preferred means of regulating cross-border migration.[18] Immigration detention is being used at various stages of the migration journey, including upon arrival, during the processing of protection or legal claims, and in preparation for removal or departure.

As a result, refugees, asylum seekers, stateless persons and migrants are frequently subjected to unlawful or arbitrary detention, placing them in a position of particular vulnerability.[19] Further exacerbating this vulnerability is the fact that many countries use a one-size-fits-all immigration detention model, where persons are detained regardless of individual circumstances, age, or protection needs.[20]

Immigration detention can last for months or even years, during which time persons are deprived of their liberty, often in overcrowded and unhygienic conditions falling below international standards, and globally, immigration detention remains far less regulated, reviewed and monitored than other forms of detention.[21] Many human rights violations can and do occur in these circumstances, and the physical and psychological impacts of even very limited immigration detention are well-documented.[22]

Immigration detention is particularly harmful to individuals who are already at a heightened risk of discrimination, abuse and exploitation such as lesbian, gay, bisexual, transgender or intersex (LGBTI) persons. While LGBTI persons are a non-homogenous group, one constant is the frequent persecution, discrimination, harassment, and physical or psychological violence that LGBTI people suffer because they either self-identify as, or are perceived to be, non-conforming with

15. For the purposes of this Position Paper, 'refugees, asylum seekers, stateless persons and migrants' is used broadly to refer to the many legal, political and social categories of individuals at risk of immigration detention. This includes, but is not limited to, refugees, asylum seekers, stateless persons, labour migrants, trafficked persons, smuggled persons, irregular/undocumented migrants, as well as visa holders.
16. *There are Alternatives (Revised),* above note 1, 10-12.
17. See generally Robyn Sampson and Grant Mitchell, 'Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales' 1(3) *Journal on Migration and Human Security,* 97 (2013).
18. International Detention Coalition, *International Detention Coalition (IDC) Immigration Detention Submission to the Special Rapporteur on the Human Rights of Migrants*, (3 February 2012), 2.
19. See generally, François Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants*, 'Detention of Migrants in an Irregular Situation, (2 April 2012) A/HRC/20/24.
20. Association for the Prevention of Torture (APT), International Detention Coalition (IDC), and United Nations High Commissioner for Refugees (UNHCR), *Monitoring Places of Immigration Detention: Practical Manual*, (Association for the Prevention of Torture and United Nations High Commissioner for Refugees: 2014).
21. Ibid.
22. See, e.g. Derrick Silove, Zachary Steel, and Charles Watters, 'Policies of Deterrence and the Mental Health of Asylum Seekers', 284(5) *Journal of the American Medical Association,* 604 (2000); Medecins Sans Frontieres, *The Impact of Detention on Migrants' Health, Briefing Paper* (Brussels: Medecins Sans Frontieres, 2010); Guy J Coffey, et al., 'The Meaning and Mental Health Consequences of Long-term Immigration Detention for People Seeking Asylum', 70(12) *Social Science & Medicine,* 2070 (2010).

heterosexual and cisgender norms and/or because their bodies differ from the socially accepted standard for female and male bodies.[23] For this reason, sexual orientation and gender identity are increasingly being recognised as a basis for international protection.[24]

Within places of immigration detention, LGBTI persons often become doubly marginalised; vulnerable to identity-based abuses in their home countries, and again forced to endure identity-based abuses in the detention environment. LGBTI persons in immigration detention are at a heightened risk of marginalisation, discrimination, and violence, both at the hands of fellow detainees and detention centre personnel.[25]

Detention policies such as physical isolation and solitary confinement of LGBTI persons have proven to be especially harmful,[26] and the general lack of gender recognition, combined with the realities of sexually-segregated detention facilities, creates a situation in which transgender and intersex migrants are particularly at risk of suffering severe psychological, physical, and sexual harm. Such abuses exacerbate depression, anxiety and other psychological trauma experienced by LGBTI persons during their migration journey.[27] In spite of this clear vulnerability, the unique protection needs of LGBTI persons have been largely ignored by States in their detention policies[28] and very little is known about successful LGBTI-sensitive alternatives to detention.

This Position Paper seeks to address some of these critical gaps. This paper first provides an overview of the serious impacts of detention on LGBTI persons. The paper then analyses the international human rights framework applicable to LGBTI refugees, asylum seekers, stateless persons and migrants at risk of immigration detention. Finally, this paper examines a number of positive alternative to detention practices, which may be employed to address the specific needs of LGBTI persons. It ends by making a number of recommendations for State policy makers and those working to end the unnecessary immigration detention of LGBTI persons or to implement LGBTI-sensitive alternatives.

23. Suzanne B Goldberg, 'Give me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men, 26 *Cornell International Law Journal*, 605 (1993); Shana Tabak and Rachel Levitan, 'LGBTI Migrants in Immigration Detention: A Global Perspective', 37 *Harvard Journal of Law & Gender*, 1 (2014), 7.
24. According to guidance from UNHCR, LGBTI asylum seekers can be recognised as refugees under art 1(A)(2) on the ground 'membership of a particular social group' based on claims related to persecution associated with their sexual orientation and gender identity. UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01.
25. Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (Amsterdam: COC Nederland and Vrije Universiteit Amsterdam, 2011) 10.
26. Tabak and Levitan, above note 23, 3, 29 and 33.
27. Tabak and Levitan, above note 23, 3; American Civil Liberties Union (ACLU) of Arizona, *In Their Own Words: Enduring Abuse in Arizona Immigration Centers,* (ACLU, 2011) 22-25.
28. Tabak and Levitan, above note 23, 2-3.

The Impacts of Immigration Detention on LGBTI Persons

All people are susceptible to human rights abuses in detention.[29] However, LGBTI persons are at a heightened risk of abuse and exploitation, including:

- physical and sexual violence
- verbal and psychological abuse
- physical isolation and solitary confinement
- lack of legal recognition of LGBTI persons' identity
- inadequate vulnerability screening
- non-gender appropriate searches or forced nudity
- lack of access to medical care

Physical and sexual violence

Within places of detention, LGBTI persons regularly experience identity-based sexual harassment and physical violence.[30] Research indicates that LGBTI detainees in both immigration and non-immigration contexts—especially transgender persons and gender nonconforming men—are particularly vulnerable to sexual violence compared with heterosexual or gender-conforming detainees.[31] According to the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

> Within detention facilities, there is usually a strict hierarchy, and those at the bottom of this hierarchy, such as children, the elderly, persons with disabilities and diseases, gay, lesbian, bisexual and trans-gender persons, suffer double or triple discrimination.[32]

Because deeply embedded intolerance and discrimination of LGBTI persons is prevalent outside of detention in many societies around the world, intolerance, and the reactionary violence that results from it, are also present within places of detention.[33] Indeed, studies have shown that a majority of male detainees feel that their own virility is questioned or threatened by the mere presence of LGBTI persons, demonstrating acute homophobia and transphobia within places of detention.[34] As a result, LGBTI persons are often singled out for sexual assault by other detainees in the detention environment.[35] Transgender persons in particular are 15 times more likely to be sexually assaulted than the general detention population,[36] and transgender women, who

29. Part of this research is based on sources related to the detention of non-migrant LGBTI individuals, typically those within the criminal justice system. This is for a number of reasons. First, there is limited academic literature available on LGBTI migrants in the immigration detention context. Second, many LGBTI migrants are detained in criminal detention facilities for administrative immigration-related purposes, therefore the context and impacts will be similar. Finally, the available academic literature indicates that the impacts of the detention environment are similar among LGBTI detainees, irrespective of the reasons for detention.
30. European Union Agency for Fundamental Rights (FRA), *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation* (European Union Agency for Fundamental Rights, 2009) 99–100.
31. Stop Prisoner Rape, *In the Shadows: Sexual violence in U.S. Detention Facilities, A Shadow Report to the U.N. Committee Against Torture* (USA: Stop Prisoner Rape, 2006); Tabak and Levitan, above note 23, 26.
32. Manfred Nowak, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, Including an Assessment of Conditions of Detention, (5 February 2010) A/HRC/13/39/Add.5, [231].
33. Office of the High Commissioner for Human Rights (OHCHR), 'Combatting Discrimination Based on Sexual Orientation and Gender Identity', available at: http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx.
34. Joint United Nations Program on HIV/AIDS (UNAIDS) and United Nations Office on Drugs and Crime (UNODC), *Diversidad Sexual, Derechos Humanos y VIH en el Sistema Penitenciario de Costa Rica*, (Costa Rica: Gossestra Intl, 2012), 41.
35. National Prison Rape Elimination Commission, *National Prison Rape Elimination Commissioner Report* (2009) 73-74; Annette de la Torre, 'Is Ze an American or a Foreigner? Male or Female? Ze's Trapped!', 17 *Cardozo Journal of Law and Gender,* 389 (2011), 404.
36. Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (Center for Evidence-Based Corrections, 2007) 27.

may be detained with men in sex-segregated immigration detention facilities,[37] are perhaps the most vulnerable to this abuse.[38]

But while transgender detainees are particularly vulnerable to physical and sexual assault, they are not alone. Across the spectrum of non-heteronormative detainees, the risk of violence—including rape, physical assault and sexual abuse—is higher for detainees from sexual minorities.[39] According to the United States Bureau of Justice Statistics, 34% of detained bisexual men and 39% of detained gay men had been sexually abused while in detention, compared with only 3.5% of men who identified themselves as heterosexual.[40]

Not only are LGBTI detainees at a heightened risk of physical and sexual violence from other detainees, they are also at a heightened risk of abuse from detention centre personnel. According to one study of U.S. prisons, approximately half of all sexual abuse is committed by staff, not by inmates.[41] Furthermore, failure on behalf of detention personnel to stop inter-detainee sexual violence can be viewed by detainees as endorsing such abuse. Detention personnel sometimes interpret any outward signs of LGBTI identity as evidence of 'consent to rape' and ignore complaints of sexual violence brought by sexual minority detainees.[42] In Costa Rica, the United Nations Office on Drugs and Crime (UNODC) and UNAIDS have observed that non-conformity with heterosexual gender norms in places of detention often results in physical punishment, and that the risk of violence faced by LGBTI detainees depends largely on detention personnel and their willingness to intervene.[43] A paradigmatic example of this prejudice by detention staff can be found in the case of a 30 year old gay man repeatedly raped by other prisoners in detention due to his sexual orientation.[44] Despite many attempts to notify the guards of his situation and requests to move out of the general population, the detention staff routinely refused to accept his written grievances, with one guard citing his sexual orientation as consent to rape.[45]

Verbal and psychological abuse

In addition to the physical and sexual violence suffered by many LGBTI detainees, LGBTI persons are also frequently subject to verbal abuse, harassment, taunting, threats of rape or sexual assault, and humiliating or degrading language both by detainees and detention centre personnel relating to their real or perceived sexual orientation or gender identity.

LGBTI persons in detention facilities are at increased risk of verbal abuse, a fact that has been extensively documented both by the United Nations Special Rapporteur on Torture, as well as by numerous civil society and human rights organisations.[46] Such instances of verbal abuse and harassment further traumatise LGBTI persons, function to condone or encourage physical and sexual abuse, and can leave deep psychological scars on LGBTI detainees years after the incidents occur.[47]

37. Amy Lieberman, 'Complaints by Transgender Detainees Quantify Abuse', Women's Enews (3 September 2013), available at: http://womensenews.org/story/lesbian-and-transgender/130902/complaints-transgender-detaineesquantify-abuse; David Kaiser and Lovisa Stannow, 'Prison Rape: Obama's Program to Stop It', New York Review of Books (published 11 October 2012), available at: http://www.nybooks.com/articles/archives/2012/oct/11/prisonrape-obamas-program-stop-it/.
38. Jaime Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (National Gay & Lesbian Task Force and National Center for Transgender Equality, 2011).
39. Association for the Prevention of Torture (APT), *LGBTI Persons Deprived of Liberty: A Framework for Preventive Monitoring* (Penal Reform International, 2015).
40. Kaiser and Stannow, above note 37.
41. Ibid.
42. Tabak and Levitan, above note 23, 27.
43. See *Diversidad Sexual, Derechos Humanos y VIH en el Sistema Penitenciario de Costa Rica*, above note 51, 42-45.
44. Just Detention International, *Survivor Testimony, "Adam, Louisiana"*, available at: http://www.justdetention.org/en/survivortestimony/stories/adam_la.aspx.
45. Ibid.
46. See, Sir Nigel Rodley, Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, *Torture and discrimination against sexual minorities*, (3 July 2001) UN Doc. A/56/156, para 18; see also Amnesty International, "Crimes of hate, conspiracy of silence: Torture and ill-treatment based on sexual identity" (ACT 40/016/2001); see also Sharita Gruberg, *Dignity Denied: LGBT Immigrants in U.S. Immigration Detention*, (Center for American Progress, November 2013),
47. Tabak and Levitan, above note 23, fn 104.

Furthermore, LGBTI persons who flee their country of origin on the basis of sexual orientation or gender identity persecution can end up being detained together with individuals of the same nationality or country of origin. These individuals often share the same discriminatory perspectives that lead LGBTI persons to migrate, and continued verbal abuse and harassment are likely.

Transgender detainees are particularly at risk of verbal and psychological abuse. Phrases such as 'he-she', 'she-male' or 'it' are considered defamatory and should never be used to refer to transgender persons.[48] However, these terms are prevalent in immigration detention facilities, and have even been used by some States to describe immigration detainees filing complaints about harassment or abuse within places of detention.[49] A case presented by the Transgender Law Center demonstrates the severity of such re-traumatisation. After seeking asylum due to sexual violence suffered in Guatemala, Nicoll, a transgender immigrant detainee, was frequently the target of such derogatory slurs by immigration detention staff.[50]

> "Transgender detainees are particularly at risk of verbal and psychological abuse"

Physical isolation and solitary confinement

Some of the most traumatising and harmful policies associated with the detention of LGBTI persons are the use of physical isolation and solitary confinement. It is common for LGBTI detainees, or those perceived as belonging to a sexual orientation or gender identity minority, to be detained together in the same cell or within the same unit in administrative segregation.[51] According to the US Department of Justice's Bureau of Justice Statistics, LGBTI detainees are more likely than other detainees to have spent time in restrictive housing and administrative segregation.[52]

While at times, physical segregation may be requested by LGBTI detainees themselves in order to avoid discrimination and abuse on the basis of their sexual orientation or gender identity, all too often LGBTI persons are forcibly segregated as a matter of policy, or in what has been referred to as a form of 'protective custody'.[53]

Sometimes referred to as 'LGBTI pods', the practice of 'protective' segregation has proven problematic in that it subjects LGBTI detainees to heightened levels of visibility and can make them a collective target for harassment by other detainees as well as by detention personnel.[54] The 'LGBTI pods' are often in worse physical condition than those located in other premises within the same detention facility or otherwise lead to LGBTI detainees being treated as second-class persons within the detention environment.[55] Such segregation from the

48. 'GLAAD Media Reference Guide – 9th Edition', above note 3.
49. The Women's eNews investigation found that the descriptor 'He/She' was used nearly twice as often as the appropriate phrase, 'Transgender' when identifying complaining detainees: Lieberman, above note 54.
50. 'Transgender Asylum Seeker Faces Abuse in Immigration Detention', Transgender Law Center, available at: http://transgenderlawcenter.org/archives/11347.
51. *LGBTI Persons Deprived of Liberty,* above note 39.
52. Association for the Prevention of Torture, APT note to the United Nations Special Rapporteur on Torture, Expert consultation on gender perspectives on torture and ill-treatment, 4 November 2015, available at: http://www.apt.ch/content/files/UN/APT_Briefing%20Note%20to%20UNSRT_report_gender.pdf; see also "Use of Restrictive Housing in U.S. Prisons and Jails, 2011–12", BJS, October 2015, available at: http://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf.
53. Juan E Méndez, Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (5 August 2011) A/66/268, [26], [69]; see also Tabak and Levitan, above note 23, 29; *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation*, above note 47, 99-100; see also Sharita Gruberg, *Dignity Denied: LGBT Immigrants in U.S. Immigration Detention*, (Center for American Progress, November 2013), available at: https://www.americanprogress.org/wp-content/uploads/2013/11/ImmigrationEnforcement-1.pdf.
54. Transgender Law Center, Press Release, *115+ LGBTQ, Immigration Organizations Ask President to Release Detained LGBTQ Immigrants,* (December 16, 2014), available at: http://transgenderlawcenter.org/archives/11302.
55. Association for the Prevention of Torture, APT note to the United Nations Special Rapporteur on Torture, Expert consultation on gender perspectives on torture and ill-treatment, 4 November 2015, available at: http://www.apt.ch/content/files/UN/APT_Briefing%20Note%20to%20UNSRT_report_gender.pdf.

general detention population can re-traumatise LGBTI persons, many of whom have been forced to migrate due to sexual orientation or gender-related discrimination in their home countries.

Additionally, as some LGBTI detainees are released over time, segregation practices may result in situations where remaining persons are left in *de facto* solitary confinement or provided limited social contact. In some places of immigration detention, administrative segregation is indistinguishable from the highest-security criminal solitary confinement, involving isolation for up to 23 hours a day in a small cell with extremely limited access to the outdoors, other people, or physical activities.[56] This practice effectively denies LGBTI persons the opportunity to access existing health, psycho-social, legal support services and other fundamental rights in places of immigration detention.[57]

The use of solitary confinement is particularly concerning given the well-known and extremely traumatic harms it poses to those detained. These harms include: heightened rates of anxiety, hallucinations, panic attacks, obsessive thinking, paranoia, nightmares, and self-directed violence, including for individuals with no prior history of mental illness.[58] In the United States, studies on the use of solitary confinement in criminal prisons have found "chronic and overwhelming feelings of sadness, hopelessness, and depression" and the highest rates of suicide among any detention environment in the country.[59]

Prolonged solitary confinement—defined as any solitary confinement beyond 15 days—has been conclusively shown to have severe negative psychological impacts on detainees,[60] and studies have shown that solitary confinement lasting more than three months "causes lasting emotional damage if not full-blown psychosis and functional disability."[61] Prolonged solitary confinement not only leads to severe mental health issues, it exacerbates post-traumatic stress disorder (PTSD) and other acute psychological conditions developed by survivors of violence.[62]

"prolonged solitary confinement 'constitutes torture or cruel, inhuman or degrading treatment or punishment.'"

For this reason, the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Mr Juan Méndez, has recognised that prolonged solitary confinement "constitutes torture or cruel, inhuman or degrading treatment or punishment."[63] Given that the prohibition of torture is a matter of *jus cogens*, and a peremptory norm of customary international law, any use of solitary confinement beyond 15 days amounts to a severe violation of international law.[64]

Furthermore, there is evidence that even shorter periods of solitary confinement should be considered 'prolonged', and the UN Special

56. Tabak and Levitan, above note 23, 30; Alexis Perlmutter et al., Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigration Detention, (Heartland Alliance National Immigrant Justice Center & Physicians for Human Rights, 2012), 9-10.
57. *X v. Turkey* [2012] (Application no. 24626/09), *Judgment*, 9 October 2012; 'This holding marked the first and only occasion in which the [European Court of Human Rights] found a violation specific to sexual orientation or gender identity with regard to Article III of the European Convention on Human Rights prohibiting punishment that amounts to torture or inhuman or degrading treatment': Tabak and Levitan, above note 23, 14.
58. See, e.g. Stuart Grassian, 'Psychiatric Effects of Solitary Confinement', *Washington University Journal of Law & Policy* 22 (2006).
59. Statement Of Professor Craig Haney To California Assembly Committee On Public Safety, Hearing On Shu Conditions In California Department Of Corrections And Rehabilitation (August 23, 2011), available at: http://solitarywatch.com/2011/09/01/pawns-in-a-failed-experiment-testimony-of-dr-craig-haney-on-solitary-confinement/.
60. Bruce A Arrigo and Jennifer Leslie Bullock, 'The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What We Should Change', 52(6) *International Journal of Offender Therapy and Comparative Criminology* 622 (2008), 627.
61. Terry A Kupers, 'What to do with the Survivors? Coping With the Long-Term Effects of Isolated Confinement', 35(8) *Criminal Justice and Behavior* 1005 (2008) 1005-1006.
62. Perlmutter et al., above note 75, 13.
63. UN Doc. A/66/268 (2011), above note 71, [77].
64. Ibid.

Rapporteur himself has noted that the 15 day distinction is somewhat arbitrary.[65] For example, a 1997 survey of the psychological literature found that every previous study of involuntary solitary confinement lasting for more than 10 days documented severe negative psychiatric symptoms in detainees.[66] In this way, even short-term isolation may amount to torture or other cruel, inhuman or degrading treatment or punishment.

Lack of legal recognition of LGBTI persons' identity

In most countries of the world, the rights of LGBTI persons are still unrecognised and may even be criminalised.[67] This lack of legal recognition of LGBTI persons' identity often leads to the denial of the rights of LGBTI persons. Specific to the detention environment, it can lead to gross physical and sexual violence when detainee requests to be placed in facilities with their preferred gender are denied.

It is a common and generally accepted positive practice to segregate detention populations by sex assigned at birth.[68] However, this type of sexual segregation can lead to serious problems for LGBTI persons. Transgender and intersex persons, in particular, are frequently placed in gender-inappropriate facilities and detention centre personnel may wrongly assign a gender identity based on their prejudice of how they think a masculine or feminine body should look like, instead of self-identification.[69] As has already been discussed, this makes the detention of transgender and intersex persons particularly unsafe. Transgender persons are 15 times more likely to be sexually assaulted than the general prison population,[70] and transgender women who are housed with men in sex-segregated immigration detention facilities are among the most vulnerable to physical and sexual abuse.[71]

The risks of violence by the non-recognition of detainees' LGBTI identity is starkly demonstrated in a 2011 case from El Salvador documented by the United Nations Special Rapporteur on Violence Against Women, Rashida Manjoo, in which a transgender woman was detained in a male-only prison and was subsequently raped more than 100 times, sometimes with the complicity of prison officials.[72]

Inadequate vulnerability screening

Within regular migration processes, screening procedures typically exist to identify individuals in situations of particular vulnerability and to ensure they are protected. However, the lack of opportunities for LGBTI persons to disclose their sexual orientation and/or gender identity in a safe, voluntary and dignified manner means that many LGBTI persons are not properly identified, may end up being detained and are therefore placed in a situation of extreme vulnerability.

Once inside the detention environment, the lack of opportunities for safe, voluntary and dignified disclosure of one's LGBTI status also places LGBTI persons at a heightened risk of forced or involuntary disclosure by virtue of segregation procedures or situations where detention personnel or other detainees 'out', or disclose this personal information without their consent. Such forced disclosure of information is not only a failure to treat people with dignity and humanity; it also puts LGBTI persons at serious risk of physical, verbal and emotional abuse as detailed in the previous sections.

65. Ibid.
66. Craig Haney and Mona Lynch, 'Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement', 23 *New York University Review of Law & Social Change,* 477 (1997), 525; see Mike Corradini et al., *Buried Alive: Solitary Confinement in the US Detention System*, (Physicians for Human Rights, 2013) 32.
67. Jansen and Spijkerboer, above note 25, 21.
68. United Nations High Commissioner for Refugees (UNHCR), *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum–Seekers and Alternatives to Detention*, (UNHCR, 2012).
69. See United Nations, 'Fact Sheet – Refugee and Asylum', United Nations for LGBTI Equality, Free & Equal Campaign, 2 available at: https://www.unfe.org/system/unfe-54-UN_Fact_Sheets_Refuge_Asylum.pdf.
70. Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (Center for Evidence-Based Corrections, 2007) 27.
71. Lieberman, above note 37; Kaiser and Stannow, above note 37; Jaime Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (National Gay & Lesbian Task Force and National Center for Transgender Equality, 2011).
72. Rashida Manjoo, United Nations Special Rapporteur on Violence Against Women, Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Rashida Manjoo , Addendum* (14 February 2011) A/HRC/17/26/Add.2, [28]-[29].

This is especially problematic for LGBT persons who have asylum or protection claims on the basis of their sexual orientation or gender identity. When LGBT asylum seekers are unable to safely and confidentially disclose their sexual orientation and/or gender identity during initial screening processes, they may effectively be denied access to asylum protection when their status is disclosed at a later time. This problem is even more acute for LGBT persons whose non-disclosure or late disclosure may be the result of feelings of shame, internalised LGBT discrimination, or an inability to name or conceptualise their identity as LGBT, especially if they have not done so previously.[73] Inadequate vulnerability screenings of asylum seekers have resulted in large numbers of individuals being returned to unsafe environments, including to States where persons are criminalised by their sexual orientation and or gender identity or otherwise places their lives in danger.[74]

Inadequate vulnerability screening also causes issues in terms of preventing, reporting and monitoring abuse within the detention environment itself. When States fail to provide opportunities for safe, voluntary and dignified disclosure of one's sexual orientation and/or gender identity, LGBT persons may be forced to attempt to 'pass' as heteronormative in order to protect themselves from abuse.[75] When this happens, often the only way of knowing about abuses to LGBT persons in detention comes after the abuse has already occurred, in the form of complaints or incident reports about verbal abuse, physical violence, and sexual assault.[76]

Non-gender appropriate searches or forced nudity

Regardless of whether States provide opportunities for safe, voluntary and dignified disclosure of one's LGBTI staus, whenever LGBTI persons are detained they face unique harms from instances of forced nudity or bodily searches, which can magnify the risk of humiliation, abuse and discrimination.[77]

International standards recommend that body searches are conducted by staff of the same gender.[78] Although relevant for most detainees, this standard is not necessarily protective for lesbian, gay or bisexual detainees, as they may face humiliation even when searched by staff of the same gender. Similarly, transgender detainees who are not recognised in accordance with their gender identity may be forcibly searched by a member of the same gender and therefore suffer physical violation and humiliation during these searches.

Lack of access to medical care

Beyond the verbal, psychological, physical, and sexual abuses which are endemic to LGBTI detention, there are additional concerns regarding the ability of LGBTI persons to realise their fundamental economic, social and cultural rights in the detention environment, particularly the right to access appropriate health and medical care.

This not only raises serious concerns around the right to non-discrimination—which requires that all detainees have equal access to medical and health services—but can also have serious and life-altering health implications. Indeed, according to the United Nations Special Rapporteur on Torture, discrimination in the provision of medical care on grounds of sexual orientation or gender identity "often contribute[s] to the

73. Tabak and Levitan, above note 23, 14-15.
74. Human Rights Watch, "You Don't Have Rights Here": US Border Screening and Returns of Central Americans to Risk of Serious Harm, (October, 2014).
75. Tabak and Levitan, above note 23, 41; Ariel Shildo and Joanne Ahola, 'Mental Health Challenges of LGBT Forced Migrants', 42 *Forced Migration Review*, 9 (2013).
76. Sharita Gruberg, Dignity Denied, above note 46.
77. APT, LGBTI Persons Deprived of Liberty, above note 39.
78. Inter-American Commission on Human Rights (IACHR), *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, above note 5, Principle XXI; United Nations General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules),* (6 October 2010) A/C.3/65/L.5, Rule 19.

process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place."[79]

Of particular concern to many LGBTI persons regarding access to medical care is the ability to receive appropriate care for HIV/AIDS and other sexually transmitted infections (STIs). According to UNAIDS, places of detention in general are already high-risk environments for STI transmission due to chronic overcrowding, stress, malnutrition, drug use, and the prevalence of violence.[80] Detainee wellbeing is often neglected and STI prevention programmes or pre-exposure prophylaxis (PrEP) are rarely made available to detainees, due to budgetary constraints, legal and policy barriers, and low political will to invest in detainees' care.[81] As a result, the prevalence of HIV/AIDS and other STIs in places of detention is between two and 10 times higher than in the general population, and in some settings HIV prevalence may be up to 50 times higher.[82] This is aggravated by the fact that there may be little or no access to prevention commodities such as condoms and lubricants in detention facilities.[83] Detention also increases exposure to other infectious diseases, which heightens risk of HIV-related morbidity.[84]

But even within the detention cohort, LGBTI persons are at a heightened risk of contracting HIV/AIDS or STIs compared with other detainees. This is due in part to the increased vulnerability to physical and sexual violence as discussed above. Additionally, some LGBTI persons arrive to places of detention already infected, often due to a history of sex work or exposure to prior sexual violence.[85] Where LGBTI persons have been victims of sexual violence within detention, they may receive no medical treatment for resulting injuries or access to Post-Exposure Prophylaxis (PEP), and confidential treatment for STIs, including HIV, are not always accessible.[86]

The lack of access to medical care is also evidenced by the limited ability of transgender detainees to continue hormone replacement therapy (HRT) and other treatments associated with gender transition. According to experts, the denied ability of someone with gender dysphoria to continue hormone therapy "can have medical implications ranging from depression to near death."[87] For these reasons, there is increasing jurisprudence that the denial of HRT is itself a form of cruel, inhuman or degrading treatment or punishment.[88]

79. Juan E Méndez, Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para. 79 (1 February 2013) A/HRC/22/53.
80. UNAIDS, *The Gap Report* (2014) 149.
81. UNAIDS, *The Gap Report* (2014) 150.
82. UNAIDS, *The Gap Report* (2014) 149.
83. UNAIDS, *The Gap Report* (2014) 151-154.
84. Ibid.
85. Tabak and Levitan, above note 23, 34-35.
86. United Nations Office on Drugs and Crime (UNODC), *Handbook on Prisoners with Special Needs*, (March 2009), 108.
87. Cindy Carcamo, 'Hormone Therapy for Transgender Immigration Detainees?', Orange County Register, available at: http://www.ocregister.com/articles/-301883--.html?page=2.
88. New York Times, Transgender Inmate's Hormone Treatment Lawsuit Gets Justice Dept. Backing, April 3 2015, available at: http://www.nytimes.com/2015/04/04/us/ashley-diamond-transgender-hormone-lawsuit.html

Applicable International Legal Standards and Guidelines

This Position Paper will not attempt to provide a comprehensive overview of the international legal framework for LGBTI persons in immigration detention. Rather, it will provide a brief introduction, seeking to highlight a number of specific international standards and guidelines relevant to LGBTI refugees, asylum seekers, stateless persons and migrants at risk of immigration detention.

The development of the rights of LGBTI persons in international law

The understanding of international legal protections for LGBTI persons is relatively new and still developing. Internationally, it was not until 1994 that the UN Human Rights Committee ruled in *Toonen v Australia* that States are obligated to protect individuals from discrimination on the basis of their sexual orientation.[89] Further, it was not until 2008, that the UN General Assembly first released a statement affirming the applicability of international human rights standards to sexual orientation and gender identity.[90] Since then, in 2011, the UN Human Rights Council adopted a resolution on human rights, sexual orientation and gender identity, which tasked the Office of the High Commissioner for Human Rights (OHCHR) to commission a study documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity.[91] The UN Human Rights Council also held a panel discussion on sexual orientation and gender identity in 2011, which represented the first time a UN intergovernmental body had held a formal debate on the subject.[92]

Another important milestone in the international recognition of the rights of LGBTI persons occurred in 2012, when a group of distinguished experts drafted the *Yogyakarta Principles*, an interpretative text on the application of international human rights law as it relates to issues of sexual orientation and gender identity.[93] In 2012 UNHCR also adopted the *UNHCR Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, which highlighted the special vulnerability of LGBTI refugees and asylum seekers in detention.[94] More recently, in 2013, the United Nations launched its 'Free and Equal' campaign to promote lesbian, gay, bisexual and transgender equality.[95]

In addition to these global developments, there have been a number of regional developments in the recognition of the rights of LGBTI persons. In 2010 the Committee of Ministers of the Council of Europe (COE) made a recommendation on the rights of LGBTI persons that included a comprehensive set of measures to promote the human rights of LGBTI persons in COE member States.[96] That same year, the COE released a *Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People* to encourage member States to promote and

89. *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee, 4 April 1994.
90. United Nations General Assembly, *Statement on Human Rights, Sexual Orientation and Gender Identity*, (18 December 2008).
91. Navenethem Pillay, United Nations High Commissioner for Human Rights, 'Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity', (17 November 2011) A/HRC/19/41.
92. United Nations Human Rights Council (UNHRC), *Human Rights Council Panel on Ending Violence and Discrimination Against Individuals Based on their Sexual Orientation and Gender Identity*, Summary of Discussion, (7 March 2012).
93. Sonia Onufer Correa and Vitit Muntarborn, 'Introduction to the Yogyakarta Principles', in *Yogyakarta Principles,* above note 12; Council of the European Union, *Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex Persons (LGBTI)*, Foreign Affairs Council Meeting, (24 June 2013), [12].
94. UNHCR, *Detention Guidelines*, above note 88, 39 [65].
95. 'UN Unveils 'Free & Equal' Campaign to Promote Lesbian, Gay, Bisexual, Transgender Rights', UN News Centre (published 26 July 2013), available at: http://www.un.org/apps/news/story.asp?NewsID=45503#.VMAvMkeUfVY.
96. Council of Europe Committee of Ministers, *Recommendation CM/Rec (2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity*, (adopted without vote on 31 March 2010).

protect the human rights of LGBTI persons in external countries.[97] Finally, in 2012 the European Parliament adopted a resolution condemning LGBTI-based discrimination and applauding those States that have taken steps to legally recognise 'LGBT people's fundamental rights'.[98]

The Americas have also taken measures to support the recognition of the rights of LGBTI persons, including, in 2011, a resolution adopted by the Organization of American States (OAS) encouraging member States to consider 'adopting public policies against discrimination by reason of sexual orientation and gender identity'.[99] That year also saw the Inter-American Commission on Human Rights (IACHR) create the first Unit, which later became a Rapporteurship on the Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons.[100] Since the Unit became operational in 2012, the Rapporteurship has taken a number of steps to promote the rights of LGBTI persons throughout the region.[101]

In its 2015 report on *Violence against LGBTI persons in the Americas*, the IACHR has confirmed how the structural vulnerability of migrants is compounded by other factors such as discrimination based on sexual orientation and gender identity.[102] Within this group, LGBT persons are extremely vulnerable to violence and discrimination. In many cases, the discrimination and violence faced by LGBT persons due to their sexual orientation and gender identity is what forces them to migrate. This may then lead to forms of discrimination against these persons in countries of transit and destination.

Moreover, the Commission highlighted in June 2014 that "in recent years, in addition to the traditional forms of persecution and situations, such as armed conflicts, generalized violence, violations of human rights, new situations, such as violence caused by organized crime, natural disasters or those caused by humans, large-scale development projects or violence based on gender identity or sexual orientation are also forcing thousands of persons to flee their countries."[103] More recently, on March 17, 2015, the IACHR held a public hearing during which it received troubling information regarding forced migration of LGBT persons in Central America, who seek asylum in other countries, due to fear of persecution based on sexual orientation and gender identity.[104]

While by no means comprehensive, the above developments reflect the growing international recognition that the rights of LGBTI persons are fundamental human rights. The following sections identify a number of fundamental human rights that also concern LGBTI persons at risk of immigration detention. Rather than a distinct or emerging set of LGBTI norms, these fundamental rights apply to all people, irrespective of sexual orientation or gender identity.

97. Council of the European Union, *Toolkit to Promote and Protect the Enjoyment of all Human Rights by LGBT People,* 11179/10 (17 June 2010).
98. European Union, *European Parliament Resolution of 24 May 2012 on the Fight Against Homophobia in Europe*, P7_TA-PROV(2012)022224, (May 2012), [1], [9].
99. Organization of American States, *Human Rights, Sexual Orientation, and Gender Identity*, AG/RES. 2653 (XLI-O/1) (7 June 2011); see also AG/RES 2435 (2008), AG/RES 2721 (2012) AG/RES 2807 (2013), AG/RES 2863 (2014), and *Case of Atala Riffo and Daughters v. Chile*, Inter-American Court of Human Rights (IACtHR), Judgment of February 24, 2012, Series C No. 239 (2012).
100. 'Press Release: IACHR Rapporteurship on the Rights of Lesbian, Gay, Bisexual, Trans and Intersex (LGBTI) Persons Becomes Fully Operational and First Rapporteur Duly Designated', Organization of American States, available at: http://www.oas.org/en/iachr/media_center/PReleases/2014/015.asp.
101. 'Rapporteurship on the Rights of Lesbian, Gay, Bisexual, Trans and Intersex (LGBTI) Persons Promotion', Organization of American States, available at: http://www.oas.org/en/iachr/lgtbi/activities/promotion.asp.
102. IACHR, Report "Violence Against LGBTI Persons in the Americas", OAS/Ser.L/V/II.rev.1 Doc. 36, November 12, 2015.
103. IACHR, Press Release No. 68/2014, "World Refugee Day: IACHR Emphasizes the Importance of the Right to Seek and Receive Asylum", June 20, 2014, available at: http://www.oas.org/en/iachr/media_center/PReleases/2014/068.asp.
104. IACHR, Public Hearing "Forced Migration and Persecution of LGBT Defenders in Central America", hearing requested by the organization Casabierta. March 17, 2015. Video available at: https://www.youtube.com/watch?v=j4OKKlYmoEU, accessed 19 April 2016.

Liberty of person

The principle limitation on the use of detention in international human rights law is the right to liberty of person, found in Article 3 of the Universal Declaration of Human Rights (UDHR) and Article 9 of the International Covenant on Civil and Political Rights (ICCPR). The right to liberty of person is guaranteed to everyone, irrespective of legal status, sexual orientation or gender identity.[105] This right is recognised in all major international and regional human rights instruments, including: Article 6 of the African Charter of Human and Peoples' Rights (African Charter), Article 7 of the American Convention on Human Rights (American Convention), Article 14 of the Arab Charter on Human Rights (Arab Charter), and Article 5 of the European Convention on Human Rights (European Convention).

The right to liberty of person has benefitted from significant clarification by international human rights bodies, and it is now clear that the right imposes a number of specific limitations on States' ability to detain. The following subsections will summarise these fundamental legal protections. They include, at a minimum, that any deprivation of liberty must be:

- → justified by a legitimate State objective;
- → in accordance with the law; and
- → non-arbitrary[106]

Legitimate objective

As a starting point, for detention to be justified, it must be based on a legitimate State objective.[107] The ICCPR does not provide an enumeration of the permissible reasons for depriving a person of liberty, however the UN Special Rapporteur on the human rights of migrants has noted that the only legitimate objectives for the deprivation of liberty of refugees, asylum seekers and migrants are the same as they are for anyone else, namely: "when someone presents a risk of absconding from future legal proceedings or administrative processes, or when someone presents a danger to their own or public security."[108] Because the ICCPR does not draw a distinction between nationals and non-nationals for the purposes of the State's legitimate objectives to detain, any decision to deprive someone of their liberty must be based on an individualised assessment of the risk they pose to one of the aforementioned grounds.[109]

It is important to note that under international law, the criminalisation of irregular entry or stay *is not* a legitimate objective on which to base detention. Irregular entry and stay should never be considered criminal offenses.[110] They are not crimes *per se* against persons, property or national security, and persons should never be classified or treated as criminals on the basis of irregular entry.[111] The UN Working Group on Arbitrary Detention (WGAD) has noted that the criminalisation of irregular entry and stay frequently contributes to unnecessary and arbitrary detention.[112] Similarly, the use of the term "illegal" to describe persons in an irregular situation is inappropriate and stigmatises them by making an implicit association with crime.[113] The proper terms are 'irregular' or 'undocumented.'[114]

105. UN Human Rights Committee (HRC): *General Comment No. 35 on Article 9, Liberty and security of person*, (CCPR/C/GC/35), para. 3; Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Detention of migrants in an irregular situation*, para. 11, A/HRC/20/24; Human Rights Committee General Comment No. 31 (2004): "the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party."
106. International Commission of Jurists (ICJ), *Migration and International Human Rights Law*, 2014, Practitioners Guide No. 6, Updated Edition, p. 178.
107. Ibid.
108. Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Detention of migrants in an irregular situation*, para. 9, A/HRC/20/24;
109. Ibid. at para. 11.
110. Ibid. at para. 13.
111. Ibid.; see also, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment No. 2 (2013), para. 24, CMW/C/GC/2: "The Committee considers that Crossing the border of a country in an unauthorized manner or without proper documentation, or overstaying a permit of stay does not constitute a crime."
112. WGAD *Report to the Seventh Session of the Human Rights Council,* A/HRC/7/4/, 10 January 2008, para. 53: "criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention."; Article 31, 1951 Convention; UNHCR Detention Guidelines 1, 2, 4; Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Detention of migrants in an irregular situation*, para. 13, A/HRC/20/24.
113. UN General Assembly Resolution 3449 (XXX) of 1975, para. 2; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment No. 2 (2013), CMW/C/GC/2; See also PICUM, Words Matter.
114. See http://picum.org/picum.org/uploads/file_/TerminologyLeaflet_reprint_FINAL.pdf.

Unlike the ICCPR, the European Convention provides an exhaustive list of the legitimate objectives for immigration detention, namely that immigration detention is only legitimate as a means of preventing unauthorised entry into the country; or with a view to deportation or extradition.[115] While these objectives may appear to expand the basis for detention provided under the ICCPR, the European Court of Human Rights (ECtHR) has clarified that they must be interpreted narrowly such that they are consistent with the existing obligation of States to ensure that no one is arbitrarily deprived of his liberty (see below, "Non-Arbitrary").[116] It should also be noted that State obligations under the European Convention must be read in conjunction with existing international obligations under the ICCPR.[117] Treaty obligations are overlapping and mutually reinforcing, not independent or read in isolation.

Lawful

While Article 9 of the ICCPR does not prohibit detention per se, it provides that any deprivation of liberty must be in accordance with clear procedures established in law.[118] Deprivation of liberty without such legal authorisation is clearly unlawful.[119] Furthermore, the grounds and procedures prescribed by law must not be destructive of the right to liberty of person.[120] For example, detention that has the effect of criminally punishing someone without providing the applicable due process protections afforded under criminal law will be unlawful.[121] This is especially relevant to the context of immigration detention as the legal protections afforded refugees, asylum seekers, stateless persons and migrants at risk of immigration detention are frequently less than those afforded under similar criminal procedures; meanwhile the conditions of immigration detention are often indistinguishable from, or worse than, criminal imprisonment.

The principle of lawfulness has been interpreted to include at least two essential elements.[122] First, the deprivation of liberty must be *in accordance with national law and procedures*. To this first requirement, the WGAD has stressed that when migrants are detained, the reasons for their detention must be "clearly defined and exhaustively enumerated in legislation."[123]

Second, the national law and procedures must be of *sufficient quality to protect the individual from arbitrary detention*. To this second requirement, the UN Human Rights Committee (HRC) has stressed that the substantive grounds for arrest or detention must be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.[124] This includes that national laws and procedures are communicated in a form that takes into account the particular culture, language, level of education, and ability to understand the procedure of each person for whom detention is being considered. This may require the provision of translators, interpreters, and legal advice—free of charge if necessary—for the person to fully understand

"the national law and procedures must be of *sufficient quality to protect the individual from arbitrary detention*."

115. ECHR, Article 5, paragraph 1 (f)
116. Vasileva v. Denmark, Application no. 52792/99, Council of Europe: European Court of Human Rights, 25 September 2003, page 9.
117. Currently all European States are party to the ICCPR.
118. ICCPR, Article 9, paragraph 1.
119. 702/1996, McLawrence v. Jamaica, para. 5.5: "[T]he principle of legality is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation."
120. 1629/2007, Fardon v. Australia, para. 7.3.
121. UN Human Rights Committee (HRC): *General Comment No. 35 on Article 9, Liberty and security of person*, (CCPR/C/GC/35), para 14; see also Concluding observations, United States of America 2006, para. 19; General Comment No. 32, paras. 15, 18.
122. ICJ, Migration and International Human Rights Law, above at 106.
123. UN Human Rights Council, *Advance Edited Version, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: report of the Working Group on Arbitrary Detention*, 15 January 2010, A/HRC/13/30.
124. See, e.g., Concluding observations Philippines 2003, para. 14 (vagrancy law vague), Mauritius 2005, para. 12 (terrorism law), Russian Federation 2009, para. 25 ("extremist activity"), Honduras 2006, para. 13 ("unlawful association").

his or her circumstances.[125] This *sufficient quality* requirement also prohibits laws that provide broad executive or administrative discretion in imposing or reviewing detention.[126] To the contrary, the decision to detain must be accompanied by "elaborate reasoning",[127] and the State must always bear the burden of proving that the detention is justified.[128]

Non-Arbitrary

Finally, the right to liberty of person imposes a strict prohibition on arbitrary detention. The prohibition on arbitrary detention is not only found in all major international and regional human rights instruments, it is part of customary international law and constitutes a *jus cogens* norm from which derogation is never possible.[129]

The HRC has stated: "the notion of 'arbitrariness' must not be equated with 'against the law' but must be interpreted more broadly to include such elements as inappropriateness, injustice, lack of predictability, and due process of law.[130] Arbitrariness may arise, for example, where there is no connection between the State's legitimate objective and the place of detention, conditions of detention, or treatment of the detained person.[131] It is therefore possible for detention to be in conformity with national laws and procedures and to still be arbitrary.[132] Immigration detention is not arbitrary *per se*, but any detention must be justified as reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time.[133] These principles comprise the well-known and fundamental elements of the prohibition on arbitrary detention. They also establish that less-restrictive measures must first be pursued and found lacking prior to any decision to detain (see below, "Obligation to implement alternative measures").

It is universally accepted that the prohibition on arbitrary detention limits the use of detention to only those times when it is an exceptional measure of last resort,[134] reasonable,[135] and a strictly necessary and proportionate response.[136]

125. ICJ, Migration and International Human Rights Law, above at 106.
126. Ibid at fn. 648.
127. Ibid at fn. 650,
128. Ibid at fn. 649.
129. UN Human Rights Committee (HRC): *General Comment No. 35 on Article 9, Liberty and security of person*, (CCPR/C/GC/35), para 66.
130. UN Human Rights Committee (HRC): *General Comment No. 35 on Article 9, Liberty and security of person*, (CCPR/C/GC/35), para. 12; 1134/2002, Gorji-Dinka v. Cameroon, para. 5.1; 305/1988, Van Alphen v. The Netherlands, para. 5.8.
131. COE, para. 32; *James, Wells and Lee v.the United Kingdom*, paras. 191-95; and *Saadi v.the United Kingdom* [GC], paras. 68-74; 1629/2007, Fardon v. Australia, para. 7.4(a); Concluding observations, Belgium 2004, para. 18; Concluding observations, United Kingdom 2001, para. 16.
132. UN Human Rights Committee (HRC): *General Comment No. 35 on Article 9, Liberty and security of person*, (CCPR/C/GC/35), para. 12; *Creangă v. Romania,* para. 84; *A. and Others v. the United Kingdom* [GC], para. 164.
133. UN Human Rights Committee (HRC): *General Comment No. 35 on Article 9, Liberty and security of person*, (CCPR/C/GC/35), para. 18; 560/1993, A. v. Australia, paras. 9.3-9.4; 794/1998, Jalloh v. Netherlands, para. 8.2; 1557/2007, Nystrom v. Australia, paras. 7.2-7.3.
134. Principle III (2) of the Inter-American Principles on the Protection of Persons Deprived of Liberty in the Americas; Committee on Migrant Workers, General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of their Families, CMW/C/GC/2, 28 of August of 2013, para 26; For a more in-depth examination of the principle of the exceptionality of deprivation of liberty under international human rights law, see: IACHR, *Report on Immigration in the United States: Detention and Due Process.* OEA/Ser.L/V/II. Doc. 78/10, December 30, 2010, paragraph 34; IACHR, Merits Report No. 86/09, Case 12.553, Jorge, José and Dante Peirano Basso (Eastern Republic of Uruguay), August 6, 2009, paragraphs 93 et seq.; IACHR, Admissibility and Merits Report No. 51/01, Case 9903, *Rafael Ferrer-Mazorra et al. (The Mariel Cubans) (United States)*. April 4, 2001, paragraphs 216-219; I/A Court H.R., *Case of Nadege Dorzema et al. v. Dominican Republic*. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C No. 251, paragraphs 124-144; I/A Court H.R., *Case of Vélez Loor v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010. Series C No. 218, paragraph 166. Other cases in which the Inter-American Court has elaborated upon the principle that any deprivation or restriction of the right to personal liberty must be exceptional in nature, see, *Case of Yvon Neptune v. Haiti*. Merits, Reparations and Costs. Judgment of May 6, 2008. Series C No. 180, paragraph 98; *Case of Chaparro Álvarez y Lapo Iñiguez v. Ecuador*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, paragraph 93, and *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, paragraph 129.
135. *A. v. Australia*
136. UN Working Group on Arbitrary Detention (WGAD), *Annual Report 2008,* UN Doc. A/HRC/10/21, 16 February 2009, paras. 67 and 82; *European Guidelines on accelerated asylum procedures,* CMCE, principle XI.1; *Conclusion No. 7, UNHCR,* para. e; *Conclusion No. 44 (XXXVII) Detention of Refugees and Asylum-Seekers,* ExCom, UNHCR, 37th Session, 1986, para. B; *Concluding Observations on Bahamas,* CERD, UN Doc. CERD/C/64/CO/1, 28 April 2004, para. 17; *Yvon Neptune v. Haiti,* IACtHR, Series C No. 180, Judgment of 6 May 2008, para. 90; *Álvarez and Iñiguez v. Ecuador,* IACtHR, Series C No. 170, Judgment of 21 November 2007, para. 53; *Vélez Loor v. Panama,* IACtHR, paras. 116, 166–171; Parliamentary Assembly of the Council of Europe, *Detention of asylum seekers and irregular migrants in Europe,* Resolution 1707 (2010), para. 3; UNHCR Detention Guidelines, 4.2

The WGAD has noted that "administrative detention of migrants should be always the last resort according to the principle of proportionality,"[137] and this has been affirmed by the UN Special Rapporteur on the human rights of migrants, among others.[138] In *Velez Loor v. Panama*, the Inter-American Court of Human Rights (IACtHR) found:

> Without prejudice to the legality of a detention, it is necessary in each case to assess... that the measures are necessary, in the sense that they are absolutely indispensable for achieving the intended purpose and that no other measure less onerous exists, in relation to the right involved, to achieve the intended purpose. Hence, the Court has indicated that the right to personal liberty assumes that any limitation of this right must be exceptional.[139]

In assessing whether detention is reasonable and necessary in all the circumstances, the principle of proportionality requires that a balance be struck between the importance of fulfilling the State's legitimate objective on the one hand, and the rights of the individual on the other.[140] Any decision to detain must consider relevant factors case-by-case, and must not be based on a mandatory rule or a broad category of people. Instead, the State must assess that there is "a compelling need to detain" based on the individual circumstances of each case, and—especially important in the context of LGBTI persons—the individual decision must take into account the effect of the detention on a person's physical and mental health.[141]

Finally, even detention that is reasonable, necessary and proportionate in its inception will become arbitrary at the moment the detention continues beyond the period for which the State can provide appropriate justification.[142] For this reason, detention must be reassessed periodically as it extends over time.

Obligation to implement "alternative measures"

Because the prohibition on arbitrary detention requires that detention be an exceptional measure of last resort, States have a legal obligation to first explore and implement "alternative measures" prior to detaining someone. This is not a stand-alone legal obligation, but rather is derived from the prohibition on arbitrary detention. The obligation to implement "alternative measures" is interchangeably referred to as the obligation to seek "non-custodial measures", "less restrictive measures", "less invasive measures" or "less intrusive measures" in various contexts, but it is fundamentally the same legal concept.[143] In 1999, the WGAD stated, "alternative and non-custodial measures . . . should always be considered before resorting to detention."[144] Subsequent guidance has clarified that this obligation goes beyond mere "consideration." States cannot resort to immigration detention simply because they don't perceive any alternative measures to be available.[145] Instead, they must actively implement alternative measures consistent with the principles of minimum intervention, necessity and proportionality and find them to be lacking.

This obligation has been affirmed by a broad range of international bodies, including: the UN General Assembly, the UN Human Rights

137. U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, para. 59, U.N. Doc. A/HRC/13/30 (Jan. 18, 2010).
138. U.N. Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants*, paras. 50, 65, U.N. Doc. A/HRC/7/12 (Feb. 25, 2008).
139. *Velez Loor v. Panama*, judgment (November 2010) 166.
140. *Vasileva v. Denmark,* ECtHR Applic. No. 52792/99 (25 September 2003), para. 37; Back to Basics, p 21.
141. 1324/2004, Shafiq v. Australia, para. 7.3; 900/1999, C. v. Australia, paras. 8.2, 8.4.
142. *A v. Australia*, para. 9.4.
143. Compare, e.g. UN Human Rights Committee (HRC): *General Comment No. 35 on Article 9, Liberty and security of person*, (CCPR/C/GC/35), para. 19 ("States parties should make available adequate community-based or alternative social care services for persons with psychosocial disabilities, in order to provide less restrictive alternatives to confinement"); with *C. v. Australia*, Communication no. 900/1999, CCPR/C/76/D/900/1999, para. 8.2 ("In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends"); with Bakhtiyari v. Australia, Communication No 1069/2002, CCPR/C/79/D/1069/2002, para. 9.3 ("the State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies").
144. UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention : addendum : report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers, 18 December 1998, E/CN.4/1999/63/Add.3, available at: http://www.refworld.org/docid/45377b810.html.
145. Edwards, Back to Basics, p. 26 (citing Article 26, Vienna Convention on the Law of Treaties 1969).

Council, the UN Committee on the Rights of the Child, the Office of the High Commissioner for Human Rights, the UN Working Group on Arbitrary Detention, the UN Committee on Migrant Workers, the UN Special Rapporteur on the human rights of migrants, the UN Committee on the Elimination of Racial Discrimination, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Court of Human Rights, and the Council of Europe.[146]

Equality and non-discrimination

The Universal Declaration of Human Rights affirms that "all human beings are born free and equal in dignity and rights,"[147] and all individuals are "equal before the law and are entitled without any discrimination to equal protection of the law."[148] The principle of equality and non-discrimination is a core pillar of international human rights law and applies irrespective of nationality or legal status.[149] The fundamental principle of equality and non-discrimination is also found in every major regional human rights system, including Article 2 of the African Charter, Article 14 of the European Convention, the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration,[150] and Article 2 of the American Declaration on the Rights and Duties of Man.[151]

All people, including LGBTI persons, are entitled the right to equality and non-discrimination.[152] Although not all international human rights treaties explicitly recognise a right to equality on the basis of sexual orientation and gender identity, discrimination on these grounds has been held to be prohibited by international human rights law,[153] and regional case law.[154] Additionally, some regional instruments[155] and resolutions[156] expressly prohibit discrimination on grounds of sexual orientation and gender identity.

> "All people, including LGBTI persons, are entitled the right to equality and non-discrimination."

This right to equality and non-discrimination is further supported by the *Yogyakarta Principles*, which state that everyone is entitled to enjoy all human rights, free from discrimination on the basis of sexual orientation or gender identity, and that 'each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination'.[157] These *Principles* also declare that States must ensure 'that no policy or practice discriminates against asylum seekers on the basis of sexual orientation or gender identity'.[158]

146. See, e.g. International Detention Coalition, *The issue of immigration detention at the UN level*, January 2011, available at: http://www.refworld.org/pdfid/4eb3bd691e8.pdf.
147. United Nations General Assembly, *Universal Declaration of Human Rights*, Resolution 217 A (III), (10 December 1948), art 1 ('UDHR').
148. Ibid art 7.
149. Ibid art 2; United Nations Human Rights Committee, 'CCPR General Comment No. 15: The Position of Aliens Under the Convention' in 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (11 April 1986) [1].
150. Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration'* (adopted 18 November 2012), arts 3, 9.
151. Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man* (adopted 2 May 1948), art 2.
152. A/HRC/19/41, above note 115, [5].
153. United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20, (2 July 2009) 10 [33]; see also United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant),* E/C.12/2000/4, (11 August 2000), 6 [18]; United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2002/11, (20 January 2003), 6 [13].
154. See, e.g., *Case of Atala Riffo and Daughters v. Chile*, Inter-American Court of Human Rights (IACtHR), Judgment of February 24, 2012, Series C No. 239 (2012).
155. See, e.g., European Union (EU), *Charter of Fundamental Rights of the European Union*, (2000/C 364/01), (18 December 2000), art 21; Inter-American Convention against All Forms of Discrimination and Intolerance, adopted at the OAS General Assembly held in Guatemala, on June 5, 2013 (not yet in force), available at: http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance.asp.
156. See, e.g., Organization of American States, *Human Rights, Sexual Orientation, and Gender Identity*, AG/RES. 2721 (XLII-O/12) (4 June 2012); Organization of American States, *Human Rights, Sexual Orientation, and Gender Identity*, AG/RES. 2435 (XXXVIII-O/08) (3 June 2008).
157. *Yogyakarta Principles*, above note 6, 10-12 (Principles 2 and 3).
158. *Yogyakarta Principles*, above note 6, 27 (Principle 23).

Right to Dignity

Article 10 of the ICCPR enshrines the fundamental right to dignity for those detained, stating "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[159] The right to dignity applies to all persons deprived of liberty, including LGBTI detainees, and principle 9 of the *Yogyakarta Principles* states that one's "sexual orientation and gender identity are integral to each person's dignity."[160]

As discussed in the previous sections, the conditions of detention and treatment of LGBTI persons within places of detention frequently deny LGBTI persons their right to be treated with dignity and humanity.

Right to Privacy

Article 12 of the UDHR states that, "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation."[161] This right is also enshrined in Article 17 of the ICCPR, Article 8 of the European Convention, and has been recognised by the Council of Europe as including "the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others'.[162]

The right to privacy is also supported by the *Yogyakarta Principles*, which call on States to '[e]nsure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or identity, and protect all persons from arbitrary or unwanted disclosure, or threat of such disclosure by others'.[163]

The right to privacy is particularly relevant to LGBTI refugees, asylum seekers, stateless persons and migrants as they may fail to disclose their LGBTI identity out of fear that the information may be passed on to friends, family members, or others in their countries of origin. Similarly, LGBTI detainees may choose not to disclose their LGBTI status out of fear of repercussions from other detainees or detention centre staff. It is therefore imperative that any disclosure of LGBTI status be kept completely confidential and that LGBTI persons have control as to if, how, and when their LGBTI status is disclosed, consistent with their right to privacy.

Recognition before the law

The right to recognition before the law is a universal human right espoused by Article 16 of the ICCPR, which states that "[e]veryone shall have the right to recognition everywhere before the law."[164] Similarly, principle 3 of the *Yogyakarta Principles* recognises that "each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination."[165] According to the *Yogyakarta Principles*, the right to recognition before the law should include the obligation of States to take all legislative, administrative and other measures to recognise a person's self-defined gender identity, including the issuing of gender-appropriate identity documents.[166]

The right to legal recognition of self-defined sexual orientation and gender identity is particularly relevant to LGBTI persons at risk of immigration detention as it may be a prerequisite for States to appropriately identify and recognise LGBTI detainees as a group in need of particular legal protection and should inform administrative immigration decisions, such as the decision whether to detain, appropriate community-based placement, or the provision of medical treatment.

159. ICCPR, Article 10.
160. Ibid 16.
161. UDHR, Article 12.
162. Council of Europe, Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe, 2nd ed (Council of Europe, France: 2011)
163. *Yogyakarta Principles*, above note 6, 14.
164. ICCPR, Article 16.
165. *Yogyakarta Principles*, above note 6, 11.
166. *Yogyakarta Principles*, above note 6, 12.

Freedom from torture and cruel, inhuman or degrading treatment or punishment

It has been mentioned that the prohibition of torture is a matter of *jus cogens*, and a peremptory norm of customary international law.[167] The *Yogyakarta Principles* also reiterate that "[e]veryone has the right to be free from torture and from cruel, inhuman or degrading treatment or punishment, including for reasons relating to sexual orientation or gender identity."[168]

However, LGBTI persons "are disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations,"[169] and when detained, they are often "detained in worse conditions of detention than the larger prison population" giving rise to serious concerns of torture or ill-treatment.[170] When detention authorities either engage in, or fail to take appropriate measures to respond to, physical and sexual violence directed at LGBTI detainees, their actions may also violate the prohibition of torture or cruel, inhuman, or degrading treatment or punishment. Furthermore, the use of prolonged solitary confinement of LGBTI detainees as a "protective measure" has been found to be a clear violation of the prohibition on torture.[171]

Right to seek and enjoy asylum

Although neither 'gender identity' nor 'sexual orientation' are explicitly recognised as grounds of persecution under the *1951 Convention Relating to the Status of Refugees Convention*, sexual orientation and gender identity are fundamental aspects of human identity that are either innate or immutable, or that a person should not be required to give up or conceal.[172] UNHCR's 2002 *Guidelines on Gender-Related Persecution* recognise that "[r]efugee claims based on differing sexual orientation contain a gender element" and that "[a] claimant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory action on account of his or her sexuality or sexual practices."[173]

Moreover, UNHCR's 2012 *Guidelines on Claims to Refugee Status based on Sexual Orientation and/or Gender Identity* find that "[p]hysical, psychological and sexual violence [against LGBTI persons], including rape, would generally meet the threshold level required to establish persecution"[174] and that even when irregularly or rarely enforced, "criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution."[175]

167. UN Doc. A/66/268 (2011), above note 71, [77].
168. *Yogyakarta Principles*, above note 6, 17 (Principle 10).
169. Sir Nigel Rodley , Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, *Torture and discrimination against sexual minorities*, (3 July 2001) UN Doc. A/56/156, para 19.
170. Ibid. at para 23.
171. See European Court of Human Rights, X v. Turkey (Application no. 24626/09), 9 October 2012.
172. *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, C.S.C.; *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, US, 225 F.3d 1084, A72-994-275, (9th Cir. 2000), 24 August 2000, later affirmed by *Morales v. Gonzales*, US, 478 F.3d 972, No. 05-70672, (9th Cir. 2007), 3 January 2007; *Appellants S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia, High Court, 9 December 2003; *Refugee Appeal No. 74665*, New Zealand, Refugee Status Appeals Authority, 7 July 2004; *HJ and HT v. Secretary of State for the Home Department*, UK, [2010] UKSC 31, Supreme Court, 7 July 2010, [11], [14], [78].
173. UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01.
174. *UNHCR Guidelines on International Protection No 9*, above note 24, 20.
175. Ibid. at para 27; see also UNHCR, *Protecting Persons With Diverse Sexual Orientations and Gender Identities, A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees* (Dec 2015); and International Commission of Jurists (ICJ), "Refugee Status Claims Based on Sexual Orientation or Gender Identity - A Practitioners' Guide no. 10", February 2016.

Additional guidelines

Yogyakarta Principles

The *Yogyakarta Principles* are a principal source of guidance on the rights of LGBTI people in international law. While they do not constitute a binding instrument of international law themselves, they "reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity"[176] and have been formally endorsed by UNHCR.[177]

UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention

The *UNHCR Detention Guidelines* are a non-binding document that provides guidance to States and UNHCR partners and staff on the detention of refugees and asylum seekers. Of particular application to LGBTI persons is Guideline 9.7, which highlights the special vulnerability of LGBTI detainees. This guideline recommends:

> Measures may need to be taken to ensure that any placement in detention of lesbian, gay, bisexual, transgender or intersex asylum-seekers avoids exposing them to risk of violence, ill-treatment or physical, mental or sexual abuse; that they have access to appropriate medical care and counselling, where applicable; and that detention personnel and all other officials in the public and private sector who are engaged in detention facilities are trained and qualified, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation or gender identity.[178]

Guideline 9.7 further states that, "Where [LGBTI asylum seekers'] security cannot be assured in detention, release or referral to alternatives to detention would need to be considered."[179]

Council of the European Union Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons

These EU Council guidelines seek to "provide officials of EU institutions and EU Member States, with guidance to be used in contacts with third countries and with international and civil society organisations, using a case-by-case approach, in order to promote and protect the human rights of LGBTI persons within its external action."[180] Among other things, the guidelines encourage European entities:

> to assess the situation of LGBTI persons in detention… [and] suggest that international monitoring bodies have a special focus on LGBTI persons during their visits to places of deprivation of liberty.[181]

They also identify a number of areas needing immediate action, such as ending the criminalisation of consensual same-sex relationships and halting legal discrimination based on sexual orientation or gender identity.

Inter-American Commission on Human Rights (IACHR), Violence Against LGBTI Persons in the Americas

The Inter-American Commission on Human Rights published this regional report in 2015 on the violence perpetrated against LGBTI persons or those perceived as LGBTI.[182] It focuses on violence against LGBTI persons as a complex and multifaceted social phenomenon requiring urgent attention. Relevant to the situation of LGBTI refugees, asylum seekers, stateless persons and migrants at risk of immigration detention, the report recommends that States: take steps to ensure the right to seek and enjoy asylum on the basis of LGBTI status; design guidelines, protocols, and training courses to ensure appropriate and respectful treatment of LGBTI persons; in consultation with LGBTI organisations, conduct training for law enforcement agencies and other State officials to improve procedures for identifying LGBTI persons in situations in vulnerability; and to implement LGBTI-tailored alternatives for the protection of LGBTI persons—especially children and adolescents—including shelters and other security measures for those in need of protection.

176. Paula L Ettelbrick and Alia Trabucco Zerán, *The Impact of the Yogyakarta Principles on International Human Rights Law Development A Study of November 2007 – June 2010 Final Report'*, (10 September 2010); see also Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Conceptualising the Yogyakarta Principles', 8 *Human Rights Law Review,* 207 (2008), 235.
177. UNHCR Guidelines on International Protection No 9, above note 24, 3.
178. UNHCR, *Detention Guidelines*, above note 68, 39 [65].
179. Ibid.
180. Council of the European Union, *Guidelines*, above note 93, [6].
181. Ibid [31].
182. Inter-American Commission on Human Rights, Violencia contra personas LGBTI, OEA/Ser.L/V/II.rev.1, Doc. 36, 12 November 2015.

Alternative Models and Positive Practices

Because immigration detention must only ever be an exceptional measure of last resort, and should never be used for persons in situations of particular vulnerability, States have an obligation to explore and implement alternatives that prevent harmful, unlawful and arbitrary detention. Alternatives to detention can be defined as "any law, policy or practice by which persons are not detained for reasons relating to their migration status."[183] Successful alternatives empower individuals to work with authorities to resolve their asylum or migration status in a timely, fair and humane manner, ensuring that individuals are constructively engaged and supported to explore all available options to resolve their case.

Key elements of successful alternatives

The IDC's program of research has identified a number of key elements for ensuring that alternatives to detention will be successful in terms of cost, compliance and wellbeing outcomes.[184] These include:

- → Using screening and assessment to tailor management and placement decisions
- → Providing holistic case management focused on case resolution
- → Focusing on early engagement
- → Ensuring individuals are well-informed and trust they have been through a fair and timely process
- → Ensuring fundamental rights are respected and basic needs are met
- → Exploring all options to remain in the country legally and all avenues for voluntary or independent departure
- → Ensuring any conditions imposed are not overly onerous

Based on these key elements, the IDC has developed the **Community Assessment and Placement (CAP)** model to help guide States, intergovernmental agencies, and NGOs in exploring, developing and successfully implementing alternatives.[185] Using the CAP model as a framework for categorising and understanding the various alternatives available to States, the following sections examine a number of positive practices and alternative models that are currently available in the context of LGBTI immigration detention or that could be adapted to the LGBTI context.

183. *There are Alternatives (Revised),* above note 1, ii78.
184. *There are Alternatives (Revised),* above note 1, 13.
185. The CAP model is available at: http://idcoalition.org/cap/.

Liberty: presumption against detention

The first overarching principle of alternatives is the right to liberty, which should include a presumption against detention. Clear presumptions against detention can be established by adopting laws, policies and practices that: establish a presumption of liberty; provide a mandate to apply alternatives in the first instance; only permit detention when alternatives cannot be applied; and prohibit the detention of vulnerable individuals.

In the case of LGBTI persons, States can establish a presumption against detention by adopting laws, policies and practices that specifically prohibit immigration detention of persons who are LGBTI-identifying. A number of States have adopted presumptions against detention in their national laws or policies, which apply either explicitly or implicitly to LGBTI persons. Such legal and policy provisions help to prevent immigration officials from resorting to detention when other options are available.[186] These presumptions against detention can be strengthened when alternatives to detention are also established in law.[187]

The following examples represent positive practices for legal and policy provisions which presume that detention is not necessary for LGBTI refugees, asylum seekers, stateless persons and migrants, or that mandate States to explore LGBTI-appropriate alternatives before resorting to detention.

Argentina *Right to liberty enshrined in national legislation*

The Argentine Immigration Law (Law 25.871), enacted in January 2004, recognises that migration is a human right, and extends constitutional and human rights protections to all persons in the country irrespective of their migration status, sexual orientation or gender identity. Article 6 of Law 25.871 guarantees all persons the right to non-discrimination based on migration status, including rights protection and access to justice, education, medical and social services; while Article 13 states that any action taken based on a person's sex, gender, or other individual identifying characteristic that arbitrarily limits their exercise or enjoyment of rights will be considered discriminatory. Immigration detention is limited in law and practice to rare instances, and is generally only permissible after a final order of deportation has been issued. Article 61 of Law 25.871 states that before deportation, all persons must be given the opportunity to explore options to regularise their status, and Article 86 guarantees the rights to free legal aid and interpretation services.[188] Migration decisions are made by immigration authorities but are reviewed by a court, with no detention during this period. Deportation and detention are both decisions that must be ordered by a court, with detention used only as a final resort after all other remedies are exhausted.[189]

Germany *Presumption of alternatives for LGBTI asylum seekers*

With the purpose to improve care, accommodation and integration of refugees in Berlin, the State government of the Land of Berlin has adopted a citywide policy that LGBTI asylum seekers are applicants in a particular situation of vulnerability and, therefore, should be accommodated in special reception and accommodation designed to meet their specific needs, rather than in detention or the general reception environment. As part of the further development of this policy, specific trainings focusing on the situation of LGBTI refugees and asylum seekers have been implemented for all staff working in refugee accommodation centres.[190]

186. *There are Alternatives (Revised),* above note 1, 8.
187. *There are Alternatives (Revised),* above note 1, 21-22.
188. Article 86 of the Immigration Law (Law 25.871)
189. *There are Alternatives (Revised),* above note 1, 19.
190. See, http://www.berlin.de/rbmskzl/aktuelles/politik-aktuell/2015/meldung.350676.php.

Minimum standards

The second principle underpinning alternatives to detention is that certain minimum standards are in place and respected. There are a number of minimum standards that States must respect and uphold for all individuals, regardless of migration status. These minimum standards help to ensure the proper functioning of migration governance systems and the effectiveness of alternatives. Without minimum standards in place, alternatives are less likely to achieve desired rates of compliance, case resolution and respect for human rights. Minimum standards include: respect for fundamental rights; ensuring the ability to meet basic needs; providing documentation, legal advice and interpretation free of charge, if necessary; resolving cases in a fair and timely manner; and providing opportunities for regular review of placement decisions.

The following examples represent positive practices for ensuring adherence to minimum standards.

Australia and Malta *Formal status recognition*

In 2013, Australia adopted the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act – the first law to include intersex status as a stand-alone prohibited ground of discrimination, in addition to LGBT discrimination.[191] Similarly, in 2015, Malta adopted the Gender Identity, Gender Expression and Sex Characteristics Act which prohibits discrimination on the basis of sexual orientation, gender identity, or sex characteristics.[192]

Canada *Interpretation and translation services*

In 2006, the Chairperson of the Immigration and Refugee Board of Canada (IRB) issued a *Guideline on Vulnerable Persons* (amended December 15, 2012) with the intention of providing procedural accommodations for individuals identified as being in situations of particular vulnerability. The *Guideline* recognises that language and cultural barriers, physical and psychological trauma, and other vulnerability factors often cause disadvantage in the ability of individuals to adequately present their claims. As a result, the IRB has been given broad discretion to tailor their administrative procedures to meet the particular needs of vulnerable persons, including among other things, providing interpreters and translators free of charge. Specific to LGBTI persons, the *Guideline* states that when individuals have suffered negative experiences due to their sexual orientation or gender identify in their countries of origin, the IRB should be "sensitive and alert" to the impact that such experiences have on the ability of individuals to present their cases and may even provide a panel and interpreter/translator of a particular gender in order to facilitate fairness in the proceedings.[193]

Chile *Ensuring basic needs are met*

In Chile asylum seekers are issued with a renewable temporary stay permit, valid for eight months, which provides the holder with an entitlement to work and provide for his or her own basic needs. Additionally, a comprehensive social assistance scheme ensures asylum seekers and their families are able to meet their basic needs, with access to food, housing, furniture and transportation. An asylum seeker is entitled to full support for three months; this then decreases to 75% after three months, 50% after six months, and ends after 12 months. However, this may be extended in special circumstances.[194]

191. United Nations, 'Fact Sheet – Intersex', above note 8.
192. Ibid.
193. Immigration and Refugee Board of Canada, Chairperson Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB (amended Dec. 15, 2012), available at: http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/guidir/Pages/GuideDir08.aspx.
194. *There are Alternatives (Revised),* above note 1, 30.

Identification and decision making

Successful migration governance systems understand that refugees, asylum seekers, stateless persons and migrants are a highly diverse population with different strengths, needs and motivations. Identifying and understanding the individual circumstances of persons within these different groups will ensure informed decisions about management and placement options, which can then be reviewed and adjusted as needed through regular review.

Screening and assessment procedures are important tools in reducing unnecessary detention. With individual screening and assessment, authorities can identify and assess levels of risk and vulnerability as well as the strengths and needs of each person. Such assessment enables authorities to make informed decisions about the most appropriate way to manage and support the individual as they seek to resolve their migration status and to make case-by-case decisions about the need to detain or not, and under what circumstances.[195] Identifying individuals in particular situations of vulnerability through screening is crucial to reducing the risk of harm to LGBTI persons.

The following examples represent positive practices for LGBTI-sensitive screening and identification.

United States *Identification of sexual orientation and gender identity minorities*

In 2011, the Williams Institute at the UCLA School of Law convened a multi-disciplinary and multi-institutional group of experts to increase population-based data about transgender people and other gender minorities.[196] The result was the Gender Identity in US Surveillance Group (GenIUSS) report on *Best Practices for Asking Questions to Identify Transgender and other Gender Minority Respondents in Population-Based Surveys*. While this tool was not developed specifically for the purposes of screening vulnerable individuals away from possible immigration detention, the report nonetheless identifies "approaches to identifying transgender people and other gender minorities" which could be adapted to the migration management context.[197]

UNHCR Resettlement Assessment Tool: *Lesbian, Gay, Bisexual, Transgender and Intersex Refugees*

In 2013, UNHCR developed the *Resettlement Assessment Tool: Lesbian, Gay, Bisexual, Transgender and Intersex Refugees* to assist in the identification of refugees' LGBTI status and assessment of their unique protection needs.[198] Through the assurance of confidentiality and an LGBTI-sensitive approach to issues of sexual orientation and gender identity, including a guide to LGBTI-sensitive vocabulary when interviewing refugees, UNHCR Resettlement Interviewers are instructed to create an open and reassuring environment to assist in the safe, dignified, and confidential disclosure of personal information such as LGBTI identity.[199] The tool also includes a step-by-step form to assist interviewers in identifying the individual needs and vulnerabilities of LGBTI individuals, such as past instances of physical and sexual violence.[200] Although this tool is designed to be used primarily in the context of refugee resettlement, its guidance on LGBTI-sensitive vocabulary and screening could be adapted to the detention determination context, as could its step-by-step interviewing form.

195. *There are Alternatives (Revised)*, above note 1, 22.
196. Gender Identity in US Surveillance Group (GenIUSS), JL Herman (Ed.), *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents in Population-Based Surveys*, (Los Angeles: Williams Institute at the UCLA School of Law, 2014).
197. Ibid.
198. *UNHCR Resettlement Assessment Tool*, above note 3.
199. Ibid 8.
200. Ibid 14-19.

United States *US Immigration and Customs Enforcement Risk Classification Assessment Tool*

In an effort to evaluate the particular vulnerabilities of individuals at risk of immigration detention and to properly assess the need to detain for immigration-related purposes, the US Immigration and Customs Enforcement agency (ICE) has created an automated system to evaluate the particular risks and vulnerabilities of migrants. This Risk Classification Assessment Tool (RCA),[201] which has been implemented nationwide since 2013, is used to help determine whether an irregular migrant should be released, detained or placed into an appropriate alternative to detention.[202] An individual's "risk based on sexual orientation / gender identity" is included as one of the many vulnerability factors that ICE officials must consider as part of the risk/vulnerability assessment, and the tool has the potential to ensure that LGBTI migrants are not placed in detention.[203]

Case management support and resolution

The most successful alternatives use case management across all stages of migration governance to ensure a coordinated and comprehensive approach to each case. Case management centres on understanding and responding to the unique needs and challenges of the individual and their context, building on an individual's strengths, and identifying and addressing vulnerability or protection concerns. The approach promotes coping and wellbeing by facilitating access to support services and networks. For people in the community, or being released into the community from detention, case management should consider practical necessities such as housing, health care, livelihood, and social support needs, and how to empower clients to meet reporting obligations, including mitigating any obstacles they may face (competing commitments, costs of travel, etc.).

The following examples represent positive practices for LGBTI-sensitive case management support.

United States *Casa Ruby*

Casa Ruby is a non-profit organisation in Washington D.C. created to address the needs of Latina transgender women and LGBTI immigrants. Founded by Ruby Jade Corado, a transgender woman and refugee from El Salvador, Casa Ruby provides bilingual and multicultural community support services to the most marginalised members of the LGBTI community.[204] Casa Ruby also operates an LGBTI safe centre, supplying hot meals, clothes and internet services to over 150 clients each week. The safe centre provides support groups, emergency housing referrals, job placement services and legal counselling for LGBTI immigrants.[205]

United States *Queer Detainee Empowerment Project (QDEP)*

The Queer Detainee Empowerment Project (QDEP) is a community-based care and support programme for LGBTI and HIV positive former immigrant detainees in New York City.[206] In an effort to assist LGBTI migrants and their families transition to life outside of detention, QDEP provides case management support and referrals for housing, education, food, travel, employment, health care, legal advocacy and mental health services.[207] They also provide a range of community support services including English classes, translation services, group therapy, financial literacy classes, and reproductive health education.

201. 'Detention Reform', United States Department of Homeland Security – US Immigration and Customs Enforcement [website] <http://www.ice.gov/detention-reform> accessed 22 January 2015; Sharita Gruberg, 'How the Prison Rape Elimination Act Helps LGBT Immigrants in Detention', Center for American Progress (published 2 April 2014), available at: https://www.americanprogress.org/issues/lgbt/report/2014/04/02/86976/how-theprison-rape-elimination-act-helps-lgbt-immigrants-in-detention/.
202. United States Department of Homeland Security, *Privacy Impact Assessment Update for the Enforcement Integrated Database (EID)*, DHS/ICE/PIA-015(f) (6 April 2012), 3-4.
203. However, current mandatory detention laws in the United States significantly limit the potential effectiveness of the RCA. See, e.g. http://immigrationimpact.com/2015/08/04/ices-risk-classification-assessment-cant-work-because-of-mandatory-detention-laws/.
204. Erika L Sanchez, 'Transgender Latina Creates Safe Haven for Multicultural LGBT Community', NBC Latino (published 30 May 2013), available at: http://nbclatino.com/2013/05/30/transgender-latina-creates-safe-havenfor-multicultural-lgbt-community/.
205. 'Our Services', *Casa Ruby* [website] <http://www.casaruby.org/drop.html> accessed 20 January 2015.
206. *Queer Detainee Empowerment Project (QDEP)* [website], <http://qdep.org/> accessed 20 January 2015.
207. Ibid.

Placement options

There are various placement options available to the State when seeking to avoid unnecessary and arbitrary immigration detention. These include placement in the community without conditions or placement in the community subject to certain conditions or restrictions on liberty as determined to be necessary and proportionate in the individual case. The CAP model describes a number of community placement options for individuals who can live independently or who need accommodation but who do not require intensive supervision or substantial conditions in order to effectively participate in the migration governance process.[208] These range from privately arranged accommodation to living with members of the host community or open reception and shelter models for particularly vulnerable individuals. While alternatives to detention may sometimes involve residence at a particular facility, the focus of community placement and support is on the mechanisms by which individual migrants are empowered to comply with the migration process, rather than the location itself.

Nearly all refugees, asylum seekers, stateless persons and migrants experience immediate needs for housing, livelihoods, and community support. However, due to heightened risks of discrimination and abuse, LGBTI persons may require unique community support. The following examples represent positive practices for LGBTI-sensitive community placement and support models that are designed to meet the unique needs of LGBTI persons.

Sweden *Civil society reception programmes*

In Sweden, following initial processing, asylum seekers are released into independent or open accommodation reception programmes.[209] These reception programs are frequently run by qualified NGOs with the requisite knowledge and understanding of the unique vulnerabilities of the clients they serve. Persons immigrating to Sweden are thus quickly placed into the care of appropriate community support programmes. One such Swedish NGO that provides targeted housing and community support to LGBTI migrants is the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL). The Federation is an organisation comprised of 7000 members and 38 branches across Sweden, including counselling centres for men and women in three Swedish cities.[210] RFSL also operates a number of member groups in cities across Sweden, including 18 community support groups for LGBTI persons living in Stockholm. One of these community support groups is the Newcomers Programme, which is a community network catering to LGBTI refugees who have fled persecution based on their sexual orientation or gender identity and LGBTI persons who have just moved to Sweden for other reasons.[211] This group provides information related to language services, health care, employment services, asylum and legal advice, providing support for 50 members each week.[212]

United States *Short-term housing support for LGBTI asylum seekers*

The Chicago LGBT Asylum Support Program (CLASP) is an organisation created to provide direct living support for LGBTI asylum seekers.[213] CLASP provides short-term housing, food and clothing, as well as spiritual, medical and legal services.[214] They are a member of the LGBT Faith & Asylum Network (LGBT-FAN), a national coalition "dedicated to helping people who are seeking safety in the United States because of persecution based on sexual orientation or gender identity in their home countries."[215] As a member of LGBT-FAN, CLASP works closely with other community organisations to provide housing and other community support services to the LGBTI immigrant community in Chicago.

208. *There are Alternatives (Revised)*, above note 1, 19-20.
209. *There are Alternatives (Revised)*, above note 1, 35 (Box 9).
210. What Is RFSL?', Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL), available at: http://www.rfsl.se/?p=3298.
211. 'Newcomers', RFSL – Stockholm, available at: http://rfslstockholm.se/medlemsgrupper/newcomers/.
212. 'RFSL Newcomers: Going to Queer Clubs Cannot be a Condition for Asylum', Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL), available at: http://www.europaeuropa.nu/engpdf/rfsl_newcomers_2p.pdf.
213. 'Give', Broadway United Methodist Church, available at: http://www.broadwaychurchchicago.com/give.
214. Anne Marie Gerhardt, 'Helping LGBT Asylees Seek Safety in Chicago', Northern Illinois Conference of the United Methodist Church (published 17 March 2014), available at: http://www.umcnic.org/clasp/.
215. LGBT Freedom and Asylum Network, available at: http://www.lgbt-fan.org/; 'Give', Broadway United Methodist Church, available at: http://www.broadwaychurchchicago.com/give.

Detention monitoring and release options

In the exceptional case that refugees, asylum seekers, stateless persons or migrants are detained, States are obliged to establish systems of independent and non-partisan oversight to ensure that the reasons for the decision to detain have been well-established and that the individual facing detention has a chance to challenge the detention.[216] This is best achieved through automatic, prompt and regular independent judicial review.

While a court can review the details of a decision to detain, the conditions of detention and the treatment of detainees are best monitored through independent access to places of detention. National human rights institutions, prison inspection authorities or non-governmental organisations are often involved in monitoring places of detention. Independent monitoring can ensure that the conditions of detention do not fall below minimum international standards and increase transparency and accountability. Additionally, in regularly monitoring and reporting on the presence of LGBTI persons in places of immigration detention, monitoring bodies can play a pivotal role in helping ensure that LGBTI detainees are protected and have access to release.

The following examples represent positive models and tools for LGBTI-sensitive preventive monitoring and release.

UNHCR / APT / IDC: *Monitoring Immigration Detention*

This Manual is for anyone or any institution carrying out immigration detention visits. There are different types of monitoring depending on the mandate and purpose of the monitoring body, with some bodies focus on handling individual cases or applications; others take a more general approach, and still others looking at systemic and structural issues. However, all monitors need to be particularly alert to the issue of vulnerabilities. Immigration detainees are already in a vulnerable situation and this can be further exacerbated for persons with special needs or risk categories (such as women, children, including unaccompanied or separated children, members of different ethnic/tribal/social groups detained together, victims of torture or trauma, persons with disabilities, the elderly, LGBTI individuals, or those with urgent medical needs). In screening for LGBTI status in immigration detention, the manual recommends:

> Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons have a heightened risk of being subjected to physical, psychological and/or sexual violence or abuse in detention, both by staff and other detainees. They may have specific medical and counselling needs. Solitary confinement or administrative segregation, while often used by authorities, is not an appropriate way to ensure the safety of LGBTI detainees. If their safety cannot be ensured in detention, LGBTI detainees ought to be released without conditions or referred to alternatives to detention.

APT Framework for Preventative Monitoring: *LGBTI Persons Deprived of Their Liberty*

The aim of "*LGBTI persons deprived of their liberty: a framework for preventive monitoring*" is to outline the main risk factors and situations to which LGBTI persons are exposed when they are deprived of their liberty in the criminal justice system, as well as to propose possible avenues of action that could be taken by monitoring bodies.[217] While not developed specifically for the context of immigration detention, the resource contains a number of good practices relevant to LGBTI persons in immigration detention.

This resource is part of Penal Reform International (PRI) and the Association for the Prevention of Torture's (APT) Detention Monitoring Tool, which aims to provide analysis and practical guidance to help monitoring bodies, including National Preventive Mechanisms, to fulfil their preventive mandate as effectively as possible when visiting police facilities or prisons. The tool seeks to support such bodies in addressing systemic risk factors that contribute to an environment where torture or other ill-treatment occurs.

216. *There are Alternatives (Revised)*, above note 1, 46.
217. APT, *LGBTI Persons Deprived of Liberty*, above note 39, 9.

Conclusion and Recommendations

It is the position of the International Detention Coalition (IDC) and consistent with existing international standards that vulnerable individuals should never be placed in immigration detention. Immigration detention must only ever be an exceptional measure of last resort, and is particularly harmful to individuals who are already at a heightened risk of discrimination, abuse and exploitation, including lesbian, gay, bisexual, transgender or intersex persons.

Within places of immigration detention, LGBTI persons face heightened levels of harassment, discrimination, psychological abuse, physical and sexual violence by detention staff as well as other detainees. They are frequently segregated in conditions falling below those of the general detainee population and well-established international standards, or are subjected to policies of solitary confinement, which have been shown to have severe mental and physical health consequences.

States have an obligation to protect the fundamental rights to dignity, humanity, and liberty of LGBTI persons. The use of immigration detention, and particularly policies of administrative segregation or "protective custody", are incompatible with these obligations. Given the pervasive and clear linkages to physical, sexual, emotional and mental harms to LGBTI persons in places of immigration detention, it is our view that LGBTI persons should never be detained for reasons solely related to their immigration or residency status or lack thereof. Indeed, it is difficult to imagine a situation in which States would be justified in detaining LGBTI persons for reasons related to their immigration status, especially as viable alternatives to detention exist.

Solitary confinement of LGBTI persons for reasons related to their immigration or residency status, or lack thereof, is particularly alarming and is never an appropriate measure. The use of such solitary confinement, especially when based on the so-called 'protection' of vulnerable LGBTI persons, exceeds the legitimate aims of the State in managing migration and puts LGBTI persons at extreme risk of torture and ill-treatment.

Instead of detaining LGBTI persons, States should prioritise LGBTI-sensitive alternatives. Non-detention and other rights-based alternatives to immigration detention are more humane than immigration detention while maintaining effective compliance with migration processes. By reducing the reliance on physical detention and investing in alternatives to detention, governments can greatly reduce the unnecessary financial and human costs of detention while maximising management and support of individuals in the community.

For LGBTI persons, appropriate non-custodial, community-based alternatives to detention better protect and empower individuals to work with authorities to resolve their asylum or migration status in a timely, fair and humane manner. Ensuring that robust screening mechanisms are in place, that minimum standards are respected, and that individuals are supported to explore all available options in their immigration case are critical to the success of alternatives to detention, which are in the interest of both the State and the individual.

Recommendations

Based on this position, the IDC recommends that:

1. States should end the immigration detention of LGBTI persons
2. Procedures should be instituted for LGBTI persons to disclose their sexual orientation or gender identity in a safe, voluntary and dignified manner
3. LGBTI-sensitive alternatives to detention should be explored, developed and implemented as a matter of priority

References

Conventions and Declarations

African Charter on Human and Peoples' Rights ('Banjul Charter'), opened for signature 27 June 1981, 22 ILM 58, (entered into force 21 October 1986)

American Convention on Human Rights, 'Pact of San Jose, Costa Rica' ('ACHR'), opened for signature 22 November 1969 (entered into force 18 July 1978)

American Declaration of the Rights and Duties of Man, Inter-American Commission on Human Rights (IACHR) (adopted 2 May 1948)

Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration* (adopted 18 November 2012)

Charter of Fundamental Rights of the European Union, (2000/C 364/01), (18 December 2000)

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984 1465 UNTS 85, (entered into force 26 June 1987)

Convention Relating to the Status of Stateless Persons, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960)

Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1(A)(2) (as modified by the 1967 Protocol)

European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), opened for signature 4 November 1950 (entered into force 3 September 1953)

International Covenant on Civil and Political Rights ('ICCPR'), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1973)

Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, opened for signature on 9 January 2003, UN Doc. A/RES/57/199 (entered into force on 22 June 2006)

United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, UN Doc. A/RES/45/113, (14 December 1990)

United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), A/C.3/65/L.5, (6 October 2010)

Universal Declaration of Human Rights, Resolution 217 A (III), (10 December 1948)

International Guidelines and Recommendations

Council of Europe, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe*, 2nd ed (Council of Europe, France: 2011)

Council of Europe Committee of Ministers, *Recommendation CM/Rec (2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity*, (adopted without vote on 31 March 2010)

Council of the European Union, *Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex Persons (LGBTI)*, Foreign Affairs Council Meeting, (24 June 2013)

Council of the European Union, *Toolkit to Promote and Protect the Enjoyment of all Human Rights by LGBT People,* 11179/10 (17 June 2010).

European Union, *European Parliament Resolution of 24 May 2012 on the Fight Against Homophobia in Europe*, P7_TA-PROV(2012)022224, (May 2012)

Inter-American Commission on Human Rights (IACHR), *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Resolution 1/08, (13 March 2008)

Organization of American States, *Human Rights, Sexual Orientation, and Gender Identity and Expression,* AG/RES. 2863 (XLIV-O/14) (June 5, 2014)

Organization of American States, *Human Rights, Sexual Orientation, and Gender Identity and Expression*, AG/RES. 2807 (XLIII-O/13) (June 6, 2013)

Organization of American States, *Human Rights, Sexual Orientation, and Gender Identity*, AG/RES. 2721 (XLII-O/12) (4 June 2012)

Organization of American States, *Human Rights, Sexual Orientation and Gender Identity*, AG/RES. 2653 (XLI-O/11) (June 7, 2011)

Organization of American States, *Human Rights, Sexual Orientation and Gender Identity*, AG/RES. 2600 (XL-O/10) (June 8, 2010)

Organization of American States, *Human Rights, Sexual Orientation and Gender Identity*, AG/RES. 2504 (XXXIX-O/09) (June 4, 2009)

Organization of American States, *Human Rights, Sexual Orientation, and Gender Identity*, AG/RES. 2435 (XXXVIII-O/08) (3 June 2008)

United Nations Committee on Economic, Social and Cultural Rights (CESCR*), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant),* E/C.12/2000/4, (11 August 2000)

United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20, (2 July 2009)

United Nations General Assembly, *Statement on Human Rights, Sexual Orientation and Gender Identity*, (18 December 2008)

United Nations High Commissioner for Refugees (UNHCR), *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum–Seekers and Alternatives to Detention*, (UNHCR, 2012)

United Nations High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/12/09 (23 October 2012)

United Nations High Commissioner for Refugees (UNHCR), *UNHCR Resettlement Assessment Tool: Lesbian, Gay, Bisexual, Transgender and Intersex Refugees*, (UNHCR, 2013)

United Nations Human Rights Committee, 'CCPR General Comment No. 15: The Position of Aliens Under the Convention' in 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (11 April 1986)

United Nations Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Addendum*, A/HRC/13/39/Add.5 (5 February 2010)

United Nations Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Rashida Manjoo, Addendum,* A/HRC/17/26/Add.2 (14 February 2011)

United Nations Human Rights Council, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/66/268 (5 August 2011)

United Nations Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, A/HRC/19/41 (17 November 2011)

United Nations Human Rights Council, *Human Rights Council Panel on Ending Violence and Discrimination Against Individuals Based on their Sexual Orientation and Gender Identity*, Summary of Discussion, (7 March 2012)

United Nations Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, 'Detention of Migrants in an Irregular Situation*, A/HRC/20/24 (2 April 2012)

United Nations Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants, 'François Crépeau, Regional Study: Management of the External Borders of the European Union and its Impact on the Human Rights of Migrants',* A/HRC/23/46 (24 April 2013)

United Nations Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/22/53 (1 February 2013)

United Nations Office on Drugs and Crime (UNODC), *Handbook on Prisoners with Special Needs*, (March 2009)

International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007)

Case Law

Appellants S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs, HCA 71, Australia, High Court, 9 December 2003

Canada (Attorney General) v. Ward, 2 S.C.R. 689, C.S.C., 30 June 1993

Case of Atala Riffo and Daughters v. Chile, Inter-American Court of Human Rights (IACtHR), Series C No. 239 (2012), Judgment of 24 February 2012

Geovanni Hernandez-Montiel v. Immigration and Naturalization Service, US, 225 F.3d 1084, A72-994-275, (9th Cir. 2000), 24 August 2000

HJ and HT v. Secretary of State for the Home Department, UK, UKSC 31, Supreme Court, 7 July 2010

Morales v. Gonzales, US, 478 F.3d 972, No. 05-70672, (9th Cir. 2007), 3 January 2007

Refugee Appeal No. 74665, New Zealand, Refugee Status Appeals Authority, 7 July 2004

Toonen v. Australia, CCPR/C/50/D/488/1992, UN Human Rights Committee, 4 April 1994

Vasileva v. Denmark, Application no. 52792/99, Council of Europe: European Court of Human Rights, 25 September 2003

X v. Turkey, Application no. 24626/09, Judgment of 9 October 2012

Research and Reports

Acer, Eleanor and Jake Goodman, 'Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, and Refugees in Immigration Detention', 24 *Georgetown Immigration Law Journal*, 507 (2010)

American Civil Liberties Union (ACLU) of Arizona, *In Their Own Words: Enduring Abuse in Arizona Immigration Centers,* (ACLU, 2011)

Arrigo, Bruce A and Jennifer Leslie Bullock, 'The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What We Should Change', 52(6) *International Journal of Offender Therapy and Comparative Criminology* 622 (2008)

Association for the Prevention of Torture (APT), *LGBTI Persons Deprived of Liberty: A Framework for Preventive Monitoring* (Penal Reform International, 2015)

Association for the Prevention of Torture (APT), Jean-Jaques Gautier Symposium 2015, *Outcome Report: Addressing vulnerabilities of LGBT persons in detention,* (2015)

Association for the Prevention of Torture (APT), International Detention Coalition (IDC), and United Nations High Commissioner for Refugees (UNHCR), *Monitoring Places of Immigration Detention: Practical Manual*, (Association for the Prevention of Torture (and United Nations High Commissioner for Refugees: 2014)

Coffey, Guy J et al., 'The Meaning and Mental Health Consequences of Long-term Immigration Detention for People Seeking Asylum', 70(12) *Social Science & Medicine,* 2070 (2010)

Corradini, Mike, et al., *Buried Alive: Solitary Confinement in the US Detention System*, (Physicians for Human Rights, 2013)

de la Torre, Annette, 'Is Ze an American or a Foreigner? Male or Female? Ze's Trapped!', 17 *Cardozo Journal of Law and Gender,* 389 (2011)

Edwards, Alice, 'Back to Basics: The Right to Liberty and Security of and "Alternatives to Detention'" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants', Person (UNHCR: April 2011) PPLA/2011/01.Rev.1

Envisioning Global LGBT Human Rights, *The Impact of Canada's New Immigration Regime*, (2014)

Ettelbrick, Paula L and Alia Trabucco Zerán, *The Impact of the Yogyakarta Principles on International Human Rights Law Development A Study of November 2007 – June 2010 Final Report'*, (10 September 2010)

European Union Agency for Fundamental Rights (FRA), *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation* (European Union Agency for Fundamental Rights, 2009)

Forced Migration Review, *Sexual Orientation and Gender Identity and the Protection of Forced Migrants*, Issue 42 (April 2013)

Gender Identity in US Surveillance Group (GenIUSS), JL Herman (Ed.), *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents in Population-Based Surveys*, (Los Angeles: Williams Institute at the UCLA School of Law, 2014),

Goldberg, Suzanne B, 'Give me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men, 26 *Cornell International Law Journal*, 605 (1993).

Grant, Jaime, et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (National Gay & Lesbian Task Force and National Center for Transgender Equality, 2011)

Gruberg, Sharita, *Dignity Denied: LGBT Immigrants in U.S. Immigration Detention*, (Center for American Progress, November 2013)

Gruberg, Sharita, 'How the Prison Rape Elimination Act Helps LGBT Immigrants in Detention', *Center for American Progress,* (published 2 April 2014)

Haney, Craig and Mona Lynch, 'Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement', 23 *New York University Review of Law & Social Change,* 477 (1997)

International Detention Coalition (IDC), *Captured Childhood* (International Detention Coalition, 2012)

International Detention Coalition (IDC), Sampson, R., Chew, V., Mitchell, G., and Bowring, L. There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (Revised), (Melbourne: International Detention Coalition, 2015).

Jansen, Sabine and Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (Amsterdam: COC Nederland and Vrije Universiteit Amsterdam, 2011)

Jenness, Valerie, et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (Center for Evidence-Based Corrections, 2007)

Joint United Nations Program on HIV/AIDS (UNAIDS), *The Gap Report* (2014)

Joint United Nations Program on HIV/AIDS (UNAIDS) and United Nations Office on Drugs and Crime (UNODC), *Diversidad Sexual, Derechos Humanos y VIH en el Sistema Penitenciario de Costa Rica*, (Costa Rica: Gossestra Intl, 2012)

Kupers, Terry A, 'What to do with the Survivors? Coping With the Long-Term Effects of Isolated Confinement', 35(8) *Criminal Justice and Behavior* 1005 (2008)

Medecins Sans Frontieres, *The Impact of Detention on Migrants' Health, Briefing Paper* (Brussels: Medecins Sans Frontieres, 2010)

National Prison Rape Elimination Commission, *National Prison Rape Elimination Commissioner Report* (2009)

O'Flaherty, Michael and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Conceptualising the Yogyakarta Principles', 8 *Human Rights Law Review,* 207 (2008)

Perlmutter, Alexis, et al., *Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigration Detention*, (Heartland Alliance National Immigrant Justice Center & Physicians for Human Rights, 2012)

Sampson, Robyn and Grant Mitchell, 'Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales' 1(3) *Journal on Migration and Human Security,* 97 (2013)

Shildo, Ariel and Joanne Ahola, 'Mental Health Challenges of LGBT Forced Migrants', 42 *Forced Migration Review*, 9 (2013)

Silove, Derrick, Zachary Steel, and Charles Watters, 'Policies of Deterrence and the Mental Health of Asylum Seekers', 284(5) *Journal of the American Medical Association,* 604 (2000)

Steel, Zachary, Naomi Frommer, and Derrick Silove, 'Part I- Mental Health Impacts of Migration: The Law and Its Effects Failing to Understand: Refugee Determination and the Traumatized Applicant', 27(6) *International Journal of Law & Psychiatry*, 511 (2004)

Stop Prisoner Rape, *In the Shadows: Sexual violence in U.S. Detention Facilities, A Shadow Report to the U.N. Committee Against Torture* (USA: Stop Prisoner Rape, 2006)

Sultan, Aamer and Kevin O'Sullivan, 'Psychological Disturbances in Asylum Seekers Held in Long Term Detention: A Participant-Observer Account', 175(11) *Medical Journal of Australia*, 593 (2001)

Tabak, Shana and Rachel Levitan, 'LGBTI Migrants in Immigration Detention: A Global Perspective', 37 *Harvard Journal of Law & Gender*, 1 (2014)

United Nations, 'Fact Sheet – Refugee and Asylum', *United Nations for LGBTI Equality, Free & Equal Campaign*

United Nations, 'Fact Sheet – Intersex', *United Nations for LGBTI Equality, Free & Equal Campaign*

United States Department of Homeland Security, *Privacy Impact Assessment Update for the Enforcement Integrated Database (EID)*, DHS/ICE/PIA-015(f) (6 April 2012)

Online Sources

Carcamo, Cindy, 'Hormone Therapy for Transgender Immigration Detainees?', *Orange County Register* http://www.ocregister.com/articles/-301883--.html?page=2

Casa Ruby
http://www.casaruby.org/drop.html

'Combatting Discrimination Based on Sexual Orientation and Gender Identity', *Office of the High Commissioner for Human Rights*
http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx

Detention Reform', *United States Department of Homeland Security – US Immigration and Customs Enforcement*
http://www.ice.gov/detention-reform

'Genetic Components of Sex and Gender', *World Health Organization (WHO)*
http://www.who.int/genomics/gender/en/index1.html

Gerhardt, Anne Marie, 'Helping LGBT Asylees Seek Safety in Chicago', *Northern Illinois Conference of the United Methodist Church*
http://www.umcnic.org/clasp/

'Give', *Broadway United Methodist Church*
http://www.broadwaychurchchicago.com/give

'GLAAD Media Reference Guide – 9th Edition', *Gay & Lesbian Alliance Against Defamation (GLAAD)*
http://www.glaad.org/reference/

'Glossary of Migration Related Terms', *United Nations Educational Scientific and Cultural Organization (UNESCO)*
http://www.unesco.org/shs/migration/glossary

Harmon, Andrew, 'Eight Months in Solitary', *Advocate,* (7 May 2012)
http://www.advocate.com/news/news-features/2012/05/07/transgender-detainees-face-challenges-broken-immigration-system

'IDC Core Position (2009)', *International Detention Coalition*, (2011)
http://idcoalition.org/publications/idc-core-position/

Inter-American Commission on Human Rights (IACHR), 'Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons', *Organization of American States*
http://www.oas.org/en/iachr/lgtbi/

Kaiser, David and Lovisa Stannow, 'Prison Rape: Obama's Program to Stop It', *New York Review of Books, (published* 11 October 2012)
http://www.nybooks.com/articles/archives/2012/oct/11/prison-rape-obamas-program-stop-it/

LGBT Freedom and Asylum Network (LGBT-FAN)
http://www.lgbt-fan.org/

Lieberman, Amy, 'Complaints by Transgender Detainees Quantify Abuse', *Women's Enews* (3 September 2013)
http://womensenews.org/story/lesbian-and-transgender/130902/complaints-transgender-detainees-quantify-abuse

Press Release: IACHR Rapporteurship on the Rights of Lesbian, Gay, Bisexual, Trans and Intersex (LGBTI) Persons Becomes Fully Operational and First Rapporteur Duly Designated', *Organization of American States*
http://www.oas.org/en/iachr/media_center/PReleases/2014/015.asp

Queer Detainee Empowerment Project (QDEP)
http://qdep.org/

'Newcomers', *RFSL – Stockholm*
http://rfslstockholm.se/medlemsgrupper/newcomers/

'What Is RFSL?', *Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL)*
http://www.rfsl.se/?p=3298

Sanchez, Erika L, 'Transgender Latina Creates Safe Haven for Multicultural LGBT Community', *NBC Latino* (published 30 May 2013)
http://nbclatino.com/2013/05/30/transgender-latina-creates-safe-haven-for-multicultural-lgbt-community/

'Survivor Testimony, "Adam, Louisiana"', *Just Detention International*
http://www.justdetention.org/en/survivortestimony/stories/adam_la.aspx

'Transgender Asylum Seeker Faces Abuse in Immigration Detention', *Transgender Law Center*
http://transgenderlawcenter.org/archives/11347

'UN Unveils 'Free & Equal' Campaign to Promote Lesbian, Gay, Bisexual, Transgender Rights', *UN News Centre,* (published 26 July 2013)
http://www.un.org/apps/news/story.asp?NewsID=45503#.VMAvMkeUfVY

Nowhere to Run: Detained Transgender Immigrants Are Abused, Beaten, and Worse, (22 May 2015)
http://www.takepart.com/feature/2015/05/22/transgender-immigrants-detention

International
Detention Coalition

Human rights for detained refugees,
asylum seekers and migrants