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# LGBTI MIGRANTS IN IMMIGRATION DETENTION: A GLOBAL PERSPECTIVE

SHANA TABAK & RACHEL LEVITAN\*

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## INTRODUCTION

In recent years, the state practice of detaining migrants has come under close examination for the multiple ways in which detention is likely to com-

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promise the human rights of detainees.<sup>1</sup> With this Article we turn our attention to the special concerns of lesbian, gay, bisexual, transgender, and intersex (“LGBTI”) detained migrants, a subgroup of vulnerable detainees that has largely remained invisible in detention systems across the globe.<sup>2</sup> Some of these individuals may be refugees seeking asylum based on previous persecution experienced due to their sexual orientation or gender identity, or on other grounds of persecution listed under the 1951 United Nations Convention relating to the Status of Refugees; others may simply be migrants who left their home countries for other reasons and who are then detained. Regardless, when placed in detention, sexual minority or gender nonconforming migrants<sup>3</sup> often face unique challenges in which their human rights may be compromised.

Although all detainees are vulnerable to human rights abuses, LGBTI detainees are particularly susceptible to heightened levels of physical and mental abuse. This abuse often includes targeted violence and sexual assault,

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<sup>1</sup> See, e.g., Eleanor Acer & Jake Goodman, *Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers and Refugees in Immigration Detention*, 24 GEO. IMMIGR. L.J. 507, 509–15 (2010); Michelle Brané & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States through Human Rights Frameworks*, 23 GEO. IMMIGR. L.J. 147, 152–64 (2008); see also Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 46–49 (2010) (describing in detail various hardships imposed by detention).

<sup>2</sup> While there may not be a universally accepted definition of the term “migrant,” see GLOBAL MIGRATION GRP., INTERNATIONAL MIGRATION AND HUMAN RIGHTS 7 (2008), archived at <http://perma.cc/0VUBZs3FbRD>, for the purposes of this Article, the authors will use the definition in the proposed International Migrants Bill of Rights [hereinafter IMBR]. Article 1(1) of the proposed IMBR defines a “migrant” as “a person who has left a State of which he or she is a citizen, national, or habitual resident.” IMBR Network, *International Migrants Bill of Rights: Draft in Progress*, 24 GEO. IMMIGR. L.J. 399, 400 (2010).

In addition, we will use the term “migrant” within this Article to include the categories of both asylum seekers and refugees. The term “asylum seeker” refers to an individual seeking recognition by a government or United Nations body as a “refugee” under the United Nations Convention relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 137, 152–53 [hereinafter Refugee Convention or 1951 Convention], or a domestic law incorporating the “refugee” definition. A “refugee” refers to an individual who has been legally recognized as such under either the Refugee Convention, *see id.* at 152, or a domestic equivalent. As detailed in this Article, asylum seekers and refugees are entitled to specific protections under international refugee law, which does not benefit all migrants.

We also use the term “irregular migrant” throughout the Article to refer to an individual who has crossed a border, entering a country of which he or she is not a national, without legal authorization to do so. While the terms “illegal” or “undocumented” are often used in the United States immigration context, *see* Emily Guskin, *‘Illegal,’ ‘Undocumented,’ ‘Unauthorized’: News Media Shift Language on Immigration*, FACT TANK (Jun. 17, 2013), archived at <http://perma.cc/0CeBzsYoNvx>, we use the term “irregular migrant” in this Article to reflect the term used more commonly in European and other international contexts, *see* CHRISTAL MOREHOUSE & MICHAEL BLOMFIELD, TRANSATLANTIC COUNCIL ON MIGRATION, *IRREGULAR MIGRATION IN EUROPE* 4 (2011), archived at <http://perma.cc/0jJth2jg378>.

<sup>3</sup> We use “sexual minorities” interchangeably with “LGBTI” in this piece, referring to individuals who may experience discrimination or persecution based on their sexual orientation or gender identity.

because perpetrators of violence often choose victims that appear to be the most vulnerable.<sup>4</sup> For example, LGBTI detainees may be singled out for harassment or abuse by virtue of their perceived nonconformity with heterosexual gender norms.<sup>5</sup> Thus, nonconforming sexual orientation or gender identity often exposes detained LGBTI migrants, similar to LGBTI inmates in non-immigration prison settings, to sexual assault and other identity-based harassment and violence from both prison officials and other detainees.<sup>6</sup> These abuses may, in turn, have the effect of exacerbating depression, anxiety, and other psychological aftereffects experienced by LGBTI people due to persecution in their countries of origin.<sup>7</sup> LGBTI detainees also suffer unique challenges regarding access to medical care appropriate to their needs, including hormone therapy for transgender individuals and HIV treatment for those who are HIV positive.<sup>8</sup> Each of these potential abuses is compounded in the context of detention by frequent and severe stigmatization, isolation, and even solitary confinement of LGBTI individuals.<sup>9</sup>

These abuses have not gone completely unnoticed by the international community, though it is only in recent years that attention has been cast on these concerns. In October 2012, the United Nations High Commissioner for Refugees (“UNHCR”) issued its new 2012 Detention Guidelines governing the detention of refugees.<sup>10</sup> Intended to provide guidance to governments, legal practitioners, decisionmakers, and advocates, they provide valuable leadership regarding the special concerns of LGBTI asylum-seekers in detention. Guideline 9.7 provides as follows:

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 counseling, where applicable; and that detention personnel and all other officials in the public and private

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<sup>4</sup> See Annette de la Torre, Note, *Is Ze an American or a Foreigner? Male or Female? Ze's Trapped!*, 17 *CARDOZO J.L. & GENDER* 389, 404 (2011).

<sup>5</sup> See *id.* at 403–04, 409.

<sup>6</sup> See NATIONAL PRISON RAPE ELIMINATION COMMISSION, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 73–74 (2009), archived at <http://perma.cc/0i82A7z1hTj>.

<sup>7</sup> See, e.g., AMERICAN CIVIL LIBERTIES UNION OF ARIZ., IN THEIR OWN WORDS: ENDURING ABUSE IN ARIZONA IMMIGRATION DETENTION CENTERS 22–25 (2011), archived at <http://perma.cc/0hBFaxzU4YZ>.

<sup>8</sup> See *infra* Part III.C.1.

<sup>9</sup> See *infra* Part III.B.

<sup>10</sup> U.N. HIGH COMM’R FOR REFUGEES, DETENTION GUIDELINES: GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION (2012), archived at <http://perma.cc/0ZwerDWfGx> [hereinafter DETENTION GUIDELINES]. These replace detention guidelines issued in 1999, U.N. HIGH COMM’R FOR REFUGEES, UNHCR’S GUIDELINES ON APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS (1999), archived at <http://perma.cc/0DwpsdAaBWZ>.

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. Where their security cannot be assured in detention, release or referral to alternatives to detention would need to be considered. In this regard, solitary confinement is not an appropriate way to manage or ensure the protection of such individuals.<sup>11</sup>

Perhaps the most progressive and comprehensive iteration of UNHCR's standards of detention for LGBTI asylum-seekers, the 2012 Detention Guidelines capture the range of harms that sexual minorities face when placed in immigration detention facilities. Although these guidelines are extremely welcome, UNHCR's new Detention Guidelines alone are insufficient to address the severe problems that characterize the detention of sexual minority migrants more broadly. Though the guidelines provide valuable insight to states that may be well aware of the violations faced by LGBTI detainees, these detainees are often invisible within detention systems, such that it is crucial that advocates call attention to who exactly these individuals are and what specific violations they face.

Detention in and of itself can constitute a violation of international refugee and human rights law, as has been well documented.<sup>12</sup> The human rights of all detainees are jeopardized when they are detained, and LGBTI detainees are not unique in facing particular challenges as a group. A variety of subgroups of detainees, such as women, unaccompanied minors, and disabled people, may face specific and distinct persecutions.<sup>13</sup> We believe that important parallels to the LGBTI experience can be drawn from the scholarship considering the rights violations experienced by these individuals, given how all of these populations are often doubly marginalized, vulnerable not only to identity-based targeting that may lead to their becoming migrants in the first place, but also to targeting while detained, both from detention officials and other detainees.

The challenges that sexual minority detainees face in a global context are similar, but have not heretofore been extensively addressed in legal scholarship.<sup>14</sup> As will be discussed below, this dearth of information may be

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<sup>11</sup> DETENTION GUIDELINES, *supra* note 10, at 39.

<sup>12</sup> See, e.g., GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 462–64 (2007) (discussing the limitations on the imposition of detention and conditions in detention facilities to stay in compliance with international law); see also *infra* Part I.C.

<sup>13</sup> See *infra* Part III.

<sup>14</sup> For discussion of specific cases highlighting concerns of transgender migrants and detainees in the U.S. immigration system, see Pooja Gehi, *Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN'S RTS. L. REP. 315 (2009) (discussing general treatment and subsequent marginalization of transgender individuals under immigration law) and Laurel Anderson, Commentary, *Punishing the Innocent: How the Classification of Male-to-Female Trans-*

due to a variety of factors that contribute to the difficulty in documenting their needs, including general invisibility, as well as the challenges in identifying and gaining access to these groups.

With this Article, we aim to shed light on the detention of LGBTI migrants, a human rights problem that is not merely national but global, and yet insufficiently addressed by either legal or empirical study. We characterize the specific challenges that LGBTI individuals may face in detention, in the hope that practitioners, government authorities, and academics alike will benefit from increased awareness. Further, we identify the specific protection gaps for LGBTI detainees. States that choose to detain migrants must respond to these protection gaps if they are to comply with their obligations under international human rights law.

In addition to identifying and analyzing the situation of LGBTI migrants within international law, we further aim to call attention to the insufficient visibility of the unique challenges that LGBTI individuals may face in detention and seek more specific recommendations from the international community and compliance from detaining states. Although UNHCR's directive in the 2012 Detention Guidelines on the treatment of LGBTI detainees is an important advance, we argue that further guidance is required in order for states to sufficiently address this problem.

Our scope in this Article is global—we seek to draw experiences, both good practices and key challenges, from a variety of nations across the world. Taking a global perspective on LGBTI immigration detention is critical to evaluating patterns of state treatment and short- and long-term impact. Because there is a significant lack of research on this issue, and many barriers that prevent researchers from accessing LGBTI migrants in detention, it can be very difficult to obtain accurate and specific statistics regarding this population. Extrapolation from global trends can provide a preliminarily useful “bird’s-eye” perspective, flagging issues that may not be obvious and alerting states and advocates to challenges observed globally that may also require attention in their own backyards.

Part I of this Article begins with a background on the practice of immigration detention and the ways in which detention has the potential to compromise basic human rights, including special protections for LGBTI individuals. Part II focuses on the threshold question of the identification of

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*gender Individuals in Immigration Detention Constitutes Illegal Punishment Under the Fifth Amendment*, 25 BERKELEY J. GENDER L. & JUST. 1 (2010) (examining transgender detainee treatment in the U.S. context). *See also* Karma R. Chávez, *Spatializing Gender Performativity: Ecstasy and Possibilities for Livable Life in the Tragic Case of Victoria Arellano*, 33 WOMEN'S STUD. IN COMM. 1 (2010) (applying theories of gender performativity and gender identity to U.S. immigration detention situations). Various human rights organizations have also reported on the global nature of these abuses. *See, e.g.*, HUMAN RIGHTS FIRST, PERSISTENT NEEDS AND GAPS: THE PROTECTION OF LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX (LGBTI) REFUGEES 6–9 (2010), archived at <http://perma.cc/0N0M7XqezWr> (describing protection gaps for LGBTI migrants, including in the detention setting).

LGBTI individuals. When, how, and, perhaps most importantly, by whom should identification of sexual minorities occur, in order to best prevent human rights abuses? In order to grapple with this threshold question, the Article draws parallels to global trends in jurisprudence exploring whether or not LGBTI people have an obligation to be “discreet,” or pass a credibility assessment regarding their sexual orientation or gender identity, before meriting protection under international refugee law.

Part III details the specific challenges faced by individuals whose sexual orientation or gender identity may result in increased risk if they are placed in immigration detention. The Article addresses concerns such as violence by facility staff and inmates, barriers to accessing medical and mental health care, and challenges securing legal services. Access to legal representation can be especially crucial for detainees who wish to challenge their detention and gain meaningful access to a country’s domestic asylum system—if they are eligible for it—or other legal recourse that may free them from detention.

Finally, in the Recommendations and Conclusions, the Article first offers a call for increased research, awareness, and data collection on this topic, and second, preliminary recommendations that may ameliorate conditions for LGBTI detainees. We argue that ultimately, states must heed the recommendations by UNHCR and other international and nongovernmental organizations by providing alternatives to detention for all self-identifying sexual minorities, establishing noncustodial measures and alternative sentencing procedures. Recognizing that states’ decisions to detain can be rooted in a complicated, multifaceted rationale, we acknowledge that a recommendation to end all detention, even for the most vulnerable migrants, including LGBTI populations, may be untenable and lack practical meaning. Therefore, we offer suggestions to improve upon protections for LGBTI detainees, if states determine that they must be detained. Yet we reiterate that detention in the immigration context should always be used as a last resort in exceptional cases, and urge state officials to consider the numerous alternatives to detention. If and when it is applied, detention should be implemented on an individual case-by-case assessment, not as a blanket policy.

## I. DETENTION OF IRREGULAR MIGRANTS AND EFFECTS ON LGBTI POPULATIONS

Immigration detention has been described by one advocacy group as “a growing phenomenon of modern governance as governments strive to regulate growing cross-border migration and limit the number of migrants who do not have legal status on their territory.”<sup>15</sup> As states have expanded the

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<sup>15</sup> INT’L DET. COAL. & LA TROBE REFUGEE RESEARCH CTR., *THERE ARE ALTERNATIVES: A HANDBOOK FOR PREVENTING UNNECESSARY IMMIGRATION DETENTION* 6 (2011) [hereinafter *IDC REPORT*].

practice of immigration detention, it has become critical that state governments and the international community devote greater attention and commitment to upholding the human rights of migrants in detention. While sovereign states have the authority to regulate migration flows within their borders, this regulation must not come at the cost of international human rights law.<sup>16</sup>

Despite states' legal obligations under human rights and refugee law, violations of detainees' rights abound across the globe.<sup>17</sup> These violations include physical and sexual violence perpetrated both by facility staff and other inmates, indefinite or arbitrary detention of migrants, and severe lack of access to medical care.<sup>18</sup>

This section lays the groundwork for Part III, which offers a detailed analysis of the ways that immigration detention compromises the human rights of LGBTI people in immigration detention. In this section, we provide the reader with background on a number of different substantive areas necessary for later analysis. These include: first, an overview of factors contributing to LGBTI migration generally; second, a discussion of states' expanding practice of immigration detention; and third, an assessment of the ways in which detention compromises the human rights of all migrant detainees, including LGBTI persons.

#### A. *Factors Contributing to LGBTI Migration*

LGBTI migrants may experience a variety of push or pull factors that lead to the choice to depart their home countries. In some cases, the decision to emigrate is explicitly motivated by persecution suffered as a result of a migrant's gender identity or sexual orientation. In other cases, LGBTI migrants' decision to emigrate is rooted in more general desires, such as for a better economic situation or freedom of political opinion or religious beliefs. In either case, however, LGBTI individuals who migrate have likely lived through human rights violations in their home countries related to sexual orientation or gender nonconformance.

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<sup>16</sup> Office of the U.N. High Comm'r for Human Rights, Administrative Detention of Migrants 1, *archived at* <http://perma.cc/0VTTnXrLSMt>.

<sup>17</sup> *See, e.g.*, Rep. of the Working Grp. on Arbitrary Det., ¶¶ 59–65, Human Rights Council 13th Sess., Mar. 1–26, 2010, U.N. Doc. A/HRC/13/30 (Jan. 18, 2010); Parliamentary Assembly of the Council of Eur., Detention of Asylum Seekers and Irregular Migrants in Europe, ¶ 3–4, 6–7, Resolution 1707 (2010) (Jan. 28, 2010), *archived at* <http://perma.cc/8YHK-XLZE>. *See generally* G.A. Res. 67/172, U.N. Doc. A/RES/67/172 (Dec. 20, 2012) (calling attention to the lack of human rights protection for migrants). *See also* U.N. High Comm'r for Human Rights, Opening Remarks to the Panel Discussion on “Human Rights of Migrants in Detention Centres” (Sept. 17, 2009), *archived at* <http://perma.cc/0UtcEVKnmo1> (“The human rights treaty bodies, the Special Procedures of the Human Rights Council and the Universal Periodic Review process have underscored with increasing urgency concerns about human rights violations related to the detention of migrants, and of asylum seekers.”).

<sup>18</sup> *See* sources cited *supra* note 17.

The push factors that encourage LGBTI individuals to leave their home countries are substantial. Indeed, in some cases the decision to leave is a matter of life or death. Suzanne B. Goldberg, in a formative article written in 1993, identified common types of persecution experienced by sexual minorities throughout the world as: “police harassment and assault, involuntary institutionalization and electroshock and drug ‘treatments,’ punishment under laws that impose extreme penalties including death for consensual lesbian or gay sexual relations, murder by paramilitary death squads, and government inaction in response to criminal assaults against lesbians and gay men.”<sup>19</sup>

Unfortunately, two decades later, sexual minorities worldwide continue to face severe discrimination and persecution at the hands of both private and state actors. Criminalization of same-sex relationships is still widespread. In seventy-six nations, engaging in consensual same-sex sexual activities between adults is a criminal act<sup>20</sup>—often for both sexes, though sometimes only for men.<sup>21</sup> Although such criminalization is specific to nonconforming sexual orientation and does not normally refer to or otherwise criminalize transgender or intersex gender identity, oftentimes the criminalization of same-sex sexual activity acts as an “indicator” that those with nonconforming gender identity may be persecuted as well.<sup>22</sup> Nonconforming gender identity may also specifically be prosecuted under laws targeting cross-dressing or punished under other non-gender-specific legal doctrines.<sup>23</sup>

Though not all countries impose criminal sanctions on same-sex relationships, this does not necessarily indicate a lack of persecution or discrimination against LGBTI individuals. Sexual and gender minorities, including transgender and intersex people, may still feel severe persecution in places where legal restrictions are unenforced or do not exist.<sup>24</sup> Even in countries where the laws are progressive on non-heteronormative sexual identity and

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<sup>19</sup> Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT’L L.J. 605, 605–06 (1993).

<sup>20</sup> LUCAS PAOLI ITABORAHY & JINGSHU ZHU, INT’L LESBIAN GAY BISEXUAL TRANS & INTERSEX ASS’N, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS: CRIMINALIZATION, PROTECTION AND RECOGNITION OF SAME-SEX LOVE 22 (2013), archived at <http://perma.cc/0jDfQVnNvej>.

<sup>21</sup> SABINE JANSEN & THOMAS SPIJKERBOER, COC NEDERLAND, FLEEING HOMOPHOBIA: ASYLUM CLAIMS RELATED TO SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE 21 (2011).

<sup>22</sup> See *id.*

<sup>23</sup> *Id.* For example, in Turkey, the Law on Misdemeanors prohibiting “public exhibitionism” and “offences against public morality” is used to impose fines against transgender people, Eur. Comm’n, *Turkey 2009 Progress Report*, at 26, SEC (2009) 1334 (Oct. 14, 2009). Courts have also on occasion applied the principle of “unjust provocation” in favor of perpetrators of crimes against transgender people. *Id.*

<sup>24</sup> See JANSEN & SPIJKERBOER, *supra* note 21, at 27–31 (documenting that even in countries where no criminal sanctions have ever been imposed or enforced against LGBTI people, they may face significant discrimination from national authorities or non-state actors).

gender nonconformity, such as in South Africa, pervasive social stigma and deeply held biases against sexual minorities have continued to lead to severe identity-based violence, including murder.<sup>25</sup> These daily-lived experiences of persecution, discrimination, criminalization, and social and familial stigma may become important considerations in evaluating the choices that sexual minorities face, and the behaviors they exhibit, if and when they are detained by other states once they have left their home countries.

In addition to the push factors of persecution and discrimination in their home countries, individuals may also be motivated to migrate by the potential pull factor of recent international media attention paid to LGBTI rights, especially in the West, and notable rights advancements made in these legal systems. Due to this reporting on LGBTI communities and those who speak out publically and ardently regarding LGBTI rights, potential migrants may be increasingly aware that greater protections for LGBTI rights may exist outside of their home country.<sup>26</sup> This “magnet” theory may explain LGBTI migration to countries that are known to be more hospitable for LGBTI individuals.<sup>27</sup>

Regardless of why they choose to leave, it is clear today that many LGBTI individuals become global migrants. As the following sections discuss, their decision to leave coincides with a global increase in irregular migration and the detention of such migrants by receiving countries. As a result, the number of LGBTI migrants in detention also has grown.

### *B. States' Expanding Practice of Immigration Detention*

A complex variety of societal and political factors explain why states pursue detention of migrants. These include rises in xenophobia and racism in many parts of the world that fuel intolerance toward migrant populations.<sup>28</sup> Security concerns, especially in the wake of the 9/11 attacks, have commonly been cited by Western government leaders as a rationale for increased monitoring of national borders.<sup>29</sup> Yet the most common explanation

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<sup>25</sup> HUMAN RIGHTS WATCH, ‘WE’LL SHOW YOU YOU’RE A WOMAN’: VIOLENCE AND DISCRIMINATION AGAINST BLACK LESBIANS AND TRANSGENDER MEN IN SOUTH AFRICA 1–2, 13–14 (2011), archived at <http://perma.cc/0qXeikfC9dh>.

<sup>26</sup> For examples, see the following articles and videos discussing the circumstances leading to the murder of LGBT activist David Kato in Uganda: Jeffrey Gettleman, *Ugandan Who Spoke Up for Gays is Beaten to Death*, N.Y. TIMES (Jan. 27, 2011), archived at <http://perma.cc/0Yn6rADaxVt>; Xan Brooks & Elliot Smith, *Call Me Kuchu: ‘Nobody Expected David Kato to be Killed’*, GUARDIAN (Nov. 5, 2012), <http://www.guardian.co.uk/film/video/2012/nov/05/call-me-kuchu-david-kato-video> (last visited Nov. 12, 2013); Joëlle Fiss, *The Murder of David Kato: One Year Later*, HUMAN RIGHTS FIRST (Jan. 26, 2012), archived at <http://perma.cc/0b1KxJEpZSY>.

<sup>27</sup> Thanks to Jayesh Rathod for helpful discussions prompting this line of thinking.

<sup>28</sup> Shyla Vohra, *Detention of Irregular Migrants and Asylum Seekers*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 49, 64–65 (Ryszard Cholewinski, Richard Perruchoud & Euan MacDonald eds., 2007).

<sup>29</sup> *Id.* at 64; IDC REPORT, *supra* note 15, at 10.

offered by states for their expanded practice of detention is that, as they are confronted with increasing numbers of migrants, detention provides a means of controlling migration flows and deterring further irregular migration.<sup>30</sup> In addition to controlling migration flows, the United States further argues that detention facilitates deportation and protects the public from any dangers posed by detainees as they await their removal.<sup>31</sup>

The Parliamentary Assembly of the Council of Europe recently noted that European member states had significantly expanded their use of detention as a response to the arrival of asylum seekers and irregular migrants.<sup>32</sup> Similarly, in the past decade, the United States has expanded its use of detention facilities for migrants.<sup>33</sup> This trend is reflected by the number of noncitizens detained by the U.S. Department of Homeland Security: in 1994, 6,785 people were in immigration detention per day in the United States;<sup>34</sup> by 2012, that number had increased almost fivefold to 32,953.<sup>35</sup> This increase in the practice of detention is evident in a variety of other countries as well.<sup>36</sup>

Despite the prevalence of detention, it is unclear that detention meets the presumptive goals of states that choose to detain, namely deterring migrants from crossing their borders without authorization.<sup>37</sup> Furthermore, it appears that irregular migration is increasing globally, despite the attempts of governments to secure their borders against irregular migrants.<sup>38</sup>

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<sup>30</sup> See Parliamentary Assembly of the Council of Eur., *supra* note 17, ¶ 1; Jesuit Refugee Service Europe, *Alternatives to Detention of Asylum Seekers* 2 (Working Paper, 2008), archived at <http://perma.cc/0TQz5FububH>.

<sup>31</sup> Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 138–39 (2013).

<sup>32</sup> Comm. on Migration, Refugees and Population of the Parliamentary Assembly of the Council of Eur., *The Detention of Asylum Seekers and Irregular Migrants in Europe Report*, ¶ 1, Doc. 12105 (Jan. 11, 2010) (referring in particular to the United Kingdom, France, and Italy).

<sup>33</sup> HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON 17 (2009), archived at <http://perma.cc/0p8jJtJVCmR>.

<sup>34</sup> DONALD KERWIN & SERENA YI-YING LIN, IMMIGRATION DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 6 (2009), archived at <http://perma.cc/0Hkw9Zhqf4J>.

<sup>35</sup> ALISON SISKIN, CONG. RESEARCH SERV., RL32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 13 (2012). The increase in detention in the United States was undoubtedly stimulated by the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 and 18 U.S.C.), which expanded the federal government's capacity to legally detain noncitizens. See KERWIN & LIN, *supra* note 34, at 6.

<sup>36</sup> See NGO Statement on International Protection: Agenda Item 5. a), delivered to the Exec. Comm. of the U.N. High Comm'r for Refugees, 61st Sess., Oct. 4–8, 2010, 7 (2010), archived at <http://perma.cc/0XdPUmeifz8>; Robyn Sampson & Grant Mitchell, *Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales*, 1 J. MIGRATION & HUM. SECURITY 97, 100 (2013).

<sup>37</sup> See Alice Edwards, *Methods of First Resort: Alternatives to Immigration Detention in Comparative Perspective*, 7 EQUAL RTS. REV. 117, 117 (2011).

<sup>38</sup> *Id.*

The international community has begun to respond to the violations of human rights law inherent in detention.<sup>39</sup> In 2008, for example, the United Nations General Assembly called for states to “respect the human rights and the inherent dignity of migrants and . . . put an end to arbitrary arrest and detention.”<sup>40</sup> The Working Group on Arbitrary Detention under the United Nations Human Rights Council has issued numerous reports citing the dangers of arbitrary detention; its mandate was renewed in 2010 for an additional three years to pursue “the investigation of instances of alleged arbitrary deprivation of liberty.”<sup>41</sup> UNHCR has reiterated its concerns regarding the effects of detention on refugee populations; one senior officer remarked that “[d]etention is generally an extremely blunt instrument to counter irregular migration. There is no empirical evidence that the threat of being detained deters irregular migration or discourages people from seeking asylum.”<sup>42</sup> NGOs dedicated to the issue of detention have similarly identified concerns with the worrisome expansion of migrant detention<sup>43</sup> and worked to frame their advocacy from a rights-based perspective, citing norms under international law and regional human rights standards that protect irregular migrants.<sup>44</sup> Scholarly attention has also turned to the human rights and refugee rights violations within detention centers, although these violations have been little explored from the specific perspective of LGBTI migrants.<sup>45</sup> Despite the best efforts of international organizations, NGOs, and

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<sup>39</sup> See, e.g., GLOBAL MIGRATION GROUP, STATEMENT OF THE GLOBAL MIGRATION GROUP ON THE HUMAN RIGHTS OF MIGRANTS IN IRREGULAR SITUATION (Sept. 30, 2010), archived at <http://perma.cc/0y3hKDTe8pB>.

<sup>40</sup> G.A. Res. 63/184, U.N. Doc. A/RES/63/184 (Dec. 18, 2008), ¶ 9.

<sup>41</sup> Rep. of the Working Grp. on Arbitrary Det., ¶ 1, Human Rights Council 16th Sess., Feb. 28–Mar. 25, 2011, U.N. Doc. A/HRC/16/47 (Jan. 19, 2011).

<sup>42</sup> UNHCR Urges States to Avoid Detaining Asylum-Seekers, U.N. HIGH COMM’R FOR REFUGEES (May 12, 2011), archived at <http://perma.cc/0VbyDwYmZ9e>.

<sup>43</sup> See IDC REPORT, *supra* note 15, at 10–11 (identifying “serious concerns” with the expanded use of immigration detention, given that detention is not an effective deterrent and that it interferes with human rights and with detainees’ health and wellbeing).

<sup>44</sup> See, e.g., Int’l Det. Coal., Migrants Forum in Asia, Migrants Rights. Int’l & Nat’l Network for Immigrant and Refugee Rights, *Statement to the Human Rights Council 12th Session, Geneva Meeting on Migrants in Detention, 17th September, 2009*, MCGILL UNIV. HANS & TAMAR OPPENHEIMER CHAIR IN PUB. INT’L LAW (Sept. 17th, 2009), archived at <http://perma.cc/0Ajy34A97GH>.

<sup>45</sup> See, e.g., Acer & Goodman, *supra* note 1 (describing the numerous human rights protections available to detainees, but with no discussion of LGBTI-specific challenges); see also Edwards, *supra* note 37 (same). In the United States, LGBTI detention conditions have drawn recent attention as a result of a complaint filed against the U.S. Department of Homeland Security’s Office of Civil Rights and Civil Liberties in 2011, alleging systemic abuse of LGBTI detainees related to their sexuality and/or gender identity. See Yasmin Nair, *NIJC Files Mass Civil Rights Complaint on Behalf of LGBT Immigrant Detainees*, WINDY CITY TIMES (Apr. 13, 2011), archived at <http://perma.cc/056FSZ1Zye6>. See also Christina Fialho, *A Model Immigration Detention Facility for LGBTI?* 42 FORCED MIGRATION REV. 50 (2013) (describing filed complaint and response from the Department of Homeland Security, which established one immigration custody unit as an LGBTI-only facility in the Santa Ana City Jail in California).

academia to address the growing phenomenon of migrant detention, problems remain acute.

### C. *International Human Rights Law and Immigration Detention*

Detention of migrants, as currently practiced in most countries, does not comport with international law. This has become evident as international judicial bodies have clarified the legal rights of those in detention, and as more and more human rights violations have been documented across the globe relating to detention.<sup>46</sup> Among the central protections of human rights law that relate to detainees are the prohibition of torture, the prohibition of arbitrary detention, and the right to liberty.<sup>47</sup> In addition, the global human rights framework provides nondiscrimination clauses, guaranteeing that the numerous human rights protections are available for all individuals, regardless of any given person's status of citizenship or migration. The United Nations Human Rights Committee ("HRC"), for instance, has clarified with regard to the International Covenant on Civil and Political Rights ("ICCPR") that the "general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens," and confirms that such rights "apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness."<sup>48</sup> Thus, migrants never lose the benefits provided by their inherent human rights while they are in detention.

Beyond the provisions that apply to all human beings under human rights law, special provisions are afforded individuals who qualify as refugees and asylum seekers under the Refugee Convention and 1967 Protocol Relating to the Status of Refugees.<sup>49</sup> These include the 1951 Convention's freedom of movement provisions<sup>50</sup> and accordant prohibitions on penalizing migrants for illegal entry or presence<sup>51</sup> or limiting their freedom of movement any more than deemed necessary.<sup>52</sup> Due to the grave potential for violations of the Refugee Convention, UNHCR has indicated that there exist

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<sup>46</sup> See *supra* note 17. See also IDC Report, *supra* note 15, at 11 (explaining how detention interferes with individuals' human rights).

<sup>47</sup> See generally U.N. Human Rights Comm., Gen. Comment No. 15: The Position of Aliens under the Covenant, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Apr. 11, 1986) (discussing torture, right to liberty, and nondiscrimination); U.N. Comm. on the Elimination of Racial Discrimination, Gen. Recommendation No. 30: Discrimination against Non-Citizens, ¶ 19, U.N. Doc. A/59/18 (Jan. 10, 2004) (discussing arbitrary detention and nondiscrimination).

<sup>48</sup> U.N. Human Rights Comm., *supra* note 47, ¶ 1. See also U.N. Human Rights Comm., Gen. Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004) (affirming the principles behind General Comment No. 15).

<sup>49</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

<sup>50</sup> See Refugee Convention, *supra* note 2, arts. 26.

<sup>51</sup> *Id.* art. 31(1).

<sup>52</sup> *Id.* art. 31(2).

only a limited number of circumstances under which detention should be contemplated by a government.<sup>53</sup> According to the Executive Committee of UNHCR, states may only resort to detention for the purposes of: (1) verifying identity; (2) verifying claims of refugee status; (3) handling asylum seekers who have destroyed their travel or identity documents or have used fraudulent documents in order to mislead immigration authorities; or (4) protecting national security.<sup>54</sup> These circumstances are defined as situations of necessity, and national law must clearly lay out provisions for such detention if states intend to detain at all.<sup>55</sup>

In recent years, human rights tribunals and bodies have promulgated standards beyond the general protections offered to all detainees that apply specifically to LGBTI populations. The HRC, as the treaty-monitoring body that evaluates state compliance of the ICCPR, has reiterated in a number of cases that human rights principles of the ICCPR apply equally to all without discrimination to LGBTI populations.<sup>56</sup> Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) mandates states to guarantee covenant rights “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,” the expansiveness of which undeniably covers discrimination based on LGBTI status.<sup>57</sup> Consequently, state parties to the ICCPR and the ICESCR must ensure protection of all covenant rights for all LGBTI migrants within their territories as set forth in both treaties. In addition to these basic human rights standards, the international community has promulgated a set of principles specifically addressing the rights of LGBTI people. The Yogyakarta Principles, a series of proposed norms developed in 2006 by a group of experts on sexual orientation and

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<sup>53</sup> See U.N. High Comm’r for Refugees, Exec. Comm. Conclusions on Detention of Refugees and Asylum-Seekers, U.N. Doc. A/41/12/Add.1 (Oct. 13, 1986).

<sup>54</sup> *Id.* (“[I]n view of the hardship which [detention] involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.”).

<sup>55</sup> See *id.*

<sup>56</sup> See International Covenant on Civil and Political Rights art. 26, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”). The HRC articulated in *Toonen v. Australia* that the reference to “sex” in the ICCPR’s antidiscrimination provision “is to be taken as including sexual orientation.” See U.N. Human Rights Comm., Views of the Human Rights Comm. under Art. 5, Para. 4, of the Optional Protocol to the Int’l Covenant on Civil & Political Rights, ¶ 8.7, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994).

<sup>57</sup> International Covenant on Economic, Social and Cultural Rights art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

gender identity, lay out the primary international law protections for sexual minorities and offer states guidance, although not binding authority, on best practices for ensuring human rights of LGBTI populations.<sup>58</sup>

Though the recommendations of these international human rights bodies have been crucial for global advancement of LGBTI rights, little jurisprudence or guidance exists that addresses the specific harms LGBTI migrants face while detained. As of this writing, the only occasion on which an international tribunal found an international law violation specific to LGBTI migrant detention came as recently as October 2012. The European Court of Human Rights (“ECHR”) held in *X v. Turkey* that segregating LGBTI detainees violates their human rights if it deprives them of meaningful access to detention center services or is tantamount to penal solitary confinement.<sup>59</sup> This holding marked the first and only occasion in which the ECHR 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.<sup>60</sup>

The lack of development in international law jurisprudence specifically addressing LGBTI individuals in immigration detention is unsurprising, considering how difficult it is to determine the nature and extent of LGBTI migrant detention on a global scale. LGBTI people who find themselves in immigration detention reflect a diverse population of individuals who have left their countries of origin for a variety of reasons. Yet due to the difficulty of accessing these populations and the common, though not universal, lack of willingness of LGBTI individuals to identify themselves as LGBTI unless identified by others, it is difficult to secure data on how many LGBTI irregular migrants have left their homes as a result of LGBTI-specific persecution, as a result of other types of persecution, or simply as a result of other factors which may have caused them to seek a better life outside their home countries.<sup>61</sup>

Better understanding the factors that influence LGBTI individuals’ decisions to migrate may shed light on what choices they face if they are placed in detention. Individuals who have come of age in societies where nonconforming sexual identity or gender identity is criminalized may not be com-

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<sup>58</sup> THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY (2007), archived at <http://perma.cc/0eHAQVDMetK>.

<sup>59</sup> *X v. Turkey*, App. No. 24626/09, 6–9 (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113876>, archived at <http://perma.cc/0MLWY7cBEs7>.

<sup>60</sup> For more commentary on the impact of this particular case, see Paul Johnson, *The Impact of X v. Turkey: Homosexuality and the ECHR*, JURIST.ORG (Oct. 9, 2012, 9:10 PM), archived at <http://perma.cc/0u92jFa7RfM>.

<sup>61</sup> In particular, there is a significant lack of data regarding intersex migrants in detention, possibly because many intersex individuals identify publicly as either male or female, not as “intersex,” and may not identify as sexual minorities, making it hard to reach the intersex population.

fortable self-identifying as “out” when they have not done so previously. Just as an individual’s choice to reveal or hide his sexual orientation or gender identity is the result of a complicated and varied set of factors, equally complex factors are also likely to come into play in determining how best to provide protection for LGBTI migrants in detention.

Better understanding the factors that influence LGBTI individuals’ decisions to migrate may shed light on what choices they face if they are placed in detention. Individuals who have come of age in societies where nonconforming sexual identity or gender identity is criminalized may not be comfortable self-identifying as “out” when they have not done so previously. Just as an individual’s choice to reveal or hide his sexual orientation or gender identity is the result of a complicated and varied set of factors, equally complex factors are also likely to come into play in determining how best to provide protection for LGBTI migrants in detention.

## II. IDENTIFICATION OF LGBTI MIGRANTS

Prior to identifying the failings of detention systems for LGBTI migrants, it is necessary to answer a threshold question: Who comprises the group of LGBTI migrants in detention? This issue touches upon important questions regarding whether individuals, states, or other actors should have the agency to determine the process by which a person is labeled as LGBTI within a detention system, and subsequently whether that person receives special protections as a result of that identification. At what point in the detention process should a person be identified as LGBTI, and who should make this identification?

Detained LGBTI migrants share many characteristics with other vulnerable groups in detention. For example, women in detention may have specific physical and mental health needs, such as a need for maternal health services,<sup>62</sup> assistance with the aftereffects of rape,<sup>63</sup> or protection from sexual violence while detained.<sup>64</sup> Similarly, children face unique challenges if they are deprived of education or appropriate mental health treatment,<sup>65</sup> are de-

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<sup>62</sup> See, e.g., Eve B. Burton & David B. Goldstein, *Vietnamese Women and Children Refugees in Hong Kong: An Argument Against Arbitrary Detention*, 4 DUKE J. COMP. & INT’L L. 71, 76–77 (1993).

<sup>63</sup> See, e.g., *id.* at 76.

<sup>64</sup> See, e.g., Mark Townsend, *Detainees at Yarl’s Wood Immigration Centre ‘Facing Sexual Abuse’*, GUARDIAN (Sept. 14, 2013), archived at <http://perma.cc/07Ym3XSS5Eea>.

<sup>65</sup> See, e.g., Terry Hutchinson & Fiona Martin, *Mental Health and Human Rights Implications for Unaccompanied Minors Seeking Asylum in Australia*, 1 J. MIGRATION & REFUGEE ISSUES 1, 19–20 (2006) (suggesting that unaccompanied children detainees whose mental health issues are left untreated are more susceptible to distress regarding detention conditions and long-term loss of social cohesion); Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL’Y REV. 159, 160 (1990) (noting that detained children in the United States have virtually no access to health care, mental health counseling, or education); M. Stern, *The Educational Rights of Asylum Seeking Children: Observing Failure*, 5 PUB. SPACE: J.L. &

tained with juvenile offenders irrespective of whether they themselves are offenders,<sup>66</sup> or put into solitary confinement.<sup>67</sup> Migrant detainees who suffer from mental illness face especially difficult circumstances as they may be unable to advocate for themselves, and “may be punished for behavior they cannot control.”<sup>68</sup> Further, they may be denied medical treatment for mental disabilities when the disabilities are not made known to detention staff. LGBTI detainees face many challenges similar to those experienced by other vulnerable groups. As will be discussed in Part III of this article, some examples of the special challenges that LGBTI detainees experience can include increased vulnerability to violence and sexual abuse, subjection to solitary confinement, and lack of appropriate medical treatment and mental health services.

Despite these commonalities, one challenge that distinguishes LGBTI detainees from other vulnerable populations is the difficulty of identifying individual members of this group. This issue may not typically arise when considering the needs of other potentially vulnerable groups in detention, as there may not be any choice involved with regard to identification. For example, women are typically separated from men in the context of detention in the same way that public bathrooms tend to be categorized: by biological sex.<sup>69</sup> Similarly, children need not choose to “come out” and identify themselves as children; their birthdates identify them as such. Although the mentally ill are perhaps not as easily identifiable as other vulnerable groups, some of these individuals may not have the choice to “come out”; their vulnerability may be rooted in a medical condition that is difficult or impossible to hide. Though it is accurate that other mentally ill individuals may be

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SOC. JUST. 1, 1–7 (2010) (detailing inadequate educational facilities for children detained in Christmas Island, Australia); Lisa Rodriguez Navarro, Comment, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 CHICANO-LATINO L. REV. 589, 602 (1998) (indicating that access to psychiatric care in U.S. detention centers is problematic, despite over fifty percent of children suffering from post-traumatic stress disorder).

<sup>66</sup> See, e.g., Emily A. Benfer, Note, *In the Best Interests of the Child: An International Human Rights Analysis of the Treatment of Unaccompanied Minors in Australia and the United States*, 14 IND. INT'L & COMP. L. REV. 729, 745 (2004).

<sup>67</sup> See, e.g., *id.*

<sup>68</sup> Bill Ong Hing, *Systemic Failure: Mental Illness, Detention, and Deportation*, 16 U.C. DAVIS J. INT'L L. & POL'Y 341, 364 (2009). See also Nora J. Kenworthy, *Asylum's Asylum: Undocumented Immigrants, Belonging, and the Space of Exception at a State Psychiatric Center*, 71 HUM. ORG. 123, 124–125 (2012) (noting that mental illness affected “abilities to claim rights, citizenship, and belonging” in migrants to the United States); Claire O'Connor, *The Impact of Detention on the Mental Health of Immigration Detainees: Implications for Failure to Deliver Adequate Mental Health Services—Who Cares*, 9 U. TECH. SYDNEY L. REV. 125, 134 (2007) (illustrating Australian examples of detention and deportation of migrants with severe mental illness).

<sup>69</sup> See DETENTION GUIDELINES, *supra* note 10, at 29 (emphasizing the need to segregate men from women and children from adults in detention facilities unless they are within the same family unit). Certainly, identification as one sex or another is much more complex, and it is problematic that detention centers assume that groupings like “women” or “men” are stable or exist in contrast to each other, given that both intersex and transgender people complicate this analysis.

missed by authorities and may be detained with the general population, the mental health profession has nonetheless set professional standards to diagnose mental illnesses, which may be used to determine whether or not a person falls into this vulnerable group in the detention context. Thus, because the characteristics associated with membership in such groups are for the most part more obvious, reports and analyses on the protection gaps faced by vulnerable populations such as women, children, and the mentally ill do not generally address the issue of identification.<sup>70</sup>

On the other hand, within the diverse group classified as LGBTI, no standards exist to classify LGBTI detainees as such. Furthermore, sexual minorities may have varying abilities to “pass” or “cover,” choosing not to identify, visibly or otherwise, with a vulnerable group. This potential for invisibility presents both opportunities and challenges for LGBTI detainees.

Sexual minorities are incredibly heterogeneous within the LGBTI umbrella. “LGBTI” is an imperfect name for a group that encompasses a variety of people, some of whom may easily “pass” as gender-conforming, such as lesbian women or gay men whose outward expression and behavior conform to culturally heteronormative presentations of gender. These people may never be identified by others as LGBTI unless they choose to be, or they may be “out” and present as such. Others may not have the option of concealing their gender identity while in detention. For instance, transgender individuals in the earlier stages of transition through hormonal therapy or other treatments may be particularly visible within a detained population. Thus, within the LGBTI group, visibility varies greatly, as does the likelihood of experiencing identity-based targeting due to an individual’s visibility as nonconforming in sexual orientation or gender.

Even within the group of LGBTI detainees who have the ability to “pass” and do not obviously present as belonging to a vulnerable subgroup of detainees, multiple subtle issues regarding LGBTI self-identification and expression arise. Although some LGBTI people may make conscious choices about how to present or not present, depending on where the person is in the “coming out” process, not all may be self-aware enough to articulate their identity as such. Scholars who have explored the psychological complexities around the process of self-identifying as LGBTI have commented that “in the absence of a safe environment, many LGBT individuals are not able to work through the internal processes necessary to allow them to integrate the multiple aspects of their sexuality.”<sup>71</sup> Thus, processes by which individuals determine how or even whether to self-identify as LGBTI are enormously complex.

The diversity among LGBTI detainees not only indicates that different subgroups may require different types of protection, but also presents an

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<sup>70</sup> See, e.g., sources cited *supra* notes 62–68.

<sup>71</sup> Ariel Shidlo & Joanne Ahola, *Mental Health Challenges of LGBT Forced Migrants*, 42 FORCED MIGRATION REV. 9, 9 (2013).

additional challenge: when an individual has the capacity to control her outwardly expressed identity, and thus disassociate from a vulnerable group, should she still be classified as part of a vulnerable population, given that she needs to obfuscate her sexual orientation or gender identity while she is detained?

Ironically, an LGBTI detainee's expression of nonconforming sexual orientation or gender identity may either lead to a protection gap, in the shape of increased persecution and abuse based on the public knowledge of that status, or to increased protections, in the shape of tailored treatment aimed at the specific needs of individuals in that group. This dilemma implicates the debate raised by Kenji Yoshino's seminal article *Covering*.<sup>72</sup> Yoshino claims that gays and lesbians may assimilate within society in a number of ways: (1) by converting their identity and becoming straight; (2) by "passing" as straight and hiding their identity; or (3) by "covering," a process through which LGBTI people downplay their identities in a way that "makes it easy for others to disattend [their] orientation."<sup>73</sup> Yoshino's principal argument posits that as individuals in society are forced to either pass or cover their sexual identities in order to experience certain protections, they are also left bereft of other protections they might be entitled to as a result of their vulnerable status being expressed.

LGBTI individuals in detention are faced with this same challenge—public expression of their sexual orientation or gender identity while detained may result in increased protection, if it is recognized appropriately, but to claim this status more often than not exposes LGBTI people to increased violations of their basic human rights. The dilemma that revealing one's sexual orientation or gender identity may either lead to increased protection or increased rights violations highlights the difficulty in determining whether LGBTI migrants in detention should be compelled either to reveal or obfuscate their LGBTI status. The increased likelihood of abuse no matter how LGBTI migrants present also suggests that although obfuscation of LGBTI status may be deemed acceptable to some LGBTI detainees, the elimination of choice regarding how to express one's sexual orientation or gender identity is an imperfect solution in the detention context. Though this question is not directly addressed under international law, two parallel areas of jurisprudence provide insight as to how human rights and refugee law might best consider this question.

#### A. *The "Discretion" Requirement*

That many LGBTI migrants are effectively forced to hide their sexual orientation or gender identity in detention in order to protect themselves from bias-motivated harm has not been adjudicated in immigration courts or

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<sup>72</sup> Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

<sup>73</sup> *Id.* at 772.

widely discussed in scholarly literature. Yet an important parallel can be drawn between this issue and the issue of whether applicants for asylum should be required to exercise discretion regarding their sexual orientation or gender identity.

The so-called “discretion” requirement has recently been addressed within the jurisprudence of domestic immigration courts. Courts in the United States, Canada, Australia, the United Kingdom, and New Zealand have found that LGBTI individuals are eligible for asylum in those countries as members of a particular social group subject to persecution under the 1951 Convention.<sup>74</sup> Yet some of those courts have questioned whether refugees who may face persecution in their countries of origin due to their LGBTI status are legally required, before being eligible for asylum, to have exercised “discretion” in the expression of their sexual orientation or gender identity in their home countries.

If applied, the discretion requirement allows adjudicators to impose an expectation or duty on LGBTI applicants to have behaved “discreetly” while residing in their countries of origin—to conceal their sexual orientation or gender identity—to avoid persecution. This requirement not only implies that individuals who are capable of hiding their sexual orientation or gender identity have nothing to fear in their country of origin, assuming that they can remain discreet or tolerate a measure of internalized repression,<sup>75</sup> but also presumes that individuals who can, should “self-protect” in this manner against LGBTI-based persecution and eliminate the need for them to apply for asylum at all. Accordingly, a United Kingdom case held that the key inquiry was whether living in discretion in one’s home country was reasonably tolerable, in which case an individual could not be granted asylum.<sup>76</sup>

Decisions in 2003 and 2011 of the High Court in Australia<sup>77</sup> and the Supreme Court of the United Kingdom<sup>78</sup> eliminated the so-called discretion

<sup>74</sup> Under the Refugee Convention, in order to qualify for refugee status, an individual must experience persecution as a result of race, religion, nationality, membership in a particular social group, or political opinion. Refugee Convention, *supra* note 2, art. 1(A)(2). Nonconforming sexual orientation has been accepted as the basis for a persecuted social group under the Refugee Convention in some major refugee-receiving countries since the 1990s. *See, e.g.*, *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (B.I.A. 1990) (U.S.); *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (Can.); N93/00593 [1994] RRTA 108 (Austl.); *R v. Immigration Appeal Tribunal, ex parte Shah*, (1992) 2 A.C. 629 (U.K.); *Refugee Appeal No. 1312/93 Re GJ* (unreported) Refugee Status Appeals Authority, 30 August 1995 (N.Z.).

<sup>75</sup> *See Jenni Millbank, From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom*, 13 INT’L J. HUM. RIGHTS 391, 398 (2009).

<sup>76</sup> *J v. Sec’y of State for the Home Dep’t*, [2006] EWCA (Civ) 1238, [2007] Imm. A.R. 73 (appeal taken from Asylum & Immigr. Trib.) (Eng.) (“[The court] will have to ask itself whether ‘discretion’ is something that the appellant can reasonably be expected to tolerate . . .”).

<sup>77</sup> *Appellant S395/2002 v. Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473.

<sup>78</sup> *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31, [2011] 1 A.C. 596 (appeal taken from Eng. & Wales).

requirement, bringing each country's laws in line with United States, Canada, and New Zealand law,<sup>79</sup> as well as UNHCR's guidance on this topic.<sup>80</sup> In *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*, the Australian High Court noted the discrepancy between their courts' approaches toward LGBTI refugees and other refugees, for instance refugees with political opinion claims, who would never be required under refugee law to be discreet about the political beliefs upon which their past persecution or fear of future persecution was based.<sup>81</sup> The court further found that "[t]o say that a decision-maker 'expects' that [a] person will live discreetly [in their home country] may . . . be accurate if it is read as a statement of what is thought likely to happen. But to say that an applicant for protection is 'expected' to live discreetly is both wrong and irrelevant to the task to be undertaken by the Tribunal if it is intended as a statement of what the applicant *must* do."<sup>82</sup> Similarly, in *HJ and HT*, the Supreme Court of the United Kingdom overturned the jurisprudence of prior cases, which had required an examination of discretion.<sup>83</sup> Despite these rebukes by Australia and the United Kingdom, the asylum law of several other countries still maintains the discretion requirement.<sup>84</sup>

In debating the merits of the discretion requirement, some scholars have criticized what is seen as an undue and potentially dangerous widening of the necessarily narrow requirements for refugee status under the 1951 Convention, claiming that if individuals are able to avoid state persecution by suppressing their sexual orientation or gender expression and thus their identities, then these applicants do not have a genuinely well-founded fear of persecution in their home country as required by the statute.<sup>85</sup> Under the 1951 Convention, only persons able to show a forward-looking risk of perse-

<sup>79</sup> See U.S., Can., and N.Z. cases cited *supra* note 74.

<sup>80</sup> U.N. HIGH COMM'R FOR REFUGEES, UNHCR GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO SEXUAL ORIENTATION AND GENDER IDENTITY 8 (2008), *archived at* <http://perma.cc/03H9B8zd57n> ("Being compelled to forsake or conceal one's sexual orientation and gender identity, where this is instigated or condoned by the State, may amount to persecution.").

<sup>81</sup> See James C. Hathaway & Jason Pobjoy, *Queer Cases Make Bad Law*, 44 N.Y.U. J. INT'L L. & POL. 315, 326–27 (2012).

<sup>82</sup> *Appellant S395/2002*, 216 CLR at 501.

<sup>83</sup> *HJ and HT*, [2010] UKSC 31, [2011] 1 A.C. 596.

<sup>84</sup> JANSEN & SPIJKERBOER, *supra* note 21, at 33–36. The publication reports that discretion reasoning still occurs in the majority of European Union member states. *Id.* at 34 (examples were found in: Austria (mostly for bisexuals), Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Hungary, Ireland, Malta, Netherlands, Norway, Poland, Romania, Spain, and Switzerland). Close to the time of publication of this Article, however, the Court of Justice of the European Union rejected the discretion argument, holding that gay asylum seekers cannot be reasonably expected to "conceal [their] homosexuality in [their] country of origin." See *Joined Cases C-199/12 to C-201/12, X, Y, Z v. Minister voor Immigratie en Asiel*, para. 76, CURIA (Nov. 7, 2013), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=144215&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=529418>, *archived at* <http://perma.cc/KN7T-WB7V>.

<sup>85</sup> Hathaway & Pobjoy, *supra* note 81, at 331–33.

cutory harm can establish a “well-founded fear,” and hence qualify as refugees.<sup>86</sup> Yet, the Australian and United Kingdom courts abolished the discretion requirement despite the notion that “none of the applicants would face the real risk of physical abuse—because they understandably decided that disguising their sexual identity and avoiding conduct associated with their sexuality was the safest course of action.”<sup>87</sup> This, according to the critique, raises a “crucial challenge to satisfaction of the Convention’s ‘well-founded fear’ requirement.”<sup>88</sup> The counterargument posits that requiring individuals to obscure their sexual identity nullifies the core tenets of the 1951 Convention, and that the approaches taken by the high courts of Australia and the United Kingdom are fully within the contours of determining refugee status under the Convention.<sup>89</sup>

### B. *Credibility Assessments in Immigration Evaluations*

A second area of jurisprudence that is instructive in our analysis of the identification process of LGBTI detainees is credibility assessments of LGBTI applicants for asylum, specifically, the challenges that arise when immigration systems evaluate whether asylum should be granted on the basis of sexual orientation or gender identity (“SOGI”) status.

Assessing the credibility of a refugee claim is a crucial component of a refugee status determination.<sup>90</sup> However, a central problem with the legal determination of SOGI asylum claims is that individuals are forced to demonstrate that they are “credibly” identifiable as LGBTI to a finder of fact.<sup>91</sup> This bar may be difficult for someone to meet if he has not had, or does not have at the time of seeking asylum, concrete evidence of this identity, such as a relationship with someone of the same sex, or evidence of hormonal therapy or attempts to receive such therapy for the purpose of transitioning between genders.<sup>92</sup>

Another issue in assessing the credibility of an asylum claim based on SOGI status is rooted in stereotypical assumptions regarding what consti-

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<sup>86</sup> See Refugee Convention, *supra* note 2, art. 1(A)(2).

<sup>87</sup> Hathaway & Pobjoy, *supra* note 81, at 331.

<sup>88</sup> *Id.*

<sup>89</sup> See Ryan Goodman, *Asylum and the Concealment of Sexual Identity: Where Not to Draw the Line*, 44 N.Y.U. J. INT'L L. & POL. 407, 425–443 (2012) (critical responses to Hathaway and Pobjoy).

<sup>90</sup> See generally Steve Norman, *Assessing the Credibility of Refugee Applicants: A Judicial Perspective*, 19 INT'L J. REFUGEE L. 273 (2007) (defending the use of credibility assessments in Australian refugee determination).

<sup>91</sup> See NICK J. MULÉ & ERIKA GATES-GASSE, ENVISIONING LGBT REFUGEE RIGHTS IN CANADA: EXPLORING ASYLUM ISSUES 20–21 (2012), archived at <http://perma.cc/0SaoYQnUC4g>.

<sup>92</sup> See, e.g., Sarah Hinger, *Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims*, 19 COLUM. J. GENDER & L. 367, 387–392 (2010); NICOLE LA VIOLETTE, SEXUAL ORIENTATION, GENDER IDENTITY AND THE REFUGEE DETERMINATION PROCESS IN CANADA 20–22 (2013), archived at <http://perma.cc/0RzrAusM1zK>.

tutes LGBTI behavior. For example, research has demonstrated that in a high number of cases, tribunal evaluations used “highly stereotyped and Westernised notions of ‘gayness’ as a template that, when applicants did not fit, led to their claim of sexual identity being rejected.”<sup>93</sup> In the United States, adjudicators’ assumptions regarding LGBTI individuals have also been identified as problematic. For example, in 2004, the U.S. Board of Immigration Appeals affirmed the findings of an immigration judge who recognized that a Mexican man was homosexual, yet claimed that his appearance was not stereotypically gay enough to merit protection.<sup>94</sup> A central concern in these claims is the non-probative and insensitive interrogation of the applicants’ sexual practices and gender expression, which would not occur with asylum claims by heterosexual or gender-conforming applicants, and may contribute to discrimination against and even exoticization of LGBTI asylum seekers. Additionally, the stereotyped expectations for LGBTI people’s behavior may pressure them into what Yoshino refers to as “reverse covering”—manipulating their external presentation to fit the evaluator’s stereotypes.<sup>95</sup> These problems present within the evaluation of SOGI asylum claims may also plague the process by which a state identifies the LGBTI individuals in its immigration detention systems.

As demonstrated by the discussion of both the discretion requirement and credibility assessments, determining the best way of proving that a person should be identified as LGBTI is a difficult task. Finders of fact must recognize that identities exist on a continuum, and are culturally varied and dependent on local norms. The debate surrounding the discretion requirement reveals that, although LGBTI status may be malleable for some individuals to some extent, its malleability is not an indicator that it can be, or should be, suppressed entirely. Similar to SOGI status in immigration proceedings, it follows that individuals in detention should not be required or pressured to suppress their sexual orientation or gender identity for protection from targeted abuse. Discussions on credibility assessments further suggest that the very need to mask certain aspects of an individual’s sexual orientation or gender identity in order to survive may indicate that, upon arrival at immigration adjudication, her external presentation may not accord with the expectations an adjudicator would have for a person of that sexual orientation or gender identity. Similar challenges are also likely to arise within the immigration detention context, as a person may not outwardly

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<sup>93</sup> Millbank, *supra* note 75, at 392. See also NICOLE LAVIOLETTE, *supra* note 92, at 22–28; Sean Rehaag, *Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada*, 53 MCGILL L.J. 59 (2008) (on assessing the credibility of bisexuality).

<sup>94</sup> *In re Soto Vega*, No. A-95880786 (B.I.A. January 27, 2004). See also Fadi Hanna, Case Comment, *Punishing Masculinity in Gay Asylum Claims*, 114 YALE L.J. 913 (2004) (critiquing the original decision in *In re Soto Vega*, in which the immigration judge explained, “I didn’t see anything in his appearance, his dress, his manner, his demeanor, his gestures, his voice, or anything of that nature that remotely approached some of the stereotypical things that society assesses to gays”).

<sup>95</sup> Yoshino, *supra* note 72, at 909.

express a sexual orientation or gender identity upon arrival, yet that same status may be present and indicate a need for additional protections.

*C. Lessons Learned Regarding Identification of LGBTI  
Migrants in Detention*

The debates surrounding both the discretion requirement and credibility assessments of LGBTI asylum seekers contribute to the question of how LGBTI migrants should be afforded specific protections as a vulnerable group when detained, since at least some members of this population may also be faced with the choice of whether and how to express their sexual or gender identity while in detention. In contrast to the asylum adjudication context, however, very little information is available describing the identification process of LGBTI migrants who arrive in immigration detention centers. It is clear that absent some means of identification, it is very difficult for such facilities to address the special vulnerabilities that LGBTI migrants in detention face. The options for how a state may identify LGBTI detainees, however, are limited. States may either develop mechanisms within their detention facilities to identify and classify LGBTI detainees, create mechanisms for self-identification by LGBTI detainees, or take a hybrid approach between these options. Further, once LGBTI detainees are identified, whether by others or through self-identification, a subsequent question arises of whether those individuals prefer to receive protection specific to their sexual orientation or gender identity. Nonetheless, regardless of what approach is used, the presence of LGBTI migrants in detention is problematic. For, while forcibly “outing” LGBTI migrants would violate their human rights, relying on self-identification can contribute to the protection gap. Given this intractable reality, we argue that states should avoid detaining LGBTI migrants entirely when at all possible.

In an asylum context, it is clear that LGBTI migrants should be afforded the right to self-identify. As articulated by the high courts of Australia and the United Kingdom, requiring an individual to obfuscate her sexual orientation or gender identity in order to obtain protection for persecution under international law compromises that individual’s basic human rights.<sup>96</sup> This is particularly true in the context of LGBTI migrants who are refugees due to the persecution they have faced on account of their gender non-conforming status. Requiring individuals to conceal their membership in a religious, racial, or social group to avoid persecution would nullify the purpose of the Refugee Convention as a protection regime.<sup>97</sup> Similarly, requiring detained LGBTI migrants who are seeking asylum to conceal their identities in

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<sup>96</sup> See generally *supra* notes 77–83 (describing court’s findings that discretion requirement was inconsistent with international law).

<sup>97</sup> See Goodman, *supra* note 89, at 425–443 (arguing that requiring individuals to obscure their sexual identity nullifies the core tenets of the 1951 Refugee Convention).

order to avoid mistreatment in detention would be completely inappropriate, especially when considering the possibility that it is the societal demand of modification of behavior itself, or the impact that the modification has on the applicant, that may be the relevant persecutory harm.

Likewise, as discussed previously in the context of credibility assessments for LGBTI asylum applicants, basing standards for access to legal protections on static expectations of gender performance is problematic. One prominent report published by COC Netherlands, an LGBTI advocacy organization, examines differences between European states' evaluations of LGBTI asylum claims. The report recommends that sexual orientation and gender identity should, in principle, be established through self-identification<sup>98</sup> in order to avoid reliance on sexual orientation and gender stereotypes imposed by untrained interviewers, judges, or decision-makers.<sup>99</sup> Such recommendations are similarly applicable in a detention context. Giving staff at detention facilities responsibility for determining the sexual orientation or gender identity of detainees could similarly result in a troubling reliance on rigid stereotypes and the creation of pressures for LGBTI migrants to conform their behavior to obtain needed protection.

While leaving LGBTI migrants to self-identify may be preferable in some ways, in a detention context, this approach can contribute to the protection gap that such migrants face. For, relying on detained LGBTI individuals to self-identify to determine eligibility for special protection does little to protect those who decide not to identify themselves at all once they are placed in detention facilities. Indeed, in many cases, expecting LGBTI detainees to self-identify may be unrealistic. LGBTI detainees may never have experienced being "out" before they are placed in immigration detention. Some individuals may have always concealed their sexual orientation or gender identity in their home countries because they feared harm from others, including their family members, friends, neighbors, society generally, or state authorities. Once placed in detention, it may be unreasonable to expect that these individuals would willingly self-identify as LGBTI. These same individuals, however, may still find themselves experiencing discrimination or abusive treatment at the hands of other inmates or detention personnel, even though they have not outwardly identified themselves as nonconforming in sexual orientation or gender.

Given these tensions, states should avoid detaining LGBTI migrants entirely when at all possible. This best practice ensures that states do not put LGBTI detainees in a position in which they are forced to conceal their LGBTI identity or risk facing persecution while detained. If states decide,

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<sup>98</sup> See JANSEN & SPIJKERBOER, *supra* note 21, at 17 ("We emphasise that self-identification is crucial. A person in a monogamous heterosexual marriage may, nevertheless, experience her- or himself as lesbian, gay or bisexual.").

<sup>99</sup> See *id.* at 47–63 (detailing key issues when interviewers, judges, and other decision-makers, such as medical or psychological professionals, are called to identify migrants as LGBTI).

however, for intricate reasons of policy necessity, that LGBTI migrants must be detained, they must be ready to grapple with the difficulty of LGBTI detainee identification. Exploring the discretion requirement and credibility assessments that are relevant in the asylum context reveals a number of factors that should be taken into consideration regarding the identification of LGBTI people in detention. First, they show the importance of allowing self-identification and creating opportunities to self-identify for individuals whose perception of self-identity is complicated by multiple layers of persecution, trauma, internalized homophobia, and other mental health-related concerns. Second, they point toward the fact that states must take into account that the presentation of sexual orientation and gender identity can be manipulated consciously or unconsciously, and that identity exists on a spectrum of varying externalized presentations and internalized feelings of self that do not fit neatly into Western notions of non-heteronormative sexual orientation or gender identity. Finally, these factors clarify that detention centers must provide adequate training for detention staff regarding these complexities.

Certainly, no simple answers exist to the problem of LGBTI status identification in the detention context. Yet, meaningful grappling with this question is essential in order to understand and address the protection gaps that face LGBTI migrants, and ensure that the individuals most in need of protection do not fall through the cracks because a detention system failed to identify them. Thus, it is important that advocates continue to monitor this question, collect and implement best practices, and continue to critically evaluate them over time.

### III. SPECIFIC PROTECTION GAPS FACED BY LGBTI MIGRANTS IN DETENTION

When detaining LGBTI migrants, states are confronted with a variety of unique protection concerns. These potential violations are problematic from a general human rights perspective. They are particularly egregious in circumstances in which an individual seeks refuge specifically on account of her LGBTI status, only to be placed in detention and confront the same types of discrimination, persecution, or abuse that led to the search for asylum in the first instance. These circumstances are of particular concern because the state involved may be in violation of both general international human rights law and its obligations under the 1951 Convention. The section below details four specific areas of concern that emerge among the potential human rights violations experienced by LGBTI detainees.<sup>100</sup>

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<sup>100</sup> We note that since the majority of research and litigation challenging conditions experienced by LGBTI migrants in detention has taken place in the United States, this section centers primarily on conditions the United States and extrapolates from this data to immigration detention across the globe. Little evidence is available documenting

### A. *Physical Violence, Sexual Violence, and Aftereffects of Violence*

Best practices suggest that immigration detention facilities should be segregated by sex.<sup>101</sup> However, such sex-segregated facilities are not designed to safely accommodate LGBTI migrants. LGBTI detainees regularly experience identity-based physical and sexual harassment and violence,<sup>102</sup> as well as verbal abuse (including harassment and threats of rape) by both other detainees<sup>103</sup> and facility staff.<sup>104</sup> Research indicates that LGBTI detainees in both immigration and non-immigration contexts, particularly transgender individuals and gender nonconforming gay men, are more vulnerable to sexual violence in detention than heterosexual, gender-conforming inmates.<sup>105</sup>

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global trends, in part to due to barriers researchers face accessing immigration detention facilities, *see, e.g.*, HUMAN RIGHTS WATCH, STUCK IN A REVOLVING DOOR: IRAQIS AND OTHER ASYLUM SEEKERS AND MIGRANTS AT THE GREECE/TURKEY ENTRANCE TO THE EUROPEAN UNION 16–17 (2008), *archived at* <http://perma.cc/0eMVHtRKnmC> (describing the suboptimal conditions under which detention centers granted interviews with detainees, if at all), and the relative newness of this research area. To counter the lack of research, we also occasionally extrapolate from data collected about LGBTI prisoners in the criminal context to draw conclusions for LGBTI detainees in the immigration context.

<sup>101</sup> *See* DETENTION GUIDELINES, *supra* note 10, at 29 (emphasizing the need to segregate men from women and children from adults in detention facilities unless they are within the same family unit). For country profiles on detention infrastructure, including on sex segregation, *see* *Global Detention Project: Country Profiles*, GLOBAL DETENTION PROJECT, <http://www.globaldetentionproject.org/countries.html> (last visited Nov. 10, 2013), *archived at* <http://perma.cc/0bgr31rYxJV>.

<sup>102</sup> *See, e.g.*, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HOMOPHOBIA AND DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN THE EU MEMBER STATES: PART II - THE SOCIAL SITUATION 99–100 (2009), *archived at* <http://perma.cc/0aBfxjppVK>. *See generally* *Conditions of Detention*, IMMIGRATION EQUALITY, <http://www.immigrationequality.org/issues/detention/conditions-of-detention> (last visited Nov. 12, 2013), *archived at* <http://perma.cc/0mKkhLcPMM5> (focused on U.S. immigration detention).

<sup>103</sup> JANSEN & SPIJKERBOER, *supra* note 21, at 78.

<sup>104</sup> *See* Comments to article from Ariel Shidlo, Clinical Assistant Professor of Psychology, Weill Cornell Medical Coll., to authors (Sept. 30, 2013) (on file with author) (“In my interviews with LGBT asylum seekers who have been in immigration detention, some former detainees reported that detention offers either directly or indirectly verbally abused them. For example, one FtoM transgender detainee who was housed with women was harassed by an officer: when he was in the women’s bathroom, the officer taunted him that he wanted to sexually assault female detainees. An example of indirect verbal abuse was the use of a female name to refer to a gay male detainee. These instances of anti-LGBT verbal abuse at the hands of officers left deep psychological scars in former detainees years after the incidents occurred.”).

<sup>105</sup> *See* STOP PRISONER RAPE, IN THE SHADOWS: SEXUAL VIOLENCE IN U.S. DETENTION FACILITIES 12, 14 (2006), *archived at* <http://perma.cc/06ckvFLngTc> (noting, in discussing detainees in both immigration detention and criminal incarceration in the United States, that “[g]ay and transgender detainees, or those who are small, effeminate, and perceived to be gay or gender variant, experience rates of prisoner rape that are several times higher than those for inmates overall” and that “[g]ay and transgender inmates are perhaps the hardest hit by sexual violence in custody. A study of one institution reported that 41 percent of gay inmates had been sexually assaulted, a rate that was three times higher than that for the institution overall.”). *See also* Erwin de Leon, *The Plight of LGBT Immigrant Detainees*, FEET IN 2 WORLDS (Feb. 15, 2012), *archived at* <http://perma.cc/08ed4B1Hr7T> (“The University of California’s Center for Evidence Based Corrections

Transgender women, who are usually housed with men in sex-segregated immigrant detention facilities,<sup>106</sup> are perhaps the most vulnerable to this abuse; in the United States, for instance, one in five transgender women prisoners have been sexually assaulted by prison staff or other inmates.<sup>107</sup>

Detention facility officials may often choose to interpret any outward signs of homosexual orientation or transgender identity as evidence of “consent to rape,” and ignore complaints of sexual violence brought by sexual minority detainees.<sup>108</sup> Meanwhile, the few available reports on detention-based violence against sexual and gender minorities suggest that LGBTI detainees are reluctant to complain of sexual violence for fear of deportation<sup>109</sup> or retribution from staff or other detainees,<sup>110</sup> compounding their vulnerability to physical and sexual abuse. LGBTI migrants held in immigration detention facilities are additionally vulnerable to sexual violence because of overcrowding and a general lack of governmental oversight or civil society monitoring of these facilities.<sup>111</sup>

The physical and psychological aftereffects of rape and other forms of sexual violence include sleep and eating disorders, depression, anxiety, hyper-vigilance, and post-traumatic stress disorder (“PTSD”).<sup>112</sup> For LGBTI migrants, sexual violence in immigration detention follows what is often a lifetime of physical assault, rape, and sexual harassment.<sup>113</sup> As a result, the

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found in 2007 that ‘sexual assault is 13 times more prevalent among transgender inmates, with 59% reporting being sexually assaulted.’”)

<sup>106</sup> Amy Lieberman, *Complaints by Transgender Detainees Quantify Abuse*, WOMEN’S ENEWS (Sept. 3, 2013), archived at <http://perma.cc/0C6sKab8EMD> (“Transgender women are typically housed with men or in solitary confinement.”).

<sup>107</sup> JAIME M. GRANT ET AL., NAT’L GAY & LESBIAN TASK FORCE & NAT’L CTR. FOR TRANSGENDER EQUAL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 168 (2011), archived at <http://perma.cc/0rNsNYHDN> iv. For other relevant statistics on harassment and physical or sexual assault, see *id.* at 166–68. Little research has been conducted on the rates of detention-based violence against out lesbians and transgender men. Anecdotal evidence indicates that transgender men housed in women’s prisons face physical and sexual violence, but more often from guards than from other inmates. Alexander L. Lee, *Nowhere to Go But Out*, Part III.A (2003) (unpublished note), <http://www.justdetention.org/pdf/nowheretogobutout.pdf>, archived at <http://perma.cc/04Hg4BNia65>. The lack of research on violence against lesbian women and transgender men may be in part due to the fact that women’s detention facilities usually receive considerably less public attention than do men’s. See *id.* at Part III.

<sup>108</sup> See STOP PRISONER RAPE, *supra* note 105, at 14 (speaking in general about prisoners and immigration detainees).

<sup>109</sup> *Id.* at 15.

<sup>110</sup> *Id.* at 10.

<sup>111</sup> *Id.* at 15; STOP PRISONER RAPE, NO REFUGE HERE: A FIRST LOOK AT SEXUAL ABUSE IN IMMIGRATION DETENTION 1–2, 8 (2004), archived at <http://perma.cc/0EyjT57ggjM>.

<sup>112</sup> *Effects of Sexual Assault, RAPE, ABUSE & INCEST* NAT’L NETWORK, <http://www.rainn.org/get-information/effects-of-sexual-assault> (last visited Nov. 12, 2013), archived at <http://perma.cc/043aKyqcPjb>; Carol E. Jordan et al., *Violence and Women’s Mental Health: The Impact of Physical, Sexual, and Psychological Aggression*, 6 ANN. REV. CLINICAL PSYCHOL. 607, 613–14 (2010).

<sup>113</sup> Shidlo & Ahola, *supra* note 71, at 9; see also HUMAN RIGHTS WATCH, *supra* note 100 (chronicling anecdotal cases of rape and sexual assault of South African lesbians and

impact of sexual violence in detention may be particularly devastating, both physically and emotionally, by exacerbating emotional scars, leading to more severe psychological damage and symptoms.<sup>114</sup>

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 clearly violate the prohibition of torture or cruel, inhuman, or degrading treatment as defined by applicable human rights instruments. The ICCPR, for instance, obligates states to ensure that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>115</sup> As explained by the HRC, this entails a positive obligation to see that detained persons suffer no additional constraints other than the deprivation of liberty and that their dignity “be guaranteed under the same conditions as for that of free persons.”<sup>116</sup> Accordingly, the United Nations has previously recognized that such physical and sexual violence in the detention setting constitutes torture.<sup>117</sup> Failing to protect LGBTI detainees against physical or sexual violence in the detention setting is thus an unquestionable violation of the Universal Declaration of Human Rights (“UDHR”),<sup>118</sup> the International Covenant on Civil and Political Rights (“ICCPR”),<sup>119</sup> and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”),<sup>120</sup> as well as applicable regional instruments prohibiting torture and cruel, inhuman, or degrading treatment and guaranteeing security of the person, due process, dignity, and humanity.<sup>121</sup>

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transgender men). Recognition of the prevalent violence experienced by LGBTI persons led to the 2011 adoption by the Human Rights Council of the first United Nations resolution on sexual orientation and gender identity, H.R.C. Res. 17/19, U.N. Doc. A/HRC/RES/17/19 (July 14, 2011), and subsequent report on the issue, U.N. High Comm’r for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity: Rep. of the United Nations High Commissioner for Human Rights*, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011).

<sup>114</sup> See Robert W. Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 INT’L J. SOC. LAW 135, 141–48 (1992) (identifying trends of re-victimization of rape survivors in U.S. prison context).

<sup>115</sup> ICCPR, *supra* note 56, art. 10(1).

<sup>116</sup> U.N. Human Rights Comm., Gen. Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty), ¶ 3, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Apr. 10, 1992).

<sup>117</sup> See U.N. ESCOR, 48th Sess., 21st mtg., ¶ 35, U.N. Doc. E/CN.4/1992/SR.21 (Feb. 21, 1992) (noting that “since . . . rape and other forms of sexual assault . . . in detention were a particularly ignominious violation of the inherent dignity and right to physical integrity of the human being, they accordingly constituted an act of torture”). See also Just Detention International, Prisoner Rape is Torture Under International Law (2009), archived at <http://perma.cc/0H4ZvXr7jkb>.

<sup>118</sup> See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, arts. 1–3, 5, 7, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

<sup>119</sup> See ICCPR, *supra* note 56, art. 7.

<sup>120</sup> See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 1–2, 16, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

<sup>121</sup> While we have not included a detailed analysis of the ways protection gaps that LGBTI migrants face in immigration detention facilities violate regional human rights instruments, a number of such provisions may be applicable, depending on the type and

### B. Social Isolation and Segregation of LGBTI Detainees

LGBTI migrants experience both social and physical isolation in detention.<sup>122</sup> Social isolation can occur for several reasons. Other detainees may isolate LGBTI migrants out of prejudice. Conversely, many LGBTI migrants isolate themselves from other detainees from their home countries in order to avoid potentially negative consequences of disclosing their sexual orientation.<sup>123</sup> This social isolation in detention mirrors what many sexual minorities experience in their countries of origin and may exacerbate feelings of depression or PTSD, and lead to other mental health consequences.<sup>124</sup>

In addition, LGBTI migrants may be physically isolated as a matter of policy.<sup>125</sup> Officials at facilities where migrants are detained sometimes proactively isolate LGBTI individuals from the general population, allegedly for their own protection: in the United States, for instance, LGBTI detainees are often placed in administrative segregation—an allegedly non-punitive form of isolation<sup>126</sup>—because of their actual or perceived vulnerability to sexual violence.<sup>127</sup> Detaining states may thus cite safety, security, or public

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location of the violations. *See, e.g.*, African Charter on Human and People's Rights art. 5, June 27, 1981, 1520 U.N.T.S. 217, 245 (prohibiting torture and cruel, inhuman or degrading treatment); Organization of American States, American Convention on Human Rights art. 5(2), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 397 (prohibiting torture and cruel, inhuman or degrading punishment); Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women art. 9, June 9, 1994, 33 I.L.M. 1534 (outlining needs of particularly vulnerable women, including "migrants, refugees or displaced persons," in the face of rape, sexual abuse, and torture); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222, 224 (prohibiting torture and inhuman or degrading treatment).

<sup>122</sup> *See generally* U.N. HIGH COMM'R FOR REFUGEES, THE PROTECTION OF LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX ASYLUM-SEEKERS AND REFUGEES: DISCUSSION PAPER (Sept. 22, 2010), *archived at* <http://perma.cc/0YGryZSUG9o> (identifying various causes and impacts of social and physical isolation).

<sup>123</sup> EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *supra* note 102, at 99–100.

<sup>124</sup> *See infra* Part III.D.

<sup>125</sup> Throughout this section, when we discuss forced isolation rising to the level of a violation of human rights, we refer to isolation that is excessive in length or that takes place in conditions of detention that are substandard. In some very limited situations, such as at night, LGBTI migrant detainees may prefer isolation. However, true consent to be placed in isolation may be difficult to obtain in detention and will often involve the risk of physical or sexual violence by prison officials that takes place out of view of potential witnesses.

<sup>126</sup> The U.S. Immigrations and Customs Enforcement defines administrative segregation as "nonpunitive status in which restricted conditions of confinement are required only to ensure the safety of detainees or others, the protection of property, or the security or good order of the facility." U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011 181 (2013), *archived at* <http://perma.cc/0htKpdcVIX>.

<sup>127</sup> Many sexual minorities are subject to involuntary solitary confinement, purportedly to provide them protection from sexual and physical violence. *See* NAT'L IMMIGRANT JUSTICE CTR. & PHYSICIANS FOR HUMAN RIGHTS, INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION 9, 19–20 (2012), *archived at* <http://perma.cc/0BG7QwezzEq>; *see, e.g.*, Johnson, *supra* note 60.

health as the basis for segregating sexual minorities from other detainees.<sup>128</sup> However, these reasons are neither acceptable under international law nor justified in practice. Rather, in reality, such practices are seriously detrimental to migrants' safety, security, and health.

In many immigrant detention centers, such administrative segregation is indistinguishable from solitary confinement, involving confinement for 23 hours a day in a small cell with extremely limited access to the outdoors, other people, or activities like exercise.<sup>129</sup> Prolonged or indefinite solitary confinement has been shown to have a particularly devastating psychological impact, which in some cases is irreversible.<sup>130</sup> This practice can lead to severe mental health aftereffects and may exacerbate PTSD or other conditions developed by survivors of violence in their countries of origin or during migration.<sup>131</sup> Often, it is difficult or impossible for detainees to avoid segregation. This may expose already vulnerable LGBTI detainees to potential mistreatment, including further sexual violence, by facility staff.<sup>132</sup>

Isolating LGBTI detainees violates their international human rights in a number of ways.<sup>133</sup> Subjecting LGBTI migrants to administrative segrega-

<sup>128</sup> For instance, the U.S. Immigration and Customs Enforcement has specifically noted that administrative segregation may be used as a last resort for detainees with special vulnerabilities, "[including] those . . . who would be susceptible to harm in general population due in part to their sexual orientation or gender identity." U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DIRECTIVE 11065.1: REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES 1-2 (2013), archived at <http://perma.cc/0ruDsRgHPkG>. Many prisons also uphold segregation policies based on HIV/AIDS status; in such places, those who test positive upon arrival, or who are already known to be HIV positive, are housed in separate prison accommodations. AM. CIVIL LIBERTIES UNION NAT'L PRISON PROJECT & HUMAN RIGHTS WATCH, SENTENCED TO STIGMA: SEGREGATION OF HIV-POSITIVE PRISONERS IN ALABAMA AND SOUTH CAROLINA 3 (2010), archived at <http://perma.cc/0Eu0EK3275w>. In Alabama and South Carolina, the two remaining states in the United States where such policies still exist, most prisoners who test positive are required to wear an armband or badge to signify their HIV positive status. See *id.* at 1, 26.

<sup>129</sup> NAT'L IMMIGRANT JUSTICE CTR. & PHYSICIANS FOR HUMAN RIGHTS, *supra* note 127, at 9-10 (2012) (stating that detainees in administrative segregation are placed in a tiny cell, rarely allowed out, and fed different food from the general detention center population).

<sup>130</sup> Special Rapporteur of the Human Rights Council, *Interim Rep. of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 26, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan E. Méndez). See also Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 328-29 (2006).

<sup>131</sup> NAT'L IMMIGRANT JUSTICE CTR. & PHYSICIANS FOR HUMAN RIGHTS, *supra* note 127, at 13.

<sup>132</sup> See Special Rapporteur of the Human Rights Council, *supra* note 130, ¶ 70 ("Because of the absence of witnesses, solitary confinement increases the risk of acts of torture and other cruel, inhuman or degrading treatment or punishment.")

<sup>133</sup> The European Court of Human Rights has recognized that "complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason." *Ilaşcu and others v. Moldova and Russia*, 2004-VII Eur. Ct. H.R. 179, 288 (2004). Isolation of LGBTI detainees in the United States has also been held to violate due process rights set out in the U.S. Constitution. See, e.g., *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Haw. 2006) (holding that placing LGBTI juvenile offenders in isola-

tion may constitute a violation of the right to equal protection of the law if conditions of segregation limit access to the basic rights accorded to other detainees.<sup>134</sup> Segregation on the basis of sexual orientation constitutes a violation of the nondiscrimination principles set out in Article 7 of the UDHR, which provides that all people are “equal before the law and are entitled without any discrimination to equal protection of the law” and “to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”<sup>135</sup> Such segregation also violates Articles 2 and 26 of the ICCPR. Article 2(1) provides that all individuals within a state party’s jurisdiction may access the rights set out in the ICCPR without distinction<sup>136</sup> and Article 26 guarantees all persons equal and effective protection of the law, without discrimination on any ground.<sup>137</sup> The isolation of LGBTI detainees runs a significant risk of violating both nondiscrimination provisions.<sup>138</sup>

Placing LGBTI migrants in segregation may also rise to the level of torture or cruel, inhuman, or degrading treatment as defined by applicable human rights instruments. If the conditions of isolation are so inadequate that they lead to severe physical or mental pain or suffering, the isolation may amount to torture or to cruel and inhuman treatment prohibited by Article 5 of the UDHR,<sup>139</sup> Article 7 of the ICCPR,<sup>140</sup> and Article 16 of the CAT.<sup>141</sup> Such isolation will also violate detainees’ human rights if it is excessive or indefinite in length, or when the length of isolation is not communicated to the LGBTI detainee, which violates the right to due process set out in Article 9 of the ICCPR.<sup>142</sup> International human rights bodies have also held that isolating detainees amounts to torture or inhuman or degrading

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tion to protect them from abuse violated their due process rights); *Tates v. Blanas*, No. S-00-2539 OMP P, 2003 U.S. Dist. LEXIS 26029, 2003 WL 23864868 (E.D. Cal. Mar. 6, 2003) (holding that a blanket policy of placing all transgender detainees in “total separation,” thus exposing them to harsh conditions normally reserved for the most dangerous inmates, violated transgender inmate’s constitutional rights); *but see* *Estate of DiMarco v. Wyoming Dep’t of Corr., Div. of Prisons*, 473 F.3d 1334 (10th Cir. 2007) (reversing district court judgment, which had held that segregating intersex prisoner from the general population of a male prison for 438 days in severe conditions violated her due process rights). *See also* NAT’L CTR. FOR LESBIAN RIGHTS, RIGHTS OF TRANSGENDER PRISONERS 1–2 (2006), archived at <http://perma.cc/0gnVfxTqxqs> (explaining the potential constitutional violations in administrative segregation of transgender prisoners).

<sup>134</sup> *See* C.H.R. Res. 1995/44, U.N. Doc. E/CN.4/1995/L.11/Add.3 (Mar. 6, 1995) (confirming that “‘other status’ in non-discrimination provisions” can be “interpreted to cover health status, including HIV/AIDS”).

<sup>135</sup> UDHR, *supra* note 118, art. 7.

<sup>136</sup> ICCPR, *supra* note 56, art. 2.

<sup>137</sup> *Id.*, art. 26.

<sup>138</sup> The reference to “sex” in both ICCPR provisions has been interpreted to include sexual orientation. *See* U.N. Human Rights Comm., *supra* note 56, ¶ 8.7.

<sup>139</sup> UDHR, *supra* note 118, art. 5.

<sup>140</sup> ICCPR, *supra* note 56, art. 7.

<sup>141</sup> CAT, *supra* note 120, art. 16.

<sup>142</sup> ICCPR, *supra* note 56, art. 9(1).

treatment when the conditions of isolation are so poor that it is tantamount to conditions of penal solitary confinement.<sup>143</sup>

If the sexual minority detainee is a minor, any form or duration of isolation will constitute cruel, inhuman, or degrading treatment. According to the United Nations Committee on the Rights of the Child, minors should in principle not be detained at all, and in the extremely limited circumstances in which their detention is justified, states must make all efforts to allow for the immediate release of children into other forms of appropriate accommodation.<sup>144</sup> The isolation of LGBTI minors in immigration detention would be an egregious violation of the Convention on the Rights of the Child.

Isolating LGBTI detainees who are mentally disabled or suffer from a previously existing mental condition, including the aftereffects of persecution in the country of origin, will likely violate the Convention on the Rights of Persons with Disabilities (“CRPD”). Article 14 of the CRPD specifically provides that persons with disabilities are entitled to enjoy their rights to liberty and security on an equal basis with others, and can be lawfully deprived of their liberty only for the reasons, and in accordance with the procedures, that would be applicable to other persons in the same jurisdiction.<sup>145</sup> Isolating LGBTI detainees with mental disabilities may also violate Article 10 of the ICCPR, which holds that all those deprived of their liberty must be treated with humanity and dignity.<sup>146</sup> This provision has been interpreted in conjunction with the United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, which upholds the basic rights of persons with mental illnesses or disabilities.<sup>147</sup>

In light of the severe physical and psychological harm that often results from isolating LGBTI detainees, and the international law that is relevant to such treatment and its effects, authorities who detain LGBTI migrants run the very real risk of engaging in a practice constituting torture or cruel, inhuman, or degrading treatment and in a violation of due process and related rights set out in international legal instruments.

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<sup>143</sup> See Special Rapporteur of the Human Rights Council, *supra* note 130, ¶ 74 (stating that “where the physical conditions of solitary confinement are so poor and the regime so strict that they lead to severe mental and physical pain or suffering of individuals who are subjected to the confinement, the conditions of solitary confinement amount to torture or to cruel and inhuman treatment”); *X v. Turkey*, App. No. 24626/09 (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113876>, archived at <http://perma.cc/0MLWY7cBEs7> (plaintiff’s isolation conditions amounted to inhuman and degrading treatment).

<sup>144</sup> See U.N. Comm. on the Rights of the Child, Gen. Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 61, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

<sup>145</sup> Convention on the Rights of Persons with Disabilities art. 14, Dec. 13, 2006, 2515 U.N.T.S. 3.

<sup>146</sup> ICCPR, *supra* note 56, art. 10(1).

<sup>147</sup> See G.A. Res. 46/119, U.N. Doc. A/RES/46/119 (Dec. 17, 1991).

### C. *Barriers to Medical Care*

Another significant problem faced by LGBTI migrants in immigration detention is lack of access to adequate medical care. Many migrants suffer from physical aftereffects of persecution in their countries of origin<sup>148</sup> and harm experienced during the migration process.<sup>149</sup> Because migrants are on the move, they may not try to get treatment until they arrive in countries of first asylum. However, in immigration detention, the lack of access to medical care is particularly pronounced; for example, recent reports have focused on the barriers to medical care experienced by migrants in detention in Asia, the Middle East, North Africa, and the United States.<sup>150</sup> These and other reports indicate that in many immigration detention facilities, only urgent

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<sup>148</sup> See *supra* Part I.C.

<sup>149</sup> Reports on Eritrean migrants, for instance, indicate that they suffer physical torture during migration. See, e.g., MIRJAM VAN REISEN ET AL., HUMAN TRAFFICKING IN THE SINAI: REFUGEES BETWEEN LIFE AND DEATH 4 (2012), archived at <http://perma.cc/0EowH6grbjZ> (describing torture of Eritrean and other refugees in the Sinai, including “severe beating, electrocution, water-drowning, burning, hanging, hanging by hair, and amputation of limbs”). This can lead to severe physical aftereffects. See, e.g., U.N. HIGH COMM’R FOR REFUGEES, SUBMISSION BY THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES FOR THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS’ COMPILATION REPORT - UNIVERSAL PERIODIC REVIEW: ISRAEL 2 (2013), archived at <http://perma.cc/0iY5gXDuDhs> (noting after interviews of more than 500 asylum-seekers held hostage in the Sinai who had been “subjected to abuse and torture at the hands of traffickers/smugglers attempting to extort money from their families” that “[all] the men and women interviewed bore visible scars, wounds and injuries attesting to the physical abuse they endured; injuries that were often so serious that it required medical intervention”).

<sup>150</sup> See, e.g., HUMAN RIGHTS WATCH, AD HOC AND INADEQUATE: THAILAND’S TREATMENT OF REFUGEES AND ASYLUM SEEKERS 30–31 (2012), archived at <http://perma.cc/06cobPAYjAL> (focusing on Thailand); HUMAN RIGHTS WATCH, *supra* note 100, at 55, 63, 84 (focusing on Greece and Turkey); Rachel Levitan, Esra Kaytaz & Oktay Durukan, *Unwelcome Guests: The Detention of Refugees in Turkey’s “Foreigners’ Guesthouses”*, 26 REFUGE 77, 84 (2009) (Turkey); HUMAN RIGHTS WATCH, SINAI PERILS: RISKS TO MIGRANTS, REFUGEES, AND ASYLUM SEEKERS IN EGYPT AND ISRAEL 68–70 (2008), archived at <http://perma.cc/0yyszka3B1BK> (Egypt); HUMAN RIGHTS WATCH, PUSHED BACK, PUSHED AROUND: ITALY’S FORCED RETURN OF BOAT MIGRANTS AND ASYLUM SEEKERS, LIBYA’S MISTREATMENT OF MIGRANTS AND ASYLUM SEEKERS 74, 80, 86 (2009), archived at <http://perma.cc/0tr8ViSu8uL> (Libya); HUMAN RIGHTS WATCH, DETAINED AND DISMISSED: WOMEN’S STRUGGLES TO OBTAIN HEALTH CARE IN UNITED STATES IMMIGRATION DETENTION 24–63 (2009), available at <http://perma.cc/0BYQ27FMjZ1> (United States, on women’s health); William Fisher, *ICE Ignores Health of Immigration Detainees*, PUBLIC RECORD (Dec. 21, 2010), archived at <http://perma.cc/0F1WmgDoJCu> (health care inadequacy in U.S. detention centers); Dana Priest & Amy Goldstein, *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, the Detainees in Their Care Often Pay a Heavy Cost*, WASH. POST, May 11, 2008, at A1 (United States). See also Special Rapporteur on the Human Rights of Migrants, *Rep. of the Special Rapporteur on the Human Rights of Migrants*, Human Rights Council, ¶ 25, U.N. Doc. A/HRC/20/24 (Apr. 2, 2012) (by François Crépeau) (“The Special Rapporteur has . . . been made aware that mental and physical health of migrant detainees is often neglected. Doctors and nurses are not always available and may not have the authority to properly treat their patients, inter alia when they need hospitalization.”).

medical care is provided, interpreters are rarely provided during medical procedures, and medical expenses are often borne by the detainees.<sup>151</sup>

These factors stand in the way of appropriate medical care, and can seriously impair detainees' health.<sup>152</sup> These problems are exacerbated by the unhealthy environment within many detention facilities—including crowded conditions and substandard hygiene,<sup>153</sup> which may increase the spread of communicable diseases and worsen the physical state of detainees with pre-existing medical conditions.

We argue that the unhealthy nature of many detention facilities and the barriers to adequate medical care that often exist are especially problematic for LGBTI migrants who are held in such places. Many LGBTI asylum seekers and migrants enter detention with specific medical needs and have particular vulnerabilities relating to their physical health. Some of these health needs flow from sexually transmitted infections (“STIs”) more common in the LGBTI population and from gender reassignment and transition among transgender detainees.

### 1. *Lack of Treatment for and Exposure to HIV/AIDS and Other Sexually Transmitted Infections*

One particular health problem of concern for LGBTI migrants is the lack of protection, treatment, and care for HIV/AIDS and other STIs. LGBTI migrants in detention face significant exposure to HIV/AIDS and other STIs. Some arrive in detention infected, often due to exposure to sexual violence or a history of sex work.<sup>154</sup> Others are infected in detention, where rates of HIV/AIDS and other STIs tend to be higher than in the general population.<sup>155</sup>

<sup>151</sup> Office of the U.N. High Comm’r for Human Rights, *supra* note 16, at 12.

<sup>152</sup> See, e.g., Tania Nicole Masmias, *Asylum seekers in Denmark – A Study of Health Status and Grade of Traumatization of Newly Arrived Asylum Seekers*, 18 TORTURE 77, 78 (2008) (noting that the physical and mental health of traumatized asylum seekers to Denmark is affected upon arrival in Denmark and waiting time in asylum centers leads to further deterioration in health).

<sup>153</sup> Special Rapporteur on the Human Rights of Migrants, *supra* note 150, ¶ 25.

<sup>154</sup> Many LGBTI refugees report experiences of sexual violence throughout their lives, which may form the core of their claims for refugee status on the basis of sexual orientation or gender identity in the first place; others report engaging in survival sex work both in countries of origin and of migration, often because of family and community rejection and lack of access to other forms of employment or livelihood. See YIFTACH MILLO, HEBREW IMMIGRANT AID SOCIETY, *INVISIBLE IN THE CITY: PROTECTION GAPS FACING SEXUAL MINORITY REFUGEES AND ASYLUM SEEKERS IN URBAN ECUADOR, GHANA, ISRAEL, AND KENYA* (2013), archived at <http://perma.cc/0U3pbpfSeSy>; HUMAN RIGHTS FIRST, *THE ROAD TO SAFETY: STRENGTHENING PROTECTIONS FOR LGBTI REFUGEES IN UGANDA AND KENYA* (2012), archived at <http://perma.cc/0uyY7PV4C8i>; Neil Grungras, Rachel Levitan & Amy Slotek, *Unsafe Haven: Security Challenges Facing LGBT Asylum Seekers and Refugees in Turkey*, 24 PRAXIS: FLETCHER J. OF HUMAN SECURITY 41, 43, 50–51 (2009). It perhaps goes without saying that sexual violence and unprotected sex during sex work are both leading causes of HIV/AIDS and other STIs.

<sup>155</sup> Because there is little research on HIV/AIDS infection in detention centers, we extrapolate this conclusion from research on HIV/AIDS infection in domestic prisons.

As observed by UNAIDS, the joint United Nations program focused on achieving universal access to HIV prevention and treatment, overcrowding in prison facilities, combined with a culture of violence and fear, create ideal breeding grounds for continued transmission of HIV.<sup>156</sup> UNAIDS further recognizes that sex and sexual violence between men is a significant cause of the spread of HIV in prison facilities worldwide.<sup>157</sup> Becoming infected as a result of sexual violence in detention is a particular concern to gender nonconforming men and transgender women, who often face higher risks of sexual violence than other detainees.<sup>158</sup>

Regardless of whether LGBTI migrants are exposed to HIV/AIDS or other STIs prior to or during detention, it appears likely that LGBTI migrants in detention may be denied medical treatment for these conditions.<sup>159</sup> Medical staff and other facility staff may also fail to uphold basic confidentiality during diagnosis or treatment of HIV/AIDS or during other medical examinations,<sup>160</sup> thus violating Article 17 of the ICCPR, which prohibits “ar-

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For instance, in the United States, which has the highest prison population in the world, Tyjen Tsai & Paola Scommegna, *U.S. Has World's Highest Incarceration Rate*, POPULATION REFERENCE BUREAU (Aug. 2012), archived at <http://perma.cc/0eRfGkXt4R1>, around 1.5 percent of detainees are HIV positive, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, BULLETIN: HIV IN PRISONS 2001-2010 5 (2012), archived at <http://perma.cc/0sLd7j4iQry>, in comparison to the less than half percent rate in the general population, J. Taussig et. al., *HIV Transmission Among Male Inmates in a State Prison System—Georgia, 1992-2005*, 55 MORBIDITY & MORTALITY WKLY. REP. 421, 421 (2006). For information on reasons for higher HIV/AIDS infection rates in U.S. prisons, see Christopher P. Krebs & Melanie Simmons, *Intraprison HIV Transmission: An Assessment of Whether It Occurs, How It Occurs, and Who is at Risk*, 14 AIDS EDUC. & PREVENTION 53 (2002); Sandra A. Springer & Frederick L. Altice, *Managing HIV/AIDS in Correctional Settings*, 2 CURRENT HIV/AIDS REP. 165, 165 (2005). Similarly, while approximately 17.8 percent of the South African population is HIV positive, UNAIDS, GLOBAL REPORT: UNAIDS REPORT ON THE GLOBAL AIDS EPIDEMIC 2010 181 (2010), archived at <http://perma.cc/0p6mqPKGEzy>, a 2002 estimate measured that as much as 41.4 percent of incarcerated people were infected with HIV, WORLD HEALTH ORG., EFFECTIVENESS OF INTERVENTIONS TO ADDRESS HIV IN PRISONS 18 (2007), archived at <http://perma.cc/OUWpDJuGeDu>. For more general information on internationally occurring trends of high HIV infection rates in prisons, see U.N. OFFICE ON DRUGS AND CRIME, HIV/AIDS PREVENTION, CARE, TREATMENT AND SUPPORT IN PRISON SETTINGS: A FRAMEWORK FOR AN EFFECTIVE NATIONAL RESPONSE vii (2006), archived at <http://perma.cc/0YkANeTxSqD>.

<sup>156</sup> JOINT U.N. PROGRAMME ON HIV/AIDS, PRISONS AND AIDS: UNAIDS TECHNICAL UPDATE 2 (1997), archived at <http://perma.cc/0wp3HZZAJL4>.

<sup>157</sup> See *id.* at 3.

<sup>158</sup> See *supra* Part III.A.

<sup>159</sup> See JOINT U.N. PROGRAMME ON HIV/AIDS, *supra* note 156, at 5 (noting only minimal health care is provided to prisoners with HIV or AIDS). Though very little data or anecdotal evidence is available documenting the experiences of migrants in detention with HIV/AIDS, based on reports exposing the entrenched sexual exploitation of sexual minority migrants, see *supra* note 154, combined with the many reports describing barriers to medical treatment in immigration detention facilities, see *supra* notes 150–173, it appears reasonable to assume that in most parts of the world, many LGBTI migrants are denied access to medical treatment for HIV/AIDS or other STIs while in detention.

<sup>160</sup> See, e.g., Comments from Shidlo, *supra* note 104 (“In my interviews with LGBT asylum seekers who have been detained, one former detainee reported that a detention center officer violated confidentiality about his HIV status. After the former detainee told

bitrary or unlawful interference” with privacy.<sup>161</sup> Article 17 has been interpreted to “encompasses obligations to respect physical privacy, . . . including the need to respect confidentiality of all information relating to a person’s HIV status.”<sup>162</sup>

When LGBTI migrants in detention infected with HIV/AIDS or other STIs face significant challenges accessing the appropriate medical care, such circumstances may reinforce the isolation, identity-related violence, and social stigma they face in detention, especially if their status becomes widely known to other detainees and staff due to breaches in confidentiality by medical facility staff.

## 2. *Lack of Hormonal Treatment for Transgender Migrants*

In addition to the health care provision gaps addressed above, transgender immigrant detainees may have very limited access to hormone treatment and other treatments associated with gender transition, which can lead to severe mental health consequences.<sup>163</sup> Research shows that transgender people tend to experience high levels of depression and anxiety, particularly when they are unable to express their deeply felt gender identities.<sup>164</sup> Transgender migrants who are unable to access hormone treatment may be at higher risk for depression, anxiety, and stress than those able to access such treatment.<sup>165</sup>

Lack of access to hormone therapy may also lead to greater exposure to physical and sexual violence by immigration detention facility officers and other detainees. Transgender migrants who were able to “pass” as their self-identified gender prior to detention may no longer pass if they are denied

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the officer that he was seeking asylum because of his sexual orientation and that he was HIV-positive, the officer placed a placard outside his cell that included his HIV status, his name, his date of birth, and the country that he was from. Other detainees who were from the same Central American small town that the HIV-positive detainee was from saw this placard. Later on, the former detainee discovered that rumors about his HIV status had spread throughout the town he was from and as a result he was doubly afraid to be forced back if he were to be deported.”)

<sup>161</sup> ICCPR, *supra* note 56, art. 17.

<sup>162</sup> OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS & JOINT U.N. PROGRAMME ON HIV/AIDS, INTERNATIONAL GUIDELINES ON HIV/AIDS AND HUMAN RIGHTS: 2006 CONSOLIDATED VERSION, at 90, U.N. Doc. HR/PUB/06/9, U.N. Sales No. E.06.XIV.4 (2006).

<sup>163</sup> We extrapolate this conclusion from denial of hormone treatment in the U.S. prison context. See Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 545–48 (2000); IMMIGRATION EQUALITY, *supra* note 102 (under “My Partner Is a Transgender Man Who Was not Taking Hormones before Being Detained, Can He Get Them now?”).

<sup>164</sup> *Key Transgender Health Concerns*, VANDERBILT UNIV. SCHOOL OF MED., <https://medschool.vanderbilt.edu/lgbti/health/transgender> (last visited Nov. 12, 2013), *archived at* <http://perma.cc/0kszVD9w7v4>.

<sup>165</sup> See Stacey L. Colton Meier et al., *The Effects of Hormonal Gender Affirmation Treatment on Mental Health in Female-to-Male Transsexuals*, 15 J. GAY & LESBIAN MENTAL HEALTH 281 (2011) (medical study examining relationship of provision of hormone therapy to transgender men and levels of depression, anxiety, and stress).

access to previously available hormone treatment, putting them at greater risk of physical and sexual violence.<sup>166</sup> Transgender men detained with other male immigrant detainees, for instance, may be at particularly high risk for violence if their birth sex is discovered.<sup>167</sup>

In the United States, access to hormone treatment for immigrant detainees is spotty at best. In 2011, the U.S. Federal Bureau of Prisons decided to allow transgender inmates to access hormone treatment regardless of whether they were receiving this treatment at the time they were detained.<sup>168</sup> Immigration detention policy in the United States, however, lags behind in comparison, and is more restrictive: though the federal guidelines for immigration detention, revised in 2012, allow transgender immigrant detainees to receive hormone treatment, this benefit is only afforded if a detainee was undergoing such treatment prior to being detained.<sup>169</sup> This is the case even if, due to the increased stressors of detention, transgender detainees experience intense feelings of “gender discordance,” which may make it particularly appropriate to administer hormone therapy and similar transition treatments.<sup>170</sup> The guidelines’ “freeze frame” approach thus does not assist transgender immigrant detainees who did not receive hormone treatment before being detained or were unable to get access to them in their home country.

Neither treatment for HIV/AIDS and other STIs nor hormone therapy is adequately provided in the immigration detention context. As observed by the NGO Immigration Equality regarding immigration detention in the United States, “LGBT immigrants in detention today face grim prospects.”<sup>171</sup> Not only are LGBTI migrants subject to general mistreatment by medical personnel, including invasive and voyeuristic examinations,<sup>172</sup> but the “overall lack of adequate health care means that LGBT people who require a regular regimen of HIV medication or hormone therapy simply do

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<sup>166</sup> See IMMIGRATION EQUALITY, *supra* note 102 (under “I am a transgender woman in immigration detention. To ensure my safety, should I request protective custody?”) (“Transgender people can understandably feel unsafe in detention. Those who have taken steps to transition may be more readily identifiable as targets for sexual or physical violence.”)

<sup>167</sup> Email from Ceren Ozturk, Legal Advisor, Helsinki Citizens’ Assembly Refugee Advocacy and Support Program, to Rachel Levitan (Oct. 23, 2013, 10:38 EST) (on file with author) (affidavit regarding confidential interview with transgender male detainee in Istanbul).

<sup>168</sup> *Federal Bureau of Prisons Makes Major Change in Transgender Medical Policy*, NAT’L CTR. FOR LESBIAN RIGHTS (Sept. 30, 2011), archived at <http://perma.cc/0J9dJGbyGT7>.

<sup>169</sup> U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 126, at 296.

<sup>170</sup> IMMIGRATION EQUALITY, *supra* note 102 (“My Partner Is a Transgender Man Who Was not Taking Hormones before Being Detained, Can He Get Them Now?”).

<sup>171</sup> *Id.* (under “What type of place is an immigration detention center? What can my loved one expect there as an LGBT person?”).

<sup>172</sup> See, e.g., Interview with transgender refugee [name and location redacted for confidentiality] (Dec. 13, 2011) (testifying that while detained for two months, doctors examined her twice, asking her questions that focused almost exclusively on her gender, and allowed into the examination room other staff who whispered to each other, suppressed laughs, and stared at her).

not receive proper care.”<sup>173</sup> In immigration detention centers where conditions may be worse than those in facilities in the United States, it is possible that sexual minorities are even less likely to get the care they need.

Immigration detention authorities’ failure to respond to the health concerns of LGBTI migrants implicates fundamental human rights. Detaining states that are signatories to the ICESCR who fail to meet the medical needs of LGBTI detainees may violate their obligation under Article 12(1) to uphold “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>174</sup> The intentional denial of hormone therapy to a transgender woman in detention, for instance, would undermine her physical health, perhaps expose her to a greater risk of physical and sexual violence, and would have a significantly negative impact on her mental health.<sup>175</sup> Furthermore, lack of appropriate medical care may violate sexual minorities’ international legal protections to the right to health and medical care enshrined in Article 25 of the UDHR<sup>176</sup> and reinforced by the ICESCR,<sup>177</sup> which are inseparable from provisions on the right to life articulated by the UDHR<sup>178</sup> and ICCPR,<sup>179</sup> and the right to freedom from degrading treatment addressed above.

#### *D. Mental Health Violations: High Incidence of Mental Distress and PTSD*

Another significant issue that detained LGBTI migrants face relates to the particular mental health needs that many migrants experience. In general, migrants throughout the world, particularly asylum seekers, report high levels of mental illness, including depression, PTSD, and other such mental health difficulties, compared with the population at large.<sup>180</sup> A comprehensive body of research has documented mental illness, particularly depression

<sup>173</sup> IMMIGRATION EQUALITY, *supra* note 102 (under “What type of place is an immigration detention center? What can my loved one expect there as an LGBT person?”).

<sup>174</sup> ICESCR, *supra* note 57, art. 12(1). The ICESCR recognizes that while developing countries are under a duty of progressive realization with regard to enforcing rights under the Covenant, developed countries are responsible for ensuring Covenant rights “to the maximum of . . . available resources.” See Comm. on Econ., Soc. Cultural Rights, Gen. Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant), U.N. Doc. E/1991/23 (Dec. 14, 1990) (interpreting the meaning of the progressive-realization requirement).

<sup>175</sup> See sources cited *supra* note 163.

<sup>176</sup> UDHR, *supra* note 118, art. 25(1).

<sup>177</sup> See Comm. on Econ., Soc. & Cultural Rights, Gen. Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Int’l Covenant on Econ., Soc. & Cultural Rights), U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

<sup>178</sup> UDHR, *supra* note 118, art. 3.

<sup>179</sup> ICCPR, *supra* note 56, art. 6(1).

<sup>180</sup> Zachary Steel et al., *Part I—The Mental Health Impacts of Migration: The Law and Its Effects; Failing to Understand: Refugee Determination and the Traumatized Applicant*, 27 INT’L J.L. & PSYCHIATRY 511, 514–15 (2004).

and PTSD, amongst post-conflict populations.<sup>181</sup> Depression and PTSD are also manifest amongst asylum seeker populations.<sup>182</sup>

Many of these symptoms result from traumas that migrants experience in their countries of origin. Triggers include exposure to war, terrorism, natural disaster, and famine.<sup>183</sup> Particularly noteworthy is the consistently high rate of asylum seekers who present with a history of exposure to torture.<sup>184</sup> Psychological, cognitive, and behavioral symptoms reported by migrants ex-

<sup>181</sup> See Paul Bolton et al., *The Mental Health and Psychosocial Effects of Organized Violence: A Qualitative Study in Northern Haiti*, 49 *TRANSCULTURAL PSYCHIATRY* 590 (2012) (finding possible depression and PTSD in Haitians exposed to organized violence); Verena Ertl et al., *Validation of a Mental Health Assessment in an African Conflict Population*, 1 *INT'L PERSP. PSYCHOL. RES. PRAC. CONSULTATION* 19 (2011) (finding PTSD in war-affected Ugandans); Kenneth E. Miller et al., *Daily Stressors, War Experiences, and Mental Health in Afghanistan*, 45 *TRANSCULTURAL PSYCHIATRY* 611 (2008) (finding PTSD in war-affected Afghan women and general distress in war-affected Afghan men); Susanne Schaal et al., *Rates of Trauma Spectrum Disorders and Risks of Posttraumatic Stress Disorder in a Sample of Orphaned and Widowed Genocide Survivors*, 2 *EUR. J. PSYCHOTRAUMATOLOGY* 1 (2011) (finding depression and PTSD in Rwandan widow and orphan genocide survivors); Inga Schalinski et al., *Female Dissociative Responding to Extreme Sexual Violence in a Chronic Crisis Setting: The Case of Eastern Congo*, 24 *J. TRAUMATIC STRESS* 235 (2011) (finding predictability of PTSD in female war-affected Congolese).

<sup>182</sup> See Kenneth Carswell et al., *The Relationship Between Trauma, Post-Migration Problems and the Psychological Well-Being of Refugees and Asylum Seekers*, 57 *INT'L J. SOC. PSYCHIATRY* 107 (2011) (finding PTSD and distress in refugees and asylum seekers in United Kingdom due to post-migration problems); Alison Gerard & Sharon Pickering, *The Crime and Punishment of Somali Women's Extra-Legal Arrival in Malta*, 52 *BRIT. J. CRIMINOLOGY* 514, 525 (2012) (finding indefinite detention in Malta as contributing to depression in Somali refugee women); Masmás et al., *supra* note 152 (finding PTSD in both torture survivor and non-tortured asylum seekers in Denmark); Gillian Morantz et al., *The Divergent Experiences of Children and Adults in the Relocation Process: Perspectives of Child and Parent Refugee Claimants in Montreal*, 25 *J. REFUGEE STUD.* 71 (2011) (finding trends of depression in children and parent asylum seekers in Canada); Derrick Silove et al., *Anxiety, Depression and PTSD in Asylum-Seekers: Associations With Pre-Migration Trauma and Post-Migration Stressors*, 170 *BRIT. J. PSYCHIATRY* 351 (1997) (finding depression, PTSD, and anxiety in asylum seekers in Australia). See also Derrick Silove et al., *No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-Affected Refugees Seeking Asylum in Australia*, 44 *TRANSCULTURAL PSYCHIATRY* 359 (2007) (collecting data and studies identifying depression and PTSD among other mental health issues in asylum seekers in Australia); Sierra van Wyk et al., *A Longitudinal Study of Mental Health in Refugees from Burma: The Impact of Therapeutic Interventions*, 46 *AUSTL. & N.Z. J. PSYCHIATRY* 995, 995–96 (2012) (assembling studies identifying depression and PTSD among other mental health issues in asylum seekers).

<sup>183</sup> Andrés J. Pumariega et al., *Mental Health of Immigrants and Refugees*, 41 *CMTY. MENTAL HEALTH J.* 581, 583 (2005).

<sup>184</sup> Most studies document rates of up to thirty-five percent, depending on the definition of torture employed. See Angela Burnett & Michael Peel, *Asylum Seekers and Refugees in Britain: The Health of Survivors of Torture and Organised Violence*, 322 *BRIT. MED. J.* 606, 607 (2001) (“Estimates of the proportion of asylum seekers who have been tortured vary from 5–30%, depending on the definition of torture used and their country of origin.”); David P. Eisenman et al., *Survivors of Torture in a General Medical Setting: How Often Have Patients Been Tortured, and How Often is it Missed?*, 172 *W. J. MED.* 301, 301 (2000) (“Five percent to 35% of the world’s refugees are estimated to have been tortured.”). See also Zachary Steel et al., *Association of Torture and Other Potentially Traumatic Events With Mental Health Outcomes Among Populations Exposed to Mass Conflict and Displacement: A Systematic Review and Meta-Analysis*, 302 *JAMA* 537,

posed to such stressors may include failure to function in daily life, suicidal tendencies, social withdrawal, self-neglect, and aggression.<sup>185</sup>

The migration process itself also traumatizes migrants.<sup>186</sup> Some observe extremely harsh conditions traveling by sea,<sup>187</sup> or observe other migrants they are traveling with murdered at the hands of smugglers.<sup>188</sup> Migrants are also exposed to post-migration stressors, including lack of access to basic services, limited work opportunities, and discrimination based on xenophobia.<sup>189</sup> Lengthy and complicated asylum procedures may be particularly associated with the deterioration in mental health, including the exacerbation of symptoms of depression and PTSD.<sup>190</sup>

A growing body of research indicates that the practice of detaining migrants, coupled with the often indefinite nature of this detention, exacerbates mental illness in migrants.<sup>191</sup> Increasingly, studies indicate that the detention of asylum seekers in countries of first asylum has a particularly detrimental impact on the mental health of this already traumatized population.<sup>192</sup> These

547 (2009) (collecting 84 published surveys and finding 21% of refugee or conflict-afflicted participants reported personal experiences of torture).

<sup>185</sup> See Burnett & Peel, *supra* note 184, at 608.

<sup>186</sup> See, e.g., Erhabor Sunday Idemudia et al., *Migration Challenges Among Zimbabwean Refugees Before, During and Post Arrival in South Africa*, 5 J. INJURY & VIOLENCE RES. 17, 22 (2013) (identifying the witnessing and experiencing of threats of or actual violence and survival sex as traumatizing experiences for Zimbabwean migrants to South Africa); Pumariega et al., *supra* note 183, at 583 (identifying disconnection from family and traumatic journeys as traumatizing experiences for migrants to the United States).

<sup>187</sup> See, e.g., HUMAN RIGHTS WATCH, PUSHED BACK, PUSHED AROUND, *supra* note 150, at 41–46.

<sup>188</sup> SIGAL ROZEN, HOTLINE FOR MIGRANT WORKERS & PHYSICIANS FOR HUMAN RIGHTS - ISRAEL, TORTURED IN SINAI, JAILED IN ISRAEL: DETENTION OF SLAVERY AND TORTURE SURVIVORS UNDER THE ANTI-INFILTRATION LAW 9 (2012), archived at <http://perma.cc/0VxThQp9pJM>.

<sup>189</sup> Pumariega et al., *supra* note 183, at 584.

<sup>190</sup> See, e.g., Cornelis J. Laban et al., *Impact of a Long Asylum Procedure on the Prevalence of Psychiatric Disorders in Iraqi Asylum Seekers in the Netherlands*, 192 J. NERVOUS & MENTAL DISEASE 843 (2004); Steel et al., *supra* note 180, at 515–16.

<sup>191</sup> See Allen S. Keller et al., *The Impact of Detention on the Health of Asylum Seekers*, 26 J. AMBULATORY CARE MGMT. 383 (2003) (finding that anxiety, depression, and PTSD in detained asylum seekers in the United States is significantly correlated to length of detention); Katy Robjant et al., *Psychological Distress Amongst Immigration Detainees: A Cross-Sectional Questionnaire Study*, 48 BRIT. J. CLINICAL PSYCHOL. 275, 282 (2009) (finding that depression and anxiety in detained asylum seekers in the United Kingdom interacts with length of detention). See also Mina Fazel & Derrick Silove, *Detention of Refugees: Australia Has Given Up Mandatory Detention Because It Damages Detainees' Mental Health*, 332 BRIT. MED. J. 251, 251 (2006) (questioning the effectiveness of psychiatric treatment in the setting of indefinite detention, which may have been the root cause of refugees' mental illness).

<sup>192</sup> See Katy Robjant et al., *Mental Health Implications of Detaining Asylum Seekers: Systematic Review*, 194 BRIT. J. PSYCHIATRY 306 (2009) (assembling studies finding anxiety, depression, and PTSD in detained migrants). See also Masao Ichikawa et al., *Effect of Post-Migration Detention on Mental Health Among Afghan Asylum Seekers in Japan*, 40 AUSTL. & NZ J. PSYCHIATRY 341 (2006) (finding higher scores for anxiety, depression, and PTSD in detained versus non-detained Afghan asylum seekers in Japan);

findings suggest that “[p]olicies regarding the long-term detention of asylum seekers should be reconsidered.”<sup>193</sup>

LGBTI migrants, like other migrants generally, may suffer significant mental health impacts from their experiences in their home countries, in transit, and once they arrive in their destination, particularly when they end up detained. LGBTI asylum seekers and refugees report trauma-related mental health problems as a result of the persecution experienced based on their sexual orientation or gender identity, often experienced repeatedly over a lifetime.<sup>194</sup> This harm includes physical and sexual violence, and various forms of harassment and discrimination, experienced in a variety of both private and public settings, carried out by wide-ranging perpetrators, including family, peers, employers, and strangers.<sup>195</sup> The relentlessness of persecution in the lives of LGBTI people is extremely common; as noted by Ariel Shidlo and Joanne Ahola, “Lesbian, gay, bisexual and transgender . . . forced migrants around the world report a history of multiple traumatic events across their lifespan. . . . Many suffer from significant mental health consequences as a result of a lifetime of cumulative trauma.”<sup>196</sup>

The psychological consequences of this often unremitting harm include depression, panic and anxiety, traumatic brain injury, and substance abuse.<sup>197</sup> Sexual minority migrants may also suffer from both PTSD, which is characterized by the “re-experiencing of traumatic events, numbing and avoidance of thinking about these events, and hyper-arousal,” and complex PTSD, which is characterized by “self-destructive behaviour, amnesia, intense shame, difficulties with intimacy, experiencing bodily pains in response to psychological distress, and despair about finding loving relationships.”<sup>198</sup> In addition, the sexual violence that is prevalent in many detention settings may re-traumatize LGBTI rape survivors.<sup>199</sup> Since LGBTI migrants so often experience sexual violence in their countries of origin, they may be entering detention facilities with more severe mental after effects of rape and suffer greater trauma if sexually abused in detention.

Detaining states that cause, exacerbate, or fail to respond to the mental health concerns of LGBTI migrants risk violating fundamental human rights. State signatories to the ICESCR may violate the rights of LGBTI detainees to “enjoyment of the highest attainable standard” of mental health by failing

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<sup>193</sup> Keller et al., *supra* note 191, at 383.

<sup>194</sup> Shidlo & Ahola, *supra* note 71, at 9.

<sup>195</sup> *See id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *See* Dumond, *supra* note 114 (looking at re-victimization of male rape survivors in U.S. prison context); *see also* Marylene Cloitre et al., *Posttraumatic Stress Disorder, Self- and Interpersonal Dysfunction Among Sexually Retraumatized Women*, 10 J. TRAUMATIC STRESS 437, 447–51 (1997) (identifying mental health issues associated with the re-traumatization of women rape survivors in general).

to respond to their psychological needs.<sup>200</sup> Furthermore, lack of appropriate mental health care may violate sexual minorities' international human rights to health and medical care as enshrined in the UDHR<sup>201</sup> and reinforced by the ICESCR,<sup>202</sup> which are tied to provisions on the right to life articulated by the UDHR<sup>203</sup> and ICCPR,<sup>204</sup> and the right to freedom from degrading treatment articulated above. The mental deterioration caused by lengthy, often indefinite, detention, combined with substandard detention conditions means that few enjoy the standard of mental health guaranteed by ICESCR, UDHR, or ICCPR.

#### RECOMMENDATIONS & CONCLUSIONS

This Article has demonstrated the severe harms detained LGBTI migrants experience and the need for specific protections within this community. Yet these insights are incomplete without a more nuanced and complete understanding of the exact harms that LGBTI detainees face across the world. Thus, it is essential that researchers, scholars, and government officials pay more attention to the distinct needs of LGBTI detainees. More substantive data will help people better understand the severity of the human rights violations against LGBTI detainees, drawing attention to a group that has typically fallen off the radar of policies meant to safeguard detainees, and enabling states to garner the political will to reform those policies in light of their unique needs. As noted at the outset of this Article, there is a serious lack of either detailed empirical data or legal scholarship on the particular problems that LGBTI migrants face when they are subject to immigrant detention. Much of what is known is based on anecdotal evidence and not rigorous research; therefore, further investigation is required before the extent of the problems experienced by LGBTI detainees can be fully understood. Such increases in research, awareness, and data collection on this topic are a necessary first step before determining preliminary recommendations that ameliorate conditions for LGBTI detainees.

In addition to providing an analysis of the human rights violations confronting LGBTI migrants in detention, we conclude that as a preliminary matter, detention should never be applied to the most vulnerable populations. Alternatives to detention must be explored by states in search of politically viable means to approach noncitizen populations within their borders. Alternative proposals to detention have been widely discussed among advo-

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<sup>200</sup> ICESCR, *supra* note 57, art. 12(1).

<sup>201</sup> UDHR, *supra* note 118, art. 25(1).

<sup>202</sup> *See* Comm. on Econ., Soc. & Cultural Rights, *supra* note 177.

<sup>203</sup> UDHR, *supra* note 118, art. 3.

<sup>204</sup> ICCPR, *supra* note 56, art. 6(1).

cate.<sup>205</sup> Not only do these non-detention approaches reflect greater awareness of the potential for abuse and problems common in detention, they may also be appealing from a financial or efficacy-measuring perspective.<sup>206</sup>

Reiterating that detention is never advisable for LGBTI and other vulnerable migrant populations, we recognize that it may not be politically feasible for states that detain migrants to efficiently implement alternatives to detention. If states do determine that detention is necessary, they should take drastic measures to remedy the severe human rights problems that LGBTI detainees often face. As discussed in this Article, available evidence points to the existence of significant concerns regarding lack of protection for the human rights of LGBTI detainees, and the need for increased safeguards for this vulnerable population. It is clear that immigration detention inherently implicates human rights norms for all detainees when it is discriminatory, prolonged, and occurs in substandard facilities. This is especially true for LGBTI detainees who face heightened risk of physical and sexual assault, solitary confinement, and limited access to physical and mental health care.

In order to ameliorate the serious problems faced by LGBTI detainees, we make a number of recommendations to states. First, with regard to the threshold question of how to identify LGBTI migrants, it is crucial that states recognize the complexity of LGBTI identities and the many barriers to and risks of identification. We advocate that all detainees, regardless of whether they are identifiably gender nonconforming, be given the opportunity to discuss their specific needs as they may relate to sexual orientation or gender identity. Although ideally the choice to identify as LGBTI lies with an individual, we recognize that, as discussed above, not all LGBTI migrants are in a position to be able to self-identify, an action that may expose them to further persecution in detention.

In addition to allowing for appropriate identification measures for LGBTI migrants, ensuring LGBTI prisoner safety and ending discrimination and abuse in detention, both by prison officials and other detainees, must be top priorities. Appropriate training for detention facility staff is also crucial—these individuals must be trained in and sensitized to the protection needs of LGBTI migrants.<sup>207</sup> It is crucial that all detention officials be

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<sup>205</sup> See, e.g., IDC REPORT, *supra* note 15, at 13, 16–50 (describing research into the various policy alternatives to detention as currently practiced and expanding on the Community Assessment and Placement model in particular).

<sup>206</sup> See *id.* at 5 (“[R]esearch shows that cost-effective and reliable alternatives to detention are currently used in a variety of settings and have been found to benefit a range of stakeholders affected by this area of policy.”). See also Das, *supra* note 31, at 149–50, 161–62 (focusing on the ineffectiveness and costliness of mandatory detention policies as currently practiced, and supporting the use of a risk assessment tool to determine ideal scope of detention).

<sup>207</sup> For a focused analysis on possible forms of sensitivity training of personnel and adjudicators dealing with LGBT migrants, as well as the limitations of such training, see Nicole LaViolette, *Overcoming Problems with Sexual Minority Refugee Claims: Is LGBT Cultural Competency Training the Solution?*, in *FLEEING HOMOPHOBIA: SEXUAL ORIENTATION, GENDER IDENTITY AND ASYLUM* 189 (Thomas Spijkerboer ed., 2013).

trained in basic concepts relating to sexual orientation and gender nonconformity, the protection gaps experienced by LGBTI migrants—including the persecution that many have experienced in countries of origin—and the best ways to provide physical, medical, legal, and other protections in a detention setting while upholding the migrants' dignity and basic human rights. Finally, access to appropriate health care, welfare services, and contact with the outside world—including legal counsel and external LGBTI support systems—must be ensured.

Again, though there are numerous ways states might improve LGBTI detainee protections, detention in the immigration context should always be used as a last resort. UNHCR's recent guidelines governing the detention of refugees,<sup>208</sup> though commendable, are nonetheless insufficient on their own to address the severe problems that characterize the detention of LGBTI migrants. If states determine that they must detain LGBTI migrants at all, they must develop express recommendations regarding how best to identify these vulnerable populations and prevent their exposure to specific types of abuse and discrimination. Ultimately, states should heed the recommendations by UNHCR and migrant advocates by providing alternatives to detention for all self-identifying sexual minorities, and by establishing noncustodial measures and alternative sentencing procedures.

This Article has highlighted several potential approaches that states may adopt to ameliorate these situations. It also highlights the pressing nature of the issue and encourages states, international agencies, and NGOs to collaborate extensively to determine the most effective approaches to better addressing LGBTI needs in detention facilities. Ultimately, the violations LGBTI migrants suffer in detention are not simply a subset of LGBTI rights, migrant, asylum seeker, and refugee rights, or detention rights. These violations encompass fundamental human rights which are explicitly protected under international law and which the global human rights system should seek to uphold regardless of citizenship, sexual orientation, or gender identity.

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<sup>208</sup> DETENTION GUIDELINES, *supra* note 10.