



# INTERNATIONAL MIGRATION LAW INFORMATION NOTE

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## INTERNATIONAL STANDARDS ON THE PROTECTION OF PEOPLE WITH DIVERSE SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS (SOGIESC) IN THE CONTEXT OF MIGRATION

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Cover image: Gabriela

*“I walked 25 days to arrive in Ecuador. The journey was very difficult. I slept on the road many times. I faced discrimination because of my sexual orientation and sometimes didn’t get the help that I needed for the same reason”.*

*Gabriela left Venezuela in search of better job opportunities. During her journey, she was often attacked and insulted.*

*“All that I knew is that I wanted to arrive in Ecuador, find a job and send money to my mother in Venezuela,” she recalls.*

*“One day on my journey I was starving, I thought I was going to die, and a Colombian woman gave me something to eat. I will never forget that.”*

*In Ecuador, IOM and partners provide support to help the LGBTIQ+ population from Venezuela integrate into Ecuadorian society.*

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# PURPOSE AND SCOPE OF INFORMATION NOTE

This Note is dedicated to examining the challenges stemming from structural vulnerability of people with diverse sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) compounded with their status as migrants, including internally displaced persons, asylum seekers and refugees. Migrants with diverse SOGIESC face additional challenges that increase their vulnerability during the migration process. People with diverse SOGIESC often leave their countries of origin as a result of push factors specific to their sexual orientation, gender identity, gender expression and/or sex characteristics, such as explicit persecution, criminalization of same-gender sexual activity or non-conforming gender identity, and various forms of discrimination. Other people with diverse SOGIESC migrate around the world for reasons unrelated to their sexual orientation, gender identity, gender expression or sex characteristics, such as to improve their economic or social situations or join members of their families in another country. However, even when migrants leave their countries of origin because of reasons primarily unrelated to their diverse SOGIESC, their diverse SOGIESC will nevertheless often have an impact on their experiences during the migration journey and in the country of destination.<sup>1</sup>

Movement, whether it be for the purpose of travelling or migrating, voluntary or forced, across international borders or within a single country, can be a high-risk experience for people with diverse SOGIESC. These risks may come from discriminatory transport staff, immigration and border officials, members of militaries or militias, police officers, unwelcoming local or migrant populations, government asylum systems, or even from assisting organizations. For transgender people, travel or migration often calls for multiple (potentially invasive) identity checks in high-security environments such as travel stations, security checkpoints, or border crossings. As such, it is important to consider the unique challenges faced by migrants with diverse SOGIESC and understand the international standards relevant for their protection.

Undoubtedly, all individuals, irrespective of their sexual orientation, gender identity, gender expression or sex characteristics, will experience the migration process differently and encounter various challenges based on, for example, their cultural, economic, family, political, and religious backgrounds. Additionally, migrants with diverse SOGIESC regularly face protection risks associated with their sexual orientation, gender identity, gender expression or sex characteristics, in addition to the challenges regularly experienced by migrants. In other words, they “experience the stress of having multiple minority identities, which can include immigrant, LGBT[IQ+], and possibly racial or ethnic minority status as well.”<sup>2</sup> Migrants with diverse SOGIESC will also experience different protection risks during migration depending on their particular profile. Women with diverse sexual orientation, for instance, may be more invisible to assisting organizations and face challenges related to their gender. Individuals with same-gender partners and children may be particularly visible in migration and experience harm. Individuals with diverse gender identity and expression, including transgender, non-binary and gender non-conforming individuals, face particularly severe discrimination and abuse, and may have issues

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<sup>1</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/HRC/37/50 (23 November 2018), para. 32 (stating that LGBTI migrants are “particularly vulnerable to discrimination, violence, sexual abuse and humiliation.”)

<sup>2</sup> R. Hopkinson and E. Keatley, LGBT Forced Migrants. In: *Trauma, Resilience, and Health Promotion in LGBT Patients* (K. Eckstrand and J. Potter (eds.), 2017), 124.

with documentation, housing and obtaining dignified employment. And both individuals with diverse gender identity and intersex individuals may encounter discrimination, harassment and abuse from government entities, assisting organizations and medical providers.

This Note is divided in three sections: the first provides a synopsis of the terminology in this specific field – noting that deference should be given to each individual’s self-identification with terminology of their preference. Secondly, this Note outlines rights in international law relevant for the protection of people with diverse SOGIESC. Finally, specific protection issues, risks and needs of people with diverse SOGIESC, within the context of migration are identified and addressed from a legal perspective under international law.

## I. TERMINOLOGY

The terms used in this Note are terms commonly used and recognized in the international community and should be used by individuals and organizations, including IOM, addressing the needs of migrants. Please note, however, that terms relating to sexual orientation, gender identity, gender expression and sex characteristics vary greatly across the world and are dependent on such factors as location, language, age and cultural references. They have also evolved, and continue to evolve, over time. Furthermore, individuals may choose different terms than the ones used in this Note when referring to their SOGIESC. The experiences of people with diverse SOGIESC will vary between and within groups, depending on the particular individual’s background.<sup>3</sup> As such, caution needs to be taken when applying these terms inflexibly, as migrants’ understandings of their SOGIESC may not necessarily fit congruently into these terms. However, there are some terms commonly used within the international context. These terms, as well as less common terms useful to our understanding of SOGIESC, are included here:

PEOPLE WITH DIVERSE SOGIESC	An umbrella term for all people whose sexual orientations, gender identities, gender expressions and/or sex characteristics place them outside culturally mainstream categories. The phrase “diverse SOGIESC” may be preferred in some contexts over LGBTIQ+ because it does not contain narrow identity terms that are perceived as Western, and it is inclusive of individuals who do not identify with specific terms. For that reason, IOM has widely adopted “diverse SOGIESC”, especially in the global context. However, LGBTIQ+ is still acceptable in a wide variety of contexts and the Note will use both terms throughout.
LGBTIQ+	An acronym for lesbian, gay, bisexual, transgender, intersex and queer. The plus sign represents people with diverse SOGIESC who identify using other terms. In some contexts, LGB, LGBT or LGBTI are used to refer to particular populations. Additional characters may be added, such as A for asexual, agender or ally, 2S for Two-

<sup>3</sup> UNHCR, *Guidelines on International Protection No. 9*, UN Doc. HCR/GIP/12/09 (23 October 2012), para. 4.

	<p>Spirit or P for pansexual. In many locations, the letter order varies, e.g., LGBTQI+ or GBLTQI+. SOGIESC-related acronyms are not static and continue to evolve over time. To ensure inclusivity and accuracy, they should be applied with careful consideration to the individuals or populations being referenced.</p>
SEX	<p>The classification of a person as having female, male and/or intersex sex characteristics. While infants are usually assigned the sex of male or female at birth based on the appearance of their external anatomy alone, a person's sex is a combination of a range of bodily sex characteristics.</p>
SEX CHARACTERISTICS	<p>Each person's physical features relating to sex, including chromosomes, gonads, sex hormones, genitals and secondary physical features emerging from puberty.</p>
SEXUAL ORIENTATION	<p>Refers to each person's enduring capacity for profound romantic, emotional and/or physical feelings for, or attraction to, other people. Encompasses hetero-, homo-, bi-, pan- and asexuality, as well as a wide range of other expressions of sexual orientation. This term is preferred over sexual preference, sexual behavior, lifestyle and way of life when describing an individual's feelings for or attraction to other people.</p>
GENDER IDENTITY	<p>Refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with their sex assigned at birth or the gender attributed to them by society. It includes the personal sense of the body, which may or may not involve a desire for modification of appearance or function of the body by medical, surgical or other means.</p>
GENDER EXPRESSION	<p>Individuals use a range of cues, such as names, pronouns, behaviour, clothing, voice, mannerisms and/or bodily characteristics, to interpret other individuals' genders. Gender expression is not necessarily an accurate reflection of gender identity. People with diverse sexual orientation, gender identity or sex characteristics do not necessarily have a diverse gender expression. Likewise, people who do not have a diverse sexual orientation, gender identity or sex characteristics may have a diverse gender expression.</p>

GAY	Men whose enduring romantic, emotional and/or physical attraction is to men; also, women who are attracted to other women.
LESBIAN	A woman whose enduring romantic, emotional and/or physical attraction is to women.
BISEXUAL	A person who has the capacity for romantic, emotional and/or physical attraction to people of more than one gender. Bisexual+ and Bi+ are sometimes also used as umbrella terms for non-monosexual identities.
TRANS / TRANSGENDER	Terms used by some people whose gender identity differs from what is typically associated with the sex they were assigned at birth. Trans, transgender and non-binary are “umbrella terms” representing a variety of words that describe an internal sense of gender that differs from the sex assigned at birth and the gender attributed to the individual by society, whether that individual identifies as a man, a woman, simply “trans” or “transgender,” with another gender or with no gender.
NON-BINARY	An adjective describing people whose gender identity falls outside the male-female binary. Non-binary encompasses a wide variety of gender experiences, including people with a specific gender identity other than man or woman, people who identify as two or more genders and people who don’t identify with any gender.
GENDER NON-CONFORMING	Behavior or appearance that is not in alignment with prevailing cultural expectations related to a particular gender. The term can apply to all individuals, regardless of SOGIESC.
INTERSEX	Intersex people are born with sex characteristics that do not fit typical definitions of male and female bodies. Intersex is an umbrella term used to describe a wide range of natural bodily variations. These variations may be apparent before or at birth, not apparent until after puberty or later, or may not be physically apparent at all. There are more than 40 intersex variations; between 0.5% and 1.7% of the population is born with intersex traits.

For more terms and definitions, please consult the [IOM SOGIESC Glossary of Terms](#).

## II. PROTECTION OF MIGRANTS WITH DIVERSE SOGIESC UNDER THE PRINCIPLES OF EQUALITY AND NON-DISCRIMINATION IN HUMAN RIGHTS LAW

Under the principles of equality and non-discrimination, all individuals are equal as human beings and by virtue of the inherent dignity of each person. All human beings are entitled to their human rights without discrimination of any kind based on, for example but not limited to, race, gender, sex, sexual orientation, ethnicity, age, language, religion, political or other opinion, national or social origin, disability, property, birth, or other status. The principle of non-discrimination is a cross-cutting principle in human rights law and is of general application, meaning it applies to everyone, including non-nationals. Below are some of the key international law instruments that codify these principles, as well as examples of relevant jurisprudence.

### 01 Universal Declaration of Human Rights

**Article 1** of the Universal Declaration of Human Rights (UDHR) provides that “all human beings are born free and equal in dignity and rights.” **Article 2** declares that “everyone is entitled to all the rights and freedoms set forth in this Declaration.”<sup>4</sup> Although the UDHR does not impose legally binding obligations on States in the same manner as treaties ratified by States, the principles of equality and non-discrimination have been recognized by various treaties and UN treaty bodies.<sup>5</sup> UN treaty bodies have specifically stated that the principles of equality and non-discrimination are applicable to individuals irrespective of nationality or migration status,<sup>6</sup> as well as diverse SOGIESC.<sup>7</sup>

### 02 International Covenant on Civil and Political Rights

As stipulated in **Article 2** of the International Covenant on Civil and Political Rights (ICCPR), all civil and political rights conferred by the ICCPR are of general application, meaning that they apply to nationals and non-nationals (with the exception of the right to vote and to be elected), and without distinction based on sex, sexual orientation and gender identity.<sup>8</sup>

In addition to **Article 2**’s general cross-cutting principle of non-discrimination, **Article 26** provides that “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

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<sup>4</sup> Universal Declaration of Human Rights (UDHR) 1948, arts. 1 and 2.

<sup>5</sup> See, e.g., CCPR, General Comment No. 18, Non-discrimination; CESCR, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights 1966); Committee on Migrant Workers, General Comment No. 2 on The Rights of Migrant Workers in an Irregular Situation and Members of Their Families, U.N. Doc. CMW/C-CG-2 (28 August 2013) para. 18.

<sup>6</sup> CESCR, *General Comment No. 20, op.cit.*, para. 30 (“The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”).

<sup>7</sup> *Ibid.*, para. 32 (“States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace). See also CCPR *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) para. 8.7 (“The Committee confines itself to noting, however, that in its view the reference to ‘sex’ in art. 2, para. 1, and 26 is to be taken as including sexual orientation.”).

<sup>8</sup> International Covenant on Civil and Political Rights (ICCPR) 1966, art.2. See also *Toonen v. Australia, op. cit.*, para. 8.7.



protection against discrimination [on any of the enumerated grounds].”<sup>9</sup> **Article 26** is of a free-standing nature, meaning that its application is not confined to the rights contained in the Covenant (civil and political), but can be used in relation to economic, social, and cultural rights. The Human Rights Committee (CCPR), which monitors the implementation of the ICCPR, has used **Article 26** for several of the individual complaints made under the Optional Protocol to the Covenant.<sup>10</sup> Notably, the CCPR has focused on **Article 26** when looking into situations concerning foreign same-gender couples who want to marry or divorce,<sup>11</sup> as well as discrimination on the basis of marital status and gender identity.<sup>12</sup>

Other rights frequently cited when addressing violations of LGBTIQ+ individuals’ rights include **Article 17 (Right to privacy)**,<sup>13</sup> **Article 19 (Freedom of expression)**<sup>14</sup> and **Article 21 (Right to peaceful assembly)**.<sup>15</sup> Moreover, with respect to migrants with diverse SOGIESC who are facing risks of persecution or human rights violations upon return, **Article 7 (Freedom from torture, inhumane or degrading treatment)** has been deemed a key provision for their protection. This will be discussed more in-depth in the section on non-refoulement.

### 03 International Covenant on Economic, Social and Cultural Rights

Consistent with the commentary provided by the CCPR, the Committee on Economic, Social and Cultural Rights (CESCR), has reaffirmed that the rights provided in the International Covenant on Economic, Social and Cultural Rights (ICESCR) apply to all migrants, including irregular migrants,<sup>16</sup> and that diverse SOGIESC should not be a barrier to realizing Covenant rights.<sup>17</sup> The UN Economic and Social Council has similarly affirmed that such rights are also guaranteed to migrants under a State’s jurisdiction, regardless of their nationality or legal status.<sup>18</sup> Moreover, the CESCR has provided guidance regarding the status of both people with diverse SOGIESC and migrants with respect to the specific rights provided in the Covenant, and has identified the particular challenges that individuals belonging to either or both groups face when trying to access their rights. For example, with respect to **Article 7 (Right to just and favourable conditions of work)** the CESCR reiterates that “equality applies to all workers without distinction based on race, ethnicity, nationality, migration or health status, disability, age, sexual orientation, gender identity or any other ground.”<sup>19</sup> Similarly, with respect to **Article 12 (Right to health)** the CESCR has clarified that the “Covenant proscribes any discrimination in access to health care and underlying

<sup>9</sup> ICCPR, art. 26.

<sup>10</sup> CCPR, *Toonen v. Australia* op. cit. See also CCPR, *Edward Young v. Australia*, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003); CCPR, *X v. Colombia*, Communication No. 1361/2005, U.N. Doc. A/62/40 (2007), at 293.

<sup>11</sup> CCPR, *C v. Australia*, U.N. Doc. No. CCPR/C/119/D/2216/2012 (2017) (on foreign same-sex marriages and access to divorce).

<sup>12</sup> *G v. Australia* (2017), U.N. Doc. No. CCPR/C/119/D/2172/2012 (2017) (on refusal to have the sex changed on the birth certificate of a married transgender person).

<sup>13</sup> *Toonen v. Australia*, op. cit.; *Edward Young v. Australia*, op. cit.

<sup>14</sup> *Irina Fedotova v. Russian Federation*, Communication No. 1932/2010, U.N. Doc. No. CCPR/C/106/D/1932/2010 (2012).

<sup>15</sup> *Alekseev v. Russian Federation*, Communication No. 1873/2009, U.N. Doc. No. CCPR/C/109/D/1873/2009 (2013).

<sup>16</sup> CESCR, *General Comment No. 20, op. cit.*, para. 30 (“The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation”).

<sup>17</sup> *Ibid.*, para. 32 (“‘Other status’ as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace”).

<sup>18</sup> CESCR, *Duties of States towards refugees and migrants under the International Covenant on Economic, Social, and Cultural Rights*, U.N. Doc. No. E/C.12/2017/1 (13 March 2017), paras. 5-6.

<sup>19</sup> CESCR, *General Comment No. 23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. No. E/C.12/GC/23 (27 April 2016), para. 11.

determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health”.<sup>20</sup> The CESCR has also explained that States have an obligation to “respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and [irregular] immigrants, to preventive, curative and palliative health services.”<sup>21</sup>

## 04 Convention on the Elimination of All Forms of Discrimination against Women

The Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) has clarified that “discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity.”<sup>22</sup> Furthermore, the Committee has emphasized that all categories of women, including migrants, fall within the scope of the obligations of State parties. Therefore, all women must be protected against all forms of discrimination by the Convention.<sup>23</sup> As such, State parties need to recognize that intersectional factors contribute to discrimination and should adopt policies and programmes to eliminate such discrimination.<sup>24</sup>

The CEDAW has noted that women’s disproportionate criminalization is correlated with their situation or status, such as being involved in prostitution, being a migrant, having been accused of adultery, being a lesbian, bisexual or transgender woman, or an intersex woman.<sup>25</sup> The Committee has also stated that, around the world, discrimination against women is compounded by intersecting factors, such as “identity as a lesbian, bisexual or transgender woman or intersex person”, which make it more difficult to gain access to justice. It has therefore urged States to repeal any legislation or provision that criminalizes lesbian, bisexual or transgender persons recognizing that these provisions allow, tolerate or condone forms of gender-based violence.<sup>26</sup> Furthermore, the Committee has, on several occasions, made recommendations regarding the protection of lesbians, bisexual and transgender women as well as intersex persons in their concluding observations.<sup>27</sup>

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<sup>20</sup> CESCR General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. No. E/C.12/2000/4 (11 August 2000), para. 18.

<sup>21</sup> *Ibid.*, para. 34.

<sup>22</sup> CEDAW, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, U.N. Doc. No. CEDAW/C/GC/28 (16 December 2010), para. 18.

<sup>23</sup> CEDAW, *General recommendation No. 26 on women migrant workers*, U.N. Doc. No. CEDAW/C/2009/WP.1/R (5 December 2008), para. 4.

<sup>24</sup> *Ibid.*, para. 18.

<sup>25</sup> CEDAW, *General recommendation No. 33 on women’s access to justice*, U.N. Doc. No. CEDAW/C/GC/33 (23 July 2015), para. 49.

<sup>26</sup> CEDAW, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, U.N. Doc. No. CEDAW/C/GC/35 (26 July 2017), para. 31 (a).

<sup>27</sup> See e.g. CEDAW, Concluding observations on the eighth periodic report of Denmark, U.N. Doc. No. CEDAW/C/DNK/CO/8 (11 March 2015), paras. 35-36; CEDAW, Concluding observations on the seventh periodic report of Chile, U.N. Doc. No. CEDAW/C/CHL/CO/7 (14 March 2018); CEDAW, Concluding observations on the seventh periodic report of Costa Rica, U.N. Doc. No. CEDAW/C/CRI/CO/7 (24 July 2017); CEDAW, Concluding observations on the combined eighth and ninth periodic reports of Guatemala, U.N. Doc. No. CEDAW/C/GTM/CO/8-9 (22 November 2017).

## 05 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

This Convention (ICRMW) was adopted to provide a focus on the rights of all migrant workers and members of their families. Although the initial general guidance from the Committee on Migrant Workers (CMW) did not include any reference to discrimination based on SOGIESC, the Committee has, over the last year, started paying more attention to the challenges faced by migrants with diverse SOGIESC. For example, the Committee has stated that “children involved in or affected by migration are entitled to the enjoyment of their rights, regardless of their or their parents’, legal guardians’ or family members’(...) gender identity or sexual orientation.”<sup>28</sup> It has also recognized that an individual might experience additional vulnerabilities during migration because of these factors.<sup>29</sup> Further, the CMW and the Committee on the Rights of the Child (CRC) ask States, with respect to the migrant child’s right to life, survival and development, to take measures to also “consider the specific vulnerable circumstances that could face migrant children on the basis of their gender identity and other factors, such as (...) sexual orientation that may aggravate the child’s vulnerability to sexual abuse, exploitation, violence, among other human rights abuses, throughout the entire migratory process.”<sup>30</sup> Notably, the Committees have also stressed the importance of States’ initiatives to prepare girls and transgender children to participate actively, effectively and equally with boys at all levels of social, economic, political and cultural leadership in countries of origin, transit and destination.<sup>31</sup> With respect to adults, the CMW also noted in one of its concluding observations that irregular migration can be driven by “social exclusion and discrimination, including violence targeting lesbian, gay, bisexual and transgender persons in the country of origin.”<sup>32</sup>

## 06 Convention on the Rights of the Child

All of the provisions provided in the Convention on the Rights of the Child (CRC) apply equally to all children regardless of their SOGIESC. Nevertheless, some of the articles in the CRC are particularly important for the protection of children with diverse SOGIESC, or for children with parents with diverse SOGIESC. For example, Article 2 provides that State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Article 16(1) states that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family or correspondence, and no unlawful attacks on his or her honour and reputation. The Committee on the Rights of the Child has also highlighted some of the specific challenges that children with diverse SOGIESC face, including school related violence and bullying, physical, sexual and psychological violence in community settings and within their own families, as well as mental

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<sup>28</sup> CMW and CRC, Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, U.N. Doc. No. CMW/C/GC/3-CRC/C/GC/22 (16 November 2017), para. 21.

<sup>29</sup> Ibid., para. 3.

<sup>30</sup> Ibid., para. 42. See also CMW and CRC, Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, U.N. Doc. No. CMW/C/GC/4-CRC/C/GC/23 (16 November 2017), para. 41.

<sup>31</sup> CMW and CRC, General Comment No. 3, op. cit., para. 39.

<sup>32</sup> CMW, *Concluding Observations on Jamaica*, U.N. Doc. No. CMW/C/JAM/CO/1 (23 May 2017), para. 62.

health problems related to the common harassment and abuse.<sup>33</sup> With respect to intersex children, the Committee has condemned the use of medically unnecessary surgical and other procedures, without the child's informed consent and urged all State Parties to ensure bodily integrity, autonomy and self-determination to the children concerned, and provide families with intersex children with adequate counselling and support.<sup>34</sup>

## 07 Yogyakarta Principles

Although all international human rights instruments apply equally to individuals regardless of their SOGIESC, there is no international convention specifically dedicated to address discrimination against people with diverse SOGIESC. Nevertheless, in 2006, a group of experts were brought together to draw up a set of international principles, relating to sexual orientation and gender, based on the existing international human rights framework. In 2007, these were adopted as the Yogyakarta Principles (YP) and although the principles are considered as “soft law,” they are based on so-called “hard law” (binding international legal standards – with which all States must comply). In 2017, the principles were supplemented by YP+10, which were additional principles that expanded on gender expression and sex characteristics.<sup>35</sup>

The Yogyakarta Principles include several essential guiding principles for the protection of people with diverse SOGIESC and they apply equally to nationals and non-nationals. The following list outlines some of the Yogyakarta Principles that are particularly relevant in the context of migration:

- ▲ Rights to Equality and Non-Discrimination **(Principle 2)**
- ▲ Right to Privacy **(Principle 6)**
- ▲ Relating to the Right to Treatment with Humanity while in Detention **(Principle 9)**
- ▲ Relating to the Right to Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment **(Principle 10)**
- ▲ Right to the Highest Attainable Standard of Health **(Principle 17)**
- ▲ Right to Freedom of Movement **(Principle 22)**
- ▲ Right to Seek Asylum **(Principle 23)**
- ▲ Right to State Protection **(Principle 30, YP+10)**
- ▲ Right to Legal Recognition **(Principle 31, YP+10)**
- ▲ Right to Sanitation **(Principle 35, YP+10)**
- ▲ Right to Practice, Protect, Preserve and Revive Cultural Diversity **(Principle 38, YP+10)**

Even though there is no supervisory mechanism monitoring the Yogyakarta Principles, international and regional human rights bodies incorporate these principles in their reasoning and decisions. For example, recently, in an advisory opinion issued in response to a request made by Costa Rica on how to fully comply with its obligations under the American Convention on Human Rights (ACHR) (see below) with respect to gender identity, equality, and non-discrimination to same-gender partnerships, the Inter-American Court of Human Rights (IACtHR) used these principles as secondary authority.<sup>36</sup> The Court explicitly acknowledged the Yogyakarta

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<sup>33</sup> See joint statement by, e.g CRC, CAT, UN independent experts, IACtHR for IDAHOT 2017 available [here](#).

<sup>34</sup> See CRC Concluding Observations on Switzerland, U.N Doc. No. CRC/C/CHE/CO/2-4 (26 February 2015), paras. 42-43.

<sup>35</sup> Yogyakarta Principles, *The Yogyakarta Principles plus 10*, (10 November 2017). Available [here](#) (accessed 26 March 2021).

<sup>36</sup> Inter-American Court of Human Rights (IACtHR), *State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)*, OC 24/17 (24 November 2017).

Principles and the YP+10 as part of the legal framework.<sup>37</sup> The Court also identified the Yogyakarta Principles as authoritative sources for developing and interpreting laws related to sexual orientation and gender identity.<sup>38</sup>

## 08 European Convention on Human Rights

The European Convention on Human Rights (ECHR)<sup>39</sup> does not include any explicit references to sexual orientation, gender identity, gender expression or sex characteristics. However, **Article 14 (Non-discrimination)**<sup>40</sup> is of general application and has been used by the European Court on Human Rights (ECtHR) for cases concerning discrimination based on sexual orientation, gender identity, gender expression or sex characteristics. The jurisprudence on discrimination based on sexual orientation is well developed in the region covered by the ECtHR. In addition to Article 14, when discussing issues relating to sexual orientation, gender identity, gender expression or sex characteristics, the ECtHR has addressed, *inter alia*, **Articles 3 (Prohibition of torture, inhuman or degrading treatment)**,<sup>41</sup> **5 (Right to liberty and security)**,<sup>42</sup> and **8 (Right to respect for private and family life) of the ECHR**.<sup>43</sup>

In 1981, the ECtHR first held that any legislation criminalizing same-sex<sup>44</sup> relations was a disproportionate measure and a violation of the right to respect for private life.<sup>45</sup> Subsequently, the ECtHR issued multiple rulings on same-sex relations.<sup>46</sup> Cases involving gender identity and the issues faced by transgender persons in enjoying their human rights under the ECHR have not been extensively addressed by the ECtHR. Nevertheless, the ECtHR has heard cases concerning right to family life,<sup>47</sup> legal recognition,<sup>48</sup> access to gender-reassignment surgery,<sup>49</sup> some of which will be discussed in Section III of this Note. As of this date, no case has yet been heard concerning intersex people, however several situations have been communicated to the Court.

## 09 American Convention on Human Rights

In line with international and regional instruments, the American Convention on Human Rights codifies the principles of non-discrimination and equality in **Articles 1 (Obligation to respect rights)** and **24 (Right to equal protection)**. The Inter-American Court of Human Rights (IACtHR), together with the Inter-American Commission

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<sup>37</sup> *Ibid.*, paras. 112, 129, 138, 148, 155, 196; footnotes 45-6, 49, 56-7, 240, 279, 294, 313, 333, 371.

<sup>38</sup> *Ibid.*, paras. 138, 196.

<sup>39</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as amended by Protocols No. 11 and No. 14.

<sup>40</sup> *Ibid.*, article 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”)

<sup>41</sup> See, e.g., *Identoba and Others v. Georgia*, App. No. 73235/12 (ECtHR, Judgment of 12 May 2015); *M.C. and A.C. v. Romania*, (app. No. 12060/12 (ECtHR, Judgment of 12 April 2016); *M.K.N. v. Sweden*, App. No. 72413/10 (ECtHR, Judgment of 27 June 2013).

<sup>42</sup> *O.M. v. Hungary*, App. No. 9912/15 (ECtHR, Judgment of 5 July 2016).

<sup>43</sup> See, e.g., *E.B. v. France*, App. No. 43546/02 (ECtHR, Judgment of 22 January 2008); *X and Others v. Austria*, App. No. 19010/07 (ECtHR, Judgment of 19 February, 2013); *Vallianatos and Others v. Greece*, App. Nos. 29381/09 and 32684/09 (ECtHR, Judgment of 7 November 2013).

<sup>44</sup> The term “same-sex” is used here as it references the term used by the Court. However, in the work of IOM the term “same-gender” is preferred.

<sup>45</sup> *Dudgeon v. the United Kingdom*, App. No. 7525/76 (ECtHR, Judgment of 22 October 1981).

<sup>46</sup> ECtHR cases relevant to migration discussed in the following section.

<sup>47</sup> *X, Y and Z v. the United Kingdom*, App. No. 21830/93 (ECtHR, Judgment of 22 April 1997).

<sup>48</sup> *B. v. France*, App. No. 13343/87 (ECtHR, Judgment of 25 March 1992).

<sup>49</sup> *L. v. Lithuania*, App. No. 27527/03 (ECtHR, Judgment of 11 September 2007); *Schlumpf v. Switzerland*, App. No. 29002/06 (ECtHR, Judgment of 8 January 2009).

on Human Rights (IACHR), constitutes the main bodies for the promotion and protection of human rights in the Inter-American region. In addition to discrimination based on sex (explicitly mentioned in [Article 1](#)), the IACtHR has stated “that the sexual orientation or gender identity of persons is a category protected by the Convention. Therefore, any regulation, act, or practice considered discriminatory based on a person’s sexual orientation is prohibited.”<sup>50</sup> Some additional rights that have been discussed by the IACtHR and IACHR with respect to people with diverse SOGIESC include [Articles 8\(1\) \(Right to a fair trial\)](#),<sup>51</sup> [25\(1\) \(Right to judicial protection\)](#),<sup>52</sup> [5\(1\) \(Personal integrity\)](#),<sup>53</sup> and [11 \(Right to private and family life\)](#)<sup>54</sup>.

In 2017, the IACtHR published an advisory opinion on *Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples*.<sup>55</sup> This advisory opinion sets out several important States’ obligations under the ACHR, including the obligation to permit transgender individuals to change their name and gender on identity documents,<sup>56</sup> to recognize same-sex<sup>57</sup> marriage,<sup>58</sup> and to ensure the economic rights of those in same-sex relationships.<sup>59</sup> The Court also affirmed that [Article 13 \(Freedom of expression\)](#) includes the right to gender identity and the manifestation of such identity.<sup>60</sup> Since 2011,<sup>61</sup> the Inter-American Human Rights system established a *Rapporteur on the Rights of LGBTI Persons* with a mandate to monitor the “situation of human rights of lesbian, gay, bisexual, trans and intersex persons in the region,” process petitions and relevant cases, and prepare reports and recommendations on legislation, public policy and judicial interpretation on the human rights of these persons.<sup>62</sup>

### III. SPECIFIC PROTECTION NEEDS AND CHALLENGES OF PEOPLE WITH DIVERSE SOGIESC IN THE CONTEXT OF MIGRATION

#### 01 Invisibility and lack of data collection

While this Note highlights some of the challenges that many people with diverse SOGIESC face during the migration process, it is important to recognize that many human rights violations continue to go unreported in

<sup>50</sup> Karen Atala Riffo and Daughters v. Chile, Series C No. 239 (IACtHR, Judgment of February 24, 2012), para. 91. See also IACtHR, Advisory Opinion, Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, OC-24/17, 24 November 2017, at para. 78.

<sup>51</sup> Ibid.

<sup>52</sup> *Homero Flor Freire v. Ecuador*, Case No. 12.743 (IACtHR, Judgment of 31 August 2016).

<sup>53</sup> *Duque v. Colombia*, (IACtHR, Judgment of 26 February 2016)

<sup>54</sup> Karen Atala Riffo and daughters v Chile, *op. cit.*

<sup>55</sup> Advisory Opinion OC-24/17, *op. cit.*

<sup>56</sup> Ibid., para. 116.

<sup>57</sup> The term “same-sex” is used here as it references the term used by the Court. However, in the work of IOM the term “same-gender” is preferred.

<sup>58</sup> Ibid., para. 225.

<sup>59</sup> Ibid., para. 198.

<sup>60</sup> Ibid., para 96.

<sup>61</sup> Between 2011-2014 the mechanism was referred to as a Unit.

<sup>62</sup> OAS, IACtHR, Rapporteurship on the Rights of LGBTIQ+ Persons. Available [here](#) (accessed 26 March 2021).



countries of origin, transit and destination, and that there is often widespread impunity with respect to violence and discrimination against migrants with diverse SOGIESC.<sup>63</sup> One major issue is the lack of data collected by States and non-State actors (including IOM and other stakeholders) on migrants with diverse SOGIESC, including general data such as prevalence and common migration routes, coping mechanism and experiences as well as on discrimination and other human rights concerns relating to migrants with diverse SOGIESC. In some countries and regions, States and non-State actors have recognized that collection and proper management of relevant data is essential in order to adequately address violence and discrimination. However, due to stigmatization in the society of both people with diverse SOGIESC and migrants, crimes and abuses continue to go unreported as there is little or no confidence in the legal and judicial system. Individuals are often reluctant to share information about their diverse SOGIESC as they fear breach of confidentiality.<sup>64</sup> In other regions, due to barriers created by criminalization, pathologization, demonization and other institutional drivers for stigmatization, there are no accurate estimates regarding the populations affected by violence and discrimination based on sexual orientation, gender identity, gender expression or sex characteristics. In some cases where States do collect data, negation can result in data that is unreliable, unsystematic and biased, and used to enact discriminatory laws and policies.<sup>65</sup> When individuals cannot seek access to justice at a national level, it is also difficult to access justice at the regional and international level, thus few cases concerning people with diverse SOGIESC will be heard by the regional or international human rights mechanisms. This has, in particular, been observed with respect to cases relating to rights of intersex people. In addition, when data, including general data, is not collected on migrants with diverse SOGIESC by assisting organizations such as IOM, the assistance and services provided may not be suitable, safe or accessible for this group of beneficiaries.

Similarly, public policies and political action and discourse often either fail to enable meaningful participation of peoples with diverse SOGIESC, or actively hinder participation through stigmatization and use of violence. This is reflected at the local level, where negative portrayals and/or the invisibility of people with diverse sexual orientation, gender identity, gender expression and sex characteristics in educational materials enables exclusion and contributes to feelings of isolation and low self-esteem for students with diverse SOGIESC while fostering discriminatory attitudes amongst peers.<sup>66</sup>

Where data is collected relating to people with diverse SOGIESC, there are several protection risks which need to be considered with respect to the actual collection and management of sensitive information. Firstly, States and other stakeholders, including assisting organizations such as IOM must adopt safeguards surrounding the collection, use and storage of data related to diverse SOGIESC and measures adopted to mitigate the associated risks.<sup>67</sup> States and other stakeholders must also always respect the overriding principle to “Do No Harm” in every action conducive to human rights implementation.<sup>68</sup> Any decision to collect data must be based on an assessment of the risks, which includes the participation of the affected communities, peoples or populations. Moreover, any collection, management and use of data must respect the right to privacy and the principle of confidentiality.<sup>69</sup> One means through which individuals maintain control over their own personal information is

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<sup>63</sup> Inter-American Commission on Human Rights Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas (2018) para. 193.

<sup>64</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, U.N. Doc A/HRC/41/45 (14 May 2019) para. 12.

<sup>65</sup> Ibid., para. 20.

<sup>66</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, U.N. Doc A\_74\_181 (17 July 2019) para. 6.

<sup>67</sup> U.N. Doc A/HRC/41/45, *op. cit.* para 46.

<sup>68</sup> Ibid., paras. 47-48.

<sup>69</sup> Ibid., para. 51.

the process of informed consent, and the choice to limit the use of personal data to lawful purposes or to the purposes consented to when they first disclosed sensitive information.<sup>70</sup>

Several of the human rights bodies have expressed concerns regarding the lack of adequate data collection mechanisms to understand and support the design of effective public policies aimed at combating human rights violations against people with diverse SOGIESC.<sup>71</sup> Moreover, it is recognized in the Yogyakarta +10 Principles that States must compile statistics and research on the extent, causes and effects of violence, discrimination and other harm, and on the effectiveness of measures to prevent, prosecute and provide reparation for such harm on grounds of sexual orientation, gender identity, gender expression and gender characteristics.<sup>72</sup> The IACHR has also stressed the importance of data collection and recognized it as the first step to make rights effective.<sup>73</sup>

## 02 Lack of Proper Individual Documentation

For many migrants, individual documentation – more specifically the lack of proper documentation – can lead to such issues as irregular status, prolonged detention, denied access to services (e.g., health, housing, employment), non-recognition of family units and refusal to register one’s children at birth, to name a few. For migrants with diverse SOGIESC, the absence of proper individual documentation can create additional issues and risks even if the person is not migrating irregularly. For instance, official documentation that does not match a person’s gender expression can lead to discrimination and ill-treatment by border authorities, police officers, social services, or other officials. In such cases, individuals may be denied the right to pass through a border or checkpoint due to their documentation. This treatment may result in a traumatic migration process, lead to unnecessary detention and place the individual at risk of harm. Inconsistent or inaccurate documents may also lead to violence, extortion, exclusion from education or employment, or a lack of access to housing and to other social services. For migrants with diverse SOGIESC in transit, a lack of proper documentation may also preclude them from accessing emergency care, services, and other protection measures.<sup>74</sup>

In relation to documentation for individuals with diverse gender identity or a sex marker that was incorrectly recorded at birth, the Yogyakarta Principles establish that “[e]veryone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics”, and that everyone “has the right to change gendered information in such documents (identity documents including birth certificates) while gendered information is included in them.”<sup>75</sup> States must therefore make available a “quick, transparent, and accessible mechanism that legally recognizes and affirms each person’s self-defined gender identity” with “a multiplicity of gender marker options” and ensure that “immigration status or other status is not used to prevent a change of name, legal sex or gender.”<sup>76</sup>

Regional jurisprudence has also highlighted the importance of documentation that accurately depicts gender to an individual’s well-being and daily life. For example, in the landmark case of *B. v. France*, the ECtHR held for the first time that there had been a violation of **Article 8 (Right to respect for family and private life)** of the

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<sup>70</sup> Ibid.

<sup>71</sup> See e.g. Inter-American Commission on Human Rights *Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas* (2018) pp. 34-40; U.N. Doc A/HRC/41/45, *op. cit.*

<sup>72</sup> Principle 30 (Right to State protection).

<sup>73</sup> *Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas, op.cit.*

<sup>74</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, U.N. Doc. A/HRC/38/43 (11 May 2018), para 10.

<sup>75</sup> Yogyakarta Principles, Principle 31.

<sup>76</sup> Ibid.



ECtHR when France did not amend a transgender woman's civil status register, placing her in "a daily situation which, taken as a whole, was not compatible with the respect due to her private life."<sup>77</sup> The IACtHR's 2017 advisory opinion also affirmed that individuals should be able to legally change their name, gender marker, and photo on identity documents and corresponding registries on the basis of self-determined gender-identity in a manner that permits individuals to utilize these documents to exercise their rights.<sup>78</sup>

Some countries that allow gender to be legally changed still require medicalized and expensive processes to change gender markers on documents. With respect to pre-conditions such as mandatory medical interventions, the CESCR has further clarified that any laws and policies that indirectly perpetuate coercive medical practices, including incentive or quota-based contraceptive policies and hormonal therapy, as well as surgery or sterilization requirements for legal recognition of one's gender identity, constitute additional violations of the obligation to respect the right to sexual and reproductive health.<sup>79</sup> Furthermore, the ECtHR has reaffirmed in several cases that compulsory requirement of sterility in order to have access to medical gender confirmation treatment, as well as access to legal gender recognition, is a violation of **Article 8** of the ECHR.<sup>80</sup>

### 03 Protection Risks during Detention

Several States have increased the use of detention as part of their migration management in the belief that it controls and deters irregular migration. Detention increases the risk of human rights violations and places a migrant in a situation of vulnerability, particularly if the migrant has diverse SOGIESC. People with diverse SOGIESC face a heightened risk of abuse during detention, especially "increased vulnerability to violence and sexual abuse, subjection to solitary confinement, and lack of appropriate medical treatment and mental health services."<sup>81</sup> As such, States should explore, and resort to, alternatives to migration detention.<sup>82</sup>

Although detention is not advisable as a means to manage migration, in particular for populations in vulnerable situations such as migrants with diverse SOGIESC, if a State ultimately concludes that detention is necessary, then it should implement measures of protection from abuse and discrimination for detainees with diverse SOGIESC.<sup>83</sup> Consultation of migrants with diverse SOGIESC for measures appropriate for their protection, appropriate training of detention staff and other detainees, provision of appropriate health care, welfare services, and contact with their community has been recommended.<sup>84</sup> While not the optimal choice, States could in some case create separate facilities for detainees with diverse SOGIESC from others in detention without segregating them administratively.<sup>85</sup> However, such measure should only be applied in agreement with the detainees concerned, with a clear procedure, and should neither lead to further stigmatization, nor hinder access to services. In lieu of such policies, States should provide alternatives to detention whenever the detention is not necessary,

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<sup>77</sup> ECtHR, *B. v. France*, App. No. 57/1990/248/319 (24 January 1992), para. 63.

<sup>78</sup> State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples, op. cit., para. 121.

<sup>79</sup> CESCR, General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. No. E/C.12/GC/22 (2 July 2009), para. 58.

<sup>80</sup> ECtHR, *Y.Y. v. Turkey*, App. No. 14793/08 (24 August 2016); *A.P., Garçon et Nicot c. France*, Apps. No. 79885/12, 52471/13 and 52596/13 (6 July 2017).

<sup>81</sup> Shana Tabak and Rachel Levitan, *LGBTIQ+ migrants in immigration detention: a global perspective*, 37.1 *Harvard Journal of Law and Gender* (2014), at 16. Available [here](#) (accessed 26 March 2021).

<sup>82</sup> *Ibid.*, at 43.

<sup>83</sup> *Ibid.*, 43-44. See also CEDAW, *Concluding observations on the seventh periodic report of Costa Rica*, U.N. Doc. No. CEDAW/C/CRI/CO/7, para. 38.

<sup>84</sup> *LGBTIQ+ migrants in immigration detention: a global perspective*, op. cit., at 44.

<sup>85</sup> Crosby Burns, Ann Garcia, and Philip E. Wolgin, *Living in Dual Shadows: LGBT Undocumented Immigrants* (March 2013), Center for American Progress. Available [here](#) (accessed 26 March 2021), p. 4.

including for migrants with diverse SOGIESC, and taking in consideration all the circumstances of the person. Usually, in cases where there is no protection risk from the migrant or host community, migrants with diverse SOGIESC will not need any specific alternatives different from those applied to other migrants. However, in cases where protection risks from the migrant and host communities are present, alternatives such as safe, dedicated housing and support from LGBTIQ+-supporting NGOs could be utilized.

It is important to mention that automatic or mandatory detention of all migrants is considered arbitrary and is a violation of international law.<sup>86</sup> Arbitrary detention violates **Article 9(1)** of the ICCPR, which states that all people have the right to not be subjected to arbitrary arrest or detention.<sup>87</sup> The criminalization of irregular migration is not a legitimate objective by the State to justify detention.<sup>88</sup> Detention based on a person's sexual orientation or gender identity is also considered arbitrary detention and is therefore a violation of international law. Yogyakarta **Principle 7** urges States to: take all necessary measures to ensure that sexual orientation or gender identity are never the basis for arrest or detention; take all necessary measures to ensure persons arrested are made aware of the reasons of their arrest, the nature of their charges, and are promptly brought to court; adopt training programs to inform police and other law enforcement personnel of “the arbitrariness of arrest and detention based on a person's sexual orientation or gender identity”; and “maintain accurate and up to date records of all arrests and detentions” as well as ensure oversight of all places of detention mandated to identify arrests potentially motivated by sexual orientation or gender identity.<sup>89</sup> The following are some of the prevalent issues faced by migrants with diverse SOGIESC in detention.

#### i. Risk of Physical and Sexual Abuse While in Detention

People with diverse SOGIESC in detention often experience physical and sexual violence by facility staff or other detainees. In particular, **transgender persons are 15 times more likely to be sexually assaulted than cisgender detention populations.**<sup>90</sup> Transgender women may also be vulnerable to violence because they are often detained with men.<sup>91</sup> Physical and sexual abuse has obvious detrimental impacts on LGBTIQ+ migrants' mental health and can further exacerbate existing emotional scars.<sup>92</sup>

It has been long recognized that physical and sexual abuse can be considered torture,<sup>93</sup> and would therefore be a violation of the international law prohibition against torture codified in various instruments, including the

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<sup>86</sup> IOM, *Global Thematic Paper: Detention and Alternatives to Detention*. Available [here](#) accessed 24 July 2019), 2.

<sup>87</sup> ICCPR *op. cit.*, art. 9(1).

<sup>88</sup> IDC, *Position Paper on LGBTIQ+ in Immigration Detention*, (June 2016). Available [here](#) (accessed 24 July 2019), 19.

<sup>89</sup> Yogyakarta Principles, Principle 7 (“asserting that all persons, regardless of sexual orientation or gender identity, who are being arrested have the right to be informed of the reasons for arrest and the nature of any charges against them, to be brought promptly before a judicial officer and to bring court proceedings to determine the lawfulness of detention, whether or not charged with any offence.”).

<sup>90</sup> Position Paper on LGBTIQ+ in Immigration Detention, *op. cit.*, p. 10.

<sup>91</sup> Shana Tabak and Rachel Levitan, LGBTIQ+ Migrants in immigration detention, *op. cit.* at 47. See also Position Paper on LGBTIQ+ in Immigration, *op. cit.*

<sup>92</sup> LGBTIQ+ Migrants in immigration detention, *op. cit.*, p. 28.

<sup>93</sup> See ESCOR, 48th Sess., *Summary record of the 21st meeting*, U.N. Doc. E/CN.4/1992/SR.21 (Feb. 21, 1992), para. 35 (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 [here](#).

UDHR,<sup>94</sup> ICCPR,<sup>95</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>96</sup> and regional instruments.<sup>97</sup> With respect to detainees with diverse SOGIESC, Yogyakarta **Principle 9 (Right to Treatment with Humanity while in Detention)**, urges States to implement protection measures to prevent potential acts of violence against LGBTIQ+ persons while in detention.<sup>98</sup> Furthermore, when sexual and physical violence towards people with diverse SOGIESC while in detention do take place, these acts should be investigated and sanctioned without delay. For example, the CEDAW has noted that, when acts of physical and sexual abuse do take place, States should promptly investigate all alleged cases of ill-treatment and violence in detention without discrimination towards lesbian and transgender individuals.<sup>99</sup>

## ii. Poor Mental Health Due to Solitary Confinement

Detainees with diverse SOGIESC are often segregated from the community as a “protective” measure, in response to complaints about sexual or physical violence.<sup>100</sup> The placement of people with diverse SOGIESC in indefinite segregation or solitary confinement may be done without any individualized assessment, documented reasons, or access to a review and appeal process.<sup>101</sup> Such segregation is often akin to solitary confinement, leading to negative mental health effects. Solitary confinement is not an appropriate way to manage or ensure the protection of people with diverse SOGIESC and will have a detrimental impact on the mental health of the confined individual, as well as their friends and relatives who cannot contact the individual.<sup>102</sup>

Several of the UN human rights mechanisms have clarified that solitary confinement might constitute torture or inhuman treatment.<sup>103</sup> Furthermore, the ECtHR has established that solitary confinement of people with diverse SOGIESC also violates provisions of ECHR. For example, in the case of *X. v. Turkey*, the ECtHR held that the use of solitary confinement to segregate a gay inmate represented a violation of **Article 3 (Prohibition of torture)** of the ECHR.<sup>104</sup> In this case, an inmate complained about intimidation and harassment because of his sexual orientation by the inmates with whom he shared a collective cell. The inmate requested placement in a cell with other gay inmates, but was instead placed in a solitary cell regularly used for extremely violent inmates, fully excluded from the rest of the prison population. The ECtHR held that segregating detainees with diverse

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<sup>94</sup> UDHR, arts. 1–3, 5, 7.

<sup>95</sup> ICCPR, art. 7.

<sup>96</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, arts. 1–2.

<sup>97</sup> ECHR, art. 3.

<sup>98</sup> Yogyakarta Principles, Principle 9.

<sup>99</sup> CEDAW, Concluding observations on the combined eighth and ninth periodic reports of Guatemala, *op cit.*, para. 45.

<sup>100</sup> *Ibid.*, p. 44.

<sup>101</sup> Communication by several of the Special Procedures of the Human Rights Council regarding the alleged ill-treatment of detainees in the United States on 19 August 2011 available [here](#) (Accessed 26 March 2021).

<sup>102</sup> The UNHCR Detention Guidelines notes in Guideline 9.7 that where the security of LGBTIQ+ asylum-seekers “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.” UNHCR, Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention (2012), p. 39.

<sup>103</sup> See, e.g., CAT, *Concluding observations on the second periodic report of Japan*, U.N. Doc. No. CAT/C/JPN/CO/2, (6–31 May 2013), para. 14; CAT/C/PT/CO/5–6, 2013, para. 12; Human Rights Comm., General Comment 20, Article 7 (Forty-fourth session, 1992), para. 6, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 30, U.N. Doc. HRI/GEN/1/Rev.1 (1994); T. Gómez de Voituret v. Uruguay, Comm’n No. 109/1981, U.N. Doc. A/39/40 (Apr. 10, 1984), paras. 12.2–13; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Reply to Questions Raised by Member States during the Interactive Dialogue at the 66th Session of the UN General Assembly* (Oct. 18, 2011), p. 7. Available [here](#) (accessed 26 March 2021).

<sup>104</sup> *X. v. Turkey*, *op. cit.*, para 62.

SOGIESC violates their human rights if it deprives them of “meaningful access” to detention center services. The court held that by segregating the plaintiff, Turkey had placed him in what amounted to solitary confinement, an unacceptable alternative to the violence he faced within the detention center’s from other detainees.<sup>105</sup>

### iii. Lack of Access to Medical Treatment and Health Services

Detention, even for a short period of time, can have a negative impact on an individual’s physical and mental health. Detention conditions, like “the loss of physical liberty [...], staff abuse, marginalization by other detainees, and lack of access to appropriate medical care, substandard hygiene, combined with the often indefinite nature of immigration detention will also frequently exacerbate existing mental illnesses and conditions.”<sup>106</sup> For people with diverse SOGIESC, trauma-related mental health problems may exist because of the persecution and discrimination experienced over a life-time, based on their sexual orientation, gender identity, gender expression and sex characteristics.<sup>107</sup> Therefore, migrants with diverse SOGIESC – who may have already suffered significant detrimental mental health impacts resulting from experiences of marginalization and discrimination in their countries of origin, transit, and destination – are exposed to a greater risk of mental health issues when detained.<sup>108</sup> Furthermore, because people with diverse SOGIESC generally rely on the LGBTIQ+ communities in transit and destination countries as support networks,<sup>109</sup> disruption of access to such support networks increases risk of mental health issues, such as depression or post-traumatic stress disorder.<sup>110</sup>

Some migrants with diverse SOGIESC, for example transitioning transgender migrants, may also require specialized medical treatment (e.g., hormonal therapy) and are often unable to access such services while detained.<sup>111</sup> Yogyakarta **Principle 9** informs that States should provide all persons in custody with proper health care, including HIV/AIDS, reproductive, and hormonal therapy services, and gender-reassignment treatments where desired, as well as counselling regarding the options available.<sup>112</sup>

### iv. Risk of Family Separation

Studies have suggested that the best practice for detention is to separate detainees based on sex– except in instances where adults and children are in the same family unit.<sup>113</sup> However, same-gender couples or families may not be able to stay together in detention under this exception when detention policies or State laws do not recognize such family units. Separation of the family unit as a result of discrimination based on sexual orientation, gender identity, gender expression and sex characteristics violates the right to respect for private and family life, the principles of equality and non-discrimination and when children are involved, the separation could also violate **Article 9 of the CRC (Non-separation of parents and children)**.

Other challenges may occur when migrants are detained and detention centers do not facilitate partner visitation for people with diverse SOGIESC. In response to this issue, the CEDAW has noted that deprivation of partner visitation for lesbian and transgender inmates is not in line with human rights law and States should ensure

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<sup>105</sup> Antoine Buyse, *Court Condemns Homophobic Treatment in Prisons*, ECHR Blog (October 10, 2012). Available [here](#) (accessed 26 March 2021).

<sup>106</sup> Shana Tabak and Rachel Levitan, *op. cit.*, 49.

<sup>107</sup> *Ibid.*, 41.

<sup>108</sup> *Ibid.*

<sup>109</sup> See, e.g., Sharita Gruberg et al, *Serving LGBTQ Immigrants and Building Welcoming Communities*, American Progress (24 January 2018), para. 16. Available [here](#) (accessed 26 March 2021).

<sup>110</sup> Shana Tabak and Rachel Levitan, *op. cit.*, at 29.

<sup>111</sup> Shana Tabak and Rachel Levitan, *op. cit.*, at p. 3.

<sup>112</sup> Yogyakarta Principles, Principle 9.

<sup>113</sup> UNHCR, (n. 48) 29; IDC (n. 43) 14; Shana Tabak and Rachel Levitan (n. 44) 26.

respect for partner visitation rights without discrimination based on sexual orientation, gender identity, gender expression and sex characteristics.<sup>114</sup>

## 04 Protection of Family Life

According to various international human rights instruments, individuals have the right to family life, which includes the right to have their established family life respected, maintained, and free from arbitrary or unlawful interference.<sup>115</sup> This right, in the context of migration, is relevant in situations of family reunification and expulsion. Both family re-unification and family unity against expulsion gives effect to preserving family unity and therefore preserve the right to family life. However, because countries of destination or transit may not legally recognize same-gender unions or different gender identities, people with diverse SOGIESC may suffer exclusion from recognition of this right. It also precludes them from regularizing their migratory status through family reunification.<sup>116</sup>

While the definition of “family” remains contested by States, the right to family life under international law is granted to all individuals regardless of the sexual orientation or gender identity of the family members. Regional human rights courts have given a wide interpretation to the term “family,” which is inclusive of same-gender couples. For example, the IACtHR states that the definition of family cannot be narrowly defined and does not apply to a specific family model.<sup>117</sup> Rather, the Court requires that States recognize and protect family ties.<sup>118</sup> The IACtHR also affirmed that same-sex couples should enjoy all family rights without discrimination, including marriage.<sup>119</sup> Particularly, it noted that the divide between same-gender and different-gender couples is artificial, as families include those with diverse gender identities and sexual orientations. In *Atala Riffo and Daughters v. Chile*, the IACtHR held that the ACHR bars discrimination based on sexual orientation when a lesbian mother claimed that she had been discriminated on the basis of sexual orientation in her children’s custody case.<sup>120</sup> The Court also referred to the recognition of the diversity of families that may exist, including those made up of same-sex [read same-gender] couples.<sup>121</sup> Moreover, the Yogyakarta Principles (Principle 24) ask States to “ensure that laws and policies recognize the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits, employment, and immigration.”

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<sup>114</sup> See e.g., CEDAW, Concluding observations on the combined eighth and ninth periodic reports of Guatemala, *op. cit.*, para. 45.

<sup>115</sup> UNGA (no. 4) art. 16; ICCPR (no. 5) art. 23; European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14 (no. 18) art. 8. See also Yogyakarta Principles, Principle 24 (declaring that all persons, regardless of sexual orientation or gender identity, have the right to found a family. This Principle understands the complex and diverse nature of families, particularly in the LGBTIQ+ community; thus, “no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members”).

<sup>116</sup> IOM, Module for Awareness-Raising and Training of Public Institutions, Social Organizations, and LGBTIQ+ Collectives and Activists in the Mesoamerican Region (2016). p. 39.

<sup>117</sup> IACtHR, Advisory Opinion OC-24/17, *op. cit.*, para. 174.

<sup>118</sup> *Ibid.*, para. 191.

<sup>119</sup> *Ibid.*, para. 192.

<sup>120</sup> IACtHR, *Atala Riffo and Daughters v Chile*, H.R. 83-84 (24 February 2012) (Merits, Reparations and Costs, Judgment), para. 85. See also American Convention on Human Rights 1969.

<sup>121</sup> *Atala Riffo and Daughters v. Chile*, *op. cit.*, para. 6.

## i. Lack of Access to Family Reunification

The CCPR has held that, although States are not required to allow same-sex<sup>122</sup> couples to marry, they are obliged, under the ICCPR, to protect individuals from discrimination on the basis of sexual orientation, which extends to ensuring that unmarried same-sex couples are treated in the same way and entitled to the same benefits as unmarried different-sex couples.<sup>123</sup> The same obligations have been affirmed by regional human rights conventions and bodies on the issue of family re-unification. For example, in *Pajic v. Croatia*, the ECtHR interpreted **Article 8 (Right to respect for private and family life)** of the ECHR to include same-sex couples. There, the Court held that Croatia discriminated on the basis of sexual orientation when it denied a woman from Bosnia-Herzegovina a residence permit, which she had requested in order to be reunited with her Croatian partner.<sup>124</sup> In refusing the permit, the ECtHR held that the State had violated **Article 14 (Right to non-discrimination)** as well as **Article 8** of the ECHR. Similarly, in *Taddeucci and McCall v. Italy*, the ECtHR held that Italy, by refusing a same-sex couple's residence permit on family grounds, had discriminated on the ground of sexual orientation and the couple's rights per **Article 8** of the ECHR.<sup>125</sup> By doing so, Italy had prevented the family from living together. In *Orlandi and Others v. Italy*, the ECtHR also held that Italy had violated **Article 8** of the ECHR when it failed to register or recognize the union of same-sex couples who had their marriages contracted abroad.<sup>126</sup> On their return to Italy, the applicants were refused registration of their marriage as such or as an equivalent civil union, thus depriving them of legal protections or other rights.

The ECtHR has also clarified that the term "spouse" is applicable for same-sex couples seeking to obtain legal residence in a Member State as a result of marriage.<sup>127</sup> In the case of *Coman and Others v. Romania*, the Court held that:

"Article 21(1) of the Treaty on the Functioning of the European Union is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same-sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38."<sup>128</sup>

## ii. Protection of the Family Unit during Expulsion

With respect to families with children, **Article 9** of the CRC provides the greatest protection for families threatened by separation through deportation.<sup>129</sup> **Article 8** of the ECHR also provides protection from deportation or

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<sup>122</sup> The term "same-sex" is used here as it references the term used by the human rights mechanisms. However, in the work of IOM the term "same-gender" is preferred.

<sup>123</sup> *Young v. Australia*, *op. cit.*, para. 10.4.

<sup>124</sup> *Pajic v. Croatia*, App. No. 68453/13 (ECtHR, Judgment of 23 February 2016), paras. 85-86.

<sup>125</sup> *Taddeucci and McCall v. Italy*, App. No. 51362/09 (ECtHR, Judgment of 30 June 2016), para. 95-96.

<sup>126</sup> *Orlandi and Others v. Italy*, App. No. 26431/12; 26742/12; 44057/12 and 60088/12 (ECtHR, Judgment of 14 December 2017), paras. 209, 211, 220.

<sup>127</sup> *Coman and Other v. Romania*, C-673/16, (Judgment of 11 January 2018), para. 34.

<sup>128</sup> *Ibid.*, para. 58.2.

<sup>129</sup> CRC art. 9; ECtHR, Guide on Article 8 of the European Convention on Human Rights (30 April 2018). Available [here](#) (accessed 26 March 2021), paras. 293, 295. See also Kate Jastram and Kathleen Newland, *Family Unity and Refugee Protection*, in Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law* (Cambridge University Press, 2003), p. 575.



expulsion in certain cases.<sup>130</sup> In *Jeunesse v. the Netherlands*, the ECtHR held that the best interests of children should be considered in the balancing exercise regarding a parent's expulsion, including the hardship of returning to the parent's country of origin.<sup>131</sup> Nevertheless, families with members with diverse SOGIESC may face challenges in enforcing their rights to maintain family unity against expulsion if the State in which they reside does not recognize them as a family unit.

## 05 Need for International Protection (Principle of *Non-Refoulement*)

The principle of non-refoulement forms an essential protection under international human rights, refugee, humanitarian and customary law. It prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations.<sup>132</sup> The basis of *non-refoulement* is set out in the 1951 Refugee Convention, but the expansion of international human rights law has broadened the scope of this obligation.<sup>133</sup> States are required to protect non-nationals from being returned to countries in which their life is threatened or where they risk being subjected to torture or inhuman and degrading treatments, regardless of their immigration status.<sup>134</sup>

Many migrants with diverse SOGIESC, including asylum applicants, come from countries of origin where same-gender relationships are formally criminalized or through other legal means considered unlawful. When prosecution, harsh punishments (like the death penalty), corporal punishment, as well as harassment and violence from law enforcement is imposed by the migrants' country of origin, or when the country of origin does not, or cannot, protect the applicant from a real risk of serious harm, the receiving State must comply with their non-refoulement obligation.<sup>135</sup> There will also be situations where people with diverse SOGIESC are not targeted through criminal law but there is widespread disregard of their human rights. For example, students or students with parents with diverse SOGIESC may be harassed at school, or people with diverse SOGIESC are forced to conceal their sexual orientation, gender identity and sex characteristics to not lose their employment or to be able to access housing.<sup>136</sup> While some of these situations will not necessarily amount to persecution under the Refugee Convention or trigger a case of refoulement, it will often be a factor for why migrants with diverse SOGIESC leave their country of origin.

### i. Risk of Discrimination and Abuse during the Asylum Process

The asylum process for people with diverse SOGIESC can be exceedingly difficult. Firstly, stigma and discrimination may prevent asylum-seekers from disclosing their intersex status, sexual orientation and/or gender

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<sup>130</sup> Kate Jastram and Kathleen Newland, *op. cit.*, 575; OHCHR, Family Reunification (November 2005). Available [here](#) (accessed 26 March 2021), p. 12.

<sup>131</sup> *Jeunesse v. the Netherlands*, App. No. 12738/10 (ECtHR, Judgment of 3 October 2014), paras. 117-119.

<sup>132</sup> IOM, *Information Note on the Principle of Non-Refoulement* (April 2014), 2, available [here](#) (accessed 19 September 2019).

<sup>133</sup> Convention Relating to the Status of Refugees 1951, art. 33.

<sup>134</sup> IOM Information Note on the Principle of Non-Refoulement, *op. cit.*, 2.

<sup>135</sup> UNHCR, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/GIP/12/01 (23 October 2012), para 25. See, e.g., Committee against Torture, *J.K. v Canada*, CAT/C/56/D/562/2013 (finding that the applicant's involvement with LGBTIQ+ oriented organizations and the applicant's risk of being detained and subsequently subject to physical or psychological abuse was sufficient to find that a State had a duty to not return the applicant).

<sup>136</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, U.N doc. A/74/181, (17 July 2019).

identity, which may raise particular obstacles for those seeking asylum, particularly if the persecution against them was based on their diverse SOGIESC in the first place.<sup>137</sup> The process is also made difficult by a lack of awareness of specific LGBTIQ+ risks and challenges among government officials—which is likely exacerbated by a lack of data on particular groups of asylum-seekers, such as intersex persons.<sup>138</sup> In addition to the lack of data, specific guidelines for the needs of asylum-seekers with diverse SOGIESC, including specific healthcare needs, do not exist and it has been noted that most asylum officers have bias and prejudice against asylum-seekers with diverse SOGIESC.<sup>139</sup> In order to properly evaluate asylum claims, the competent authorities must be trained on SOGIESC terminology, risks to people with diverse SOGIESC around the world, and the application of human rights law including the Yogyakarta Principles. Furthermore, the Yogyakarta Principles explicitly advocate for an asylum process that ensures that gender identity and sexual orientation are accepted grounds for recognition of refugee status and asylum and that no policy or practice discrimination exists against applicants on those bases.<sup>140</sup> Moreover, sensitive personal data (regarding, for example, the identity of the asylum seeker as well as their sexual orientation or gender identity) should not be shared with authorities from countries of origin in order to protect the life, security and privacy of the persons concerned and their families.<sup>141</sup>

While some progress has been made, States continue to use methods contrary to human rights law to verify the basis for an applicant's claim related to their diverse SOGIESC – often raising concerns about the similarly controversial reliance on credibility assessments. For example, the European Court of Justice (ECJ) has clarified that questions by authorities relating to the details of an applicant's sexual practices are contrary to the respect for private and family life enshrined in the EU Charter on Fundamental Rights and that the submission of tests or evidence to demonstrate homosexuality have no probative value and would infringe Article 1 (human dignity) of the said Charter.<sup>142</sup> Similarly the case of *F v. Bevándorlási és Állampolgársági Hivatal* is just one example of how the ECJ have tried to place limits on the methods for verifying a person's sexual orientation or gender identity, while also attempting to provide State parties with the means to question the factual assertions of applicants. In this case, the Court reaffirmed the commonly understood notion **that sexual orientation can prove someone's membership to a particular social group, whether the person actually holds the identity linking them to said group, or whether that identity is imputed on them by the perpetrator of harm.**<sup>143</sup> On the issue of using psychological expert reports to verify an applicant's claim regarding said identities, the Court held that the use of the particular personality tests at issue in the case were violative of the applicant's right to respect of their private life.<sup>144</sup> However, the Court did not rule out the possibility that some type of expert report could be used if:

“[T]he procedures for such a report are consistent with the fundamental rights guaranteed by the Charter, [if] that authority and those courts or tribunals do not base their decision solely on the

<sup>137</sup> Ibid. para 55.

<sup>138</sup> FRA, “Current Migration Situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers,” March 2017, p 2 (stating that “virtually no information could be collected on intersex asylum seekers”).

<sup>139</sup> Ibid. p 2.

<sup>140</sup> Yogyakarta Principles, Principle 23.

<sup>141</sup> A/HRC/38/41, *op. cit.* para. 36.

<sup>142</sup> Joined cases *A, B and C v Staatssecretaris van Veiligheid en Justitie* C-148/13 to C-150/13 (Court of Justice of the European Union) (2 December 2014) paras. 64-65.

<sup>143</sup> *F v Bevándorlási és Állampolgársági Hivatal* (Office for Immigration and Citizenship, Hungary), C-473/16 (Court of Justice of the European Union) (Judgement on 25 January 2018), paras. 30-31.

<sup>144</sup> Ibid., para. 71.



conclusions of the expert's report and [if] they are not bound by those conclusions when assessing the applicant's statements relating to his sexual orientation."<sup>145</sup>

While the Court placed limits on the use of such reports, it maintained that they "may prove useful for the assessment of the facts and circumstances and may be prepared without prejudicing the fundamental rights of that applicant."<sup>146</sup>

In sum, when courts or other competent authorities use intrusive, unproven, and disproportionate examinations, whether physical or psychological, in an attempt to determine an applicant's SOGIESC, they run the risk of subjecting the applicant to further harm as well as refouling a person who may not "pass" these tailored credibility assessments, but still faces a risk of serious harm if returned.

Another issue arises when migrants with diverse SOGIESC may have hidden their sex characteristics, sexual orientation or gender identity in their country of origin to avoid violence and discrimination. States should not rely on this concealment to justify the return of a migrant to a place where they may face violence or discrimination as a result of their identity. Courts in various jurisdictions have held that asylum-seekers cannot be refoiled because they can change or conceal their identity to avoid persecution. For example, in *Minister voor Immigratie en Asiel v. X, Y, and Z*, the ECJ held that "requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it. Therefore, an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution."<sup>147</sup>

CEDAW, in its General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, recommends that States should:

"[I]nterpret the definition of a refugee in the 1951 Convention relating to the Status of Refugees in line with obligations of non-discrimination and equality; fully integrate a gender-sensitive approach while interpreting all legally recognized grounds; classify gender-related claims under the ground of membership of a particular social group, where necessary; and consider adding sex and/or gender, as well as the reason of being lesbian, bisexual or transgender, and other status to the list of grounds for refugee status in their national asylum legislation."<sup>148</sup>

CEDAW urges States to consider all aspects of an asylum claim as they pertain to and intersect with discrimination based on gender identity, sex, sexuality, race, ethnicity, health, class, caste, religion, and nationality.<sup>149</sup> Just as treating the claims of women through the lens of the male experience may "impede a comprehensive determination of their claims,"<sup>150</sup> so too does treating the claims of all applications, regardless of their gender identity or sexual orientation, through the lens of the cisgender and heterosexual experience.

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<sup>145</sup> Ibid., para. 46.

<sup>146</sup> Ibid., para. 37.

<sup>147</sup> *X (C-199/12), Y (C-200/12) and Z (C-201/12) v. Minister voor Immigratie en Asiel* (Court of Justice of the European Union) (Judgment of 7 November 2013), paras. 70-71.

<sup>148</sup> CEDAW General Recommendation No. 32 (2014), para. 38.

<sup>149</sup> Ibid., para. 6.

<sup>150</sup> Ibid., para. 16.

## ii. Risks in the Country of Asylum

Even when asylum-seekers with diverse SOGIESC have left their country of origin to seek international protection, many countries of initial asylum have strict laws and social norms targeting LGBTIQ+ individuals. This leads to a lack of access to appropriate refugee status determination procedures and necessary services. In addition, migrants with diverse SOGIESC frequently face violence in their host countries, including confinement, harassment and physical and psychological abuse.<sup>151</sup> The risk of violence and abuse often emanates from private individuals in the host community or by other migrants. There have also been several incidents reported concerning torture of asylum-seekers and refugees with diverse SOGIESC by State officials such as police officers and detention staff as well the use of arbitrary and unlawful imprisonment of in deplorable conditions.<sup>152</sup>

Protection of asylum-seekers and refugees with diverse SOGIESC require a multi-faceted response to risks in the host community.<sup>153</sup> States should consult and collaborate with refugee and asylum-seekers with diverse SOGIESC, relevant civil society organizations and other agencies to implement safety mechanisms that best address their needs and ensure reduction of risk in the host communities. One example of an approach that may in some circumstances address these risks is the “scattered housing” approach, in which accommodation options are provided for asylum-seekers and refugees with diverse SOGIESC separate from where other refugee and asylum-seeker populations live.<sup>154</sup> Scattered housing also implies that asylum-seekers and refugees with diverse SOGIESC are not all grouped together, apart from other refugee communities, but rather that they are scattered around in small clusters. Another approach that may address these risks in some circumstances is local integration, which provides safe housing with other people with diverse SOGIESC in the host community to foster relationships of understanding between the local residents and the migrants.<sup>155</sup> If no measure in the host community is feasible, leaving the individual still at risk, an expedited resettlement to a third country should be considered.<sup>156</sup>

## 06 Challenges in Accessing Economic, Social and Cultural Rights

Economic, social and cultural (ESC) rights are human rights concerning the basic social and economic conditions needed to live a life of dignity and freedom, relating to work and workers' rights, social security, health, education, food, water, housing, and healthy environment. Although the ICECSR applies to all people within a State's jurisdiction, in practice, migrants, and particularly migrants in irregular situations, face many challenges when trying to access these rights. These challenges are often exacerbated for migrants with diverse SOGIESC due to factors such as a lack of awareness on the part of service providers or discrimination in the host community. The following sections outline the common challenges and the international standards surrounding some of the key ESC rights, namely, the right to health, labour rights,<sup>157</sup> and the right to adequate standard of living.

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<sup>151</sup> Human Rights First, *The Road to Safety: Strengthening Protection for LGBTIQ+ Refugees in Uganda and Kenya*, available [here](#) (accessed 26 March 2021).

<sup>152</sup> Communication by several of the Special Procedures of the Human Rights Council regarding the alleged ill-treatment of refugees in Kenya on 21 September 2018, available [here](#) (accessed 26 March 2021).

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Claudia Torrisi, *The double stigma of LGBTIQ+ asylum seekers*, Open Migration (31 March 2017). Available [here](#) (accessed 26 March 2021).

<sup>156</sup> For more information see UNHCR, *Resettlement Assessment Tool: Lesbian, Gay, Bisexual, Transgender and Intersex Refugees* (April 2013), available [here](#) (accessed 26 March 2021), p. 13.

<sup>157</sup> This note does not look at the standards issued by the International Labour Organization.

## i. Right to Health

The right to enjoyment of highest attainable standard of health is provided by several of the human rights instruments including the ICESCR, CRC, CEDAW and ICRMW. As per the CESCR, “the right to health contains both freedoms and entitlements. The freedoms include the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.”<sup>158</sup>

As an example, children with intersex traits may be subjected to surgeries, hormonal treatments and other procedures in an attempt to forcibly change their appearance to align with societal expectations about male and female bodies. Surgery and other treatments carried out on children by definition cannot be premised upon informed consent. In the vast majority of cases, there is not a medical need for such interventions. Surgery is typically irreversible and can cause a wide range of severe, negative physical and psychological health effects, as well as result in sterilization. Parents of intersex children often face pressure to agree to such surgeries or treatments without being informed of alternatives or about the potential negative consequences. In a study carried out by EU’s Fundamental Rights Agency - 62 percent of intersex respondents did not provide – and were not asked for – their or their parents’ consent before undergoing surgical intervention to modify their sex characteristics.<sup>159</sup> The rationale is frequently based on social prejudice, stigma associated with intersex bodies and administrative requirements to assign sex at the moment of birth registration. The UN considers surgery and other unnecessary treatments on intersex individuals to be a fundamental human rights violation. In addition to intersex advocacy organizations, a number of other bodies have called for an end to the practice of unnecessary surgery and treatment, including the Committee on the Rights of the Child, the Committee Against Torture and the special procedures mandate holders on the right to health and on torture.<sup>160</sup> Both intersex children and adults may struggle to get dignified and appropriate health care addressing their full range of needs.

The right to health also includes entitlements such as the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.”<sup>161</sup> Migrants with diverse SOGIESC may experience barriers to emergency or primary healthcare because of homophobia and transphobia, as well as ignorance about intersex individuals, in society.<sup>162</sup> Access to the right to health is particularly challenging in States where diverse SOGIESC is explicitly criminalized, health policies discriminatory (in law or in fact), and where discriminatory attitudes among healthcare providers is condoned.<sup>163</sup> The effect of such discrimination have reportedly lead to mental health repercussions and self-violence.<sup>164</sup>

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<sup>158</sup> Op. cit. CESCR General Comment No. 14, The right to the highest attainable standard of health, para. 8.

<sup>159</sup> FRA “A long way to go for LGBTI equality” (2020) p. 51.

<sup>160</sup> See for example CAT Concluding Observations on the seventh periodic report of France, CAT/C/FRA/CO/7, (4 May 2016), paras 34-35; CRC Concluding observations on the combined second to fourth periodic reports of Switzerland (CRC/C/CHE/CO/2-4) paras. 42-43.

<sup>161</sup> Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2000/4 (28 December 1999), para. 3.

<sup>162</sup> WHO, Prevention and Treatment of HIV and Other Sexually Transmitted Infections Among Men Who Have Sex With Men and Transgender People (2011), p. 10.

<sup>163</sup> HRC (no. 37), *op. cit.*, 14.

<sup>164</sup> *Ibid.*

With respect to secondary health care, these services are usually even more difficult to access, particularly for migrants in an irregular situation. Transgender migrants often face grave struggles when trying to access hormonal therapy and other medical services in a host country.<sup>165</sup> For individuals who have started their hormonal therapy in the country of origin (or in another country), the interruption of treatment in such cases can have severe consequences and lead to hazardous self-medication.<sup>166</sup> Furthermore, migrants with diverse SOGIESC may seek professional mental health help for many reasons, including but not limited to, trauma, substance and drug abuse, domestic violence, sexual abuse, hate crimes, and coming out; nevertheless, specialized mental health care is often difficult to access.<sup>167</sup>

**Article 12(1)** of the ICESCR states that “the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,” including migrants with diverse SOGIESC.<sup>168</sup>

Moreover, the CESCR has recognized that people with diverse SOGIESC experience multiple and intersecting forms of discrimination with respect to sexual and reproductive health.<sup>169</sup> Importantly, the CESCR has stated all persons, regardless of gender identity or sexual orientation, are entitled to the same legal protection and access to sexual and reproductive health services<sup>170</sup> and that a State is in violation of the right to sexual and reproductive health when it fails to take preventative measures to:

“[P]rohibit and take measures to prevent all forms of violence and coercion committed by private individuals and entities, including domestic violence, rape (including marital rape), sexual assault, abuse and harassment, including during conflict, post-conflict and transition situations; violence targeting lesbian, gay, bisexual, transgender and intersex persons(...), forced sterilization, forced (...); and medically unnecessary, irreversible and involuntary surgery and treatment performed on intersex infants or children.”<sup>171</sup>

Migrant workers with diverse SOGIESC in an irregular situation may also face heightened vulnerabilities, as they are particularly exposed to “health-impairing or life-threatening working conditions. They are more likely to work in sectors such as construction and domestic work, which have a higher incidence of workplace accidents, and are more vulnerable to exploitative working conditions and precarious housing, which in turn undermine their physical and psychological well-being.”<sup>172</sup> To access healthcare, migrants with diverse SOGIESC in an irregular situation may resort to high-risk strategies that put their lives at stake. For instance, an undocumented migrant may use another individual’s documents to access healthcare, leading to life-altering complications in

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<sup>165</sup> FRA, “Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers,” March 2017, *op.cit.*

<sup>166</sup> *Ibid.*

<sup>167</sup> American Center for Progress. “Serving LGBTQ Immigrants and Building Welcoming Communities.” (24 January 2018) available [here](#) (accessed 26 March 2021)

<sup>168</sup> ICESCR, Art. 3(2).

<sup>169</sup> CESCR, General Comment No. 20 (2000) on Non-discrimination in economic, social and cultural Rights E/C.12/GC/22, (2 July 2009), para. 2.

<sup>170</sup> CESCR, General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, para. 59.

<sup>171</sup> *Ibid.*, para. 59.

<sup>172</sup> European Union Agency for Fundamental Rights, *Migrants in an Irregular Situation: access to healthcare in 10 European Union Member States* (October 2011), p. 3.

treatment when the information does not reflect the migrant's personal health background. Migrants may experience the same stigma felt by migrants and the LGBTIQ+ population in general, with the added vulnerability of their irregular legal status.

## ii. Labour Rights

Labour rights are protected by several of the human rights instruments as well as by the conventions issued by the International Labour Organization (ILO). For the purpose of this note, labour rights include: **the right to work (Article 6 ICESCR); the right of everyone to the enjoyment of just and favourable conditions of work (Article 7 ICESCR)** as well as other relevant rights surrounding labour such as right to join a trade union, social security, etc. The CESCR has clarified that States have to take steps to ensure that no one is discriminated against with respect to their labour rights including on the grounds of sexual orientation and gender identity. In their General Comment 20 on Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) the CESCR stated that "States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace."<sup>173</sup>

As migrants with diverse SOGIESC may face a heightened risk of harassment, CESCR's General Comment No. 23 states that legislation, such as anti-discrimination laws, the penal code and labour legislation, should define harassment broadly, with explicit reference to sexual and other forms of harassment, such as on the basis of sex, disability, race, sexual orientation, gender identity and intersex status.<sup>174</sup>

Migrant workers are also particularly vulnerable to exploitation, long working hours, unfair wages and dangerous and unhealthy working environments. With respect to trafficking and exploitation, the Yogyakarta Principles (Principle 11) therefore ask States to adopt measures designed to prevent trafficking, which address the factors that increase vulnerability, including various forms of inequality and discrimination on the grounds of actual or perceived sexual orientation or gender identity, or the expression of these or other identities. Further, the CMW and the CRC have recognized that migrant children with diverse SOGIESC "face gender-specific risks and vulnerabilities which should be identified and specifically addressed [...] Additional measures should be taken to address the particular vulnerability of [children], including those who might have a disability, as well as children who are [LGBTIQ+], to trafficking for the purposes of sexual exploitation and abuse."<sup>175</sup> Furthermore, "initiatives should be taken to prepare girls and transgender children to participate actively, effectively and equally with boys at all levels of social, economic, and political and cultural leadership."<sup>176</sup>

## iii. Right to Adequate Standard of Living

As per Article 11 of the ICESCR, the right to an adequate standard of living entails the right to adequate food, clothing and housing, and to the continuous improvement of living conditions. Moreover, the Yogyakarta Principles (Principle 14) provides that States shall take all necessary legislative, administrative and other measures

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<sup>173</sup> CESCR, E/C.12/GC/20, *op. cit.*, para. 32.

<sup>174</sup> CESCR, UN Doc. E/C.12/GC/23 *op. cit.*, para. 48.

<sup>175</sup> CMW and CRC, General Comment No. 3, *op. cit.*, para. 42.

<sup>176</sup> *Ibid.*, para. 39.

to ensure equal access, without discrimination on the basis of sexual orientation, gender identity, gender expression or sex characteristics, to adequate food, safe drinking water, adequate sanitation and clothing.

Access to services supporting an adequate standard of living for people with diverse SOGIESC during migration and displacement is often exceedingly difficult. For example, migrants with diverse SOGIESC may face harassment and discrimination by service providers, including governmental entities, assisting organizations (including by staff), and the host community. To avoid this, and as recognized by the *Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity* in his report, many asylum-seekers with diverse SOGIESC, as a strategy for survival, often conceal their identities, not only to escape harassment and abuse but also to access food, livelihood provisions and shelter during displacement.<sup>177</sup> The concealing of identity can also make it difficult for aid providers (including IOM staff) to provide adequate support, including in the context of internal displacement. Moreover, the facilities put in place to assist migrants, including during an emergency or displacement, may not be suited for the needs of people with diverse SOGIESC or may be discriminatory, which makes the assessment of individual protection needs in countries of transit and destination and the provision of adequate shelter and sanitation facilities, as well as access to permanent housing, particularly important.<sup>178</sup>

Moreover, migrants with diverse SOGIESC may face ‘hidden homelessness,’ meaning that they stay for short periods in temporary housing – such as living with a friend – but ultimately face homelessness.<sup>179</sup> This is further exacerbated by the fact that many of the existing shelters may turn away people with diverse SOGIESC, and very few countries have shelters supporting the homeless individuals with diverse SOGIESC specifically.<sup>180</sup> Additionally, migrants with diverse SOGIESC may face blackmail when seeking housing arrangements.<sup>181</sup> Access to housing becomes increasingly difficult as many migrants have limited financial resources compounded with a lack of access to information.<sup>182</sup> The CESCR has also recognized that actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of *inter alia* sexual orientation.<sup>183</sup> States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.<sup>184</sup>

## FOR MORE INFORMATION

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<sup>177</sup> A/74/181 *op. cit.*, para. 53.

<sup>178</sup> *Ibid.*

<sup>179</sup> LGBT Asylum Support Task Force, “The case of insecure housing and homelessness among LGBT asylum seekers in the United States,” (2015).

<sup>180</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, U.N. Doc A/74/181 (17 July 2019), para. 16.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*

<sup>183</sup> E/C.12/GC/20, *op. cit.*, para. 11.

<sup>184</sup> *Ibid.*