

Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence

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Abstract

This article draws attention to the situation of LGBT persons during armed conflict. Subjected to violence and discrimination outside the context of armed conflict, the latter aggravates their vulnerability and exposure to various abuses. Despite important progress made with respect to their protection under human rights law, a similar effort is largely absent from the international humanitarian law discourse. This article accordingly highlights some of the norms and challenges pertaining to the protection of LGBT persons in time of war.

Keywords: international humanitarian law, LGBT, sexual orientation, gender identity, armed conflict, protection, discrimination, *non-refoulement*, sexual violence.

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Introduction

The effects of armed conflict on lesbian, gay, bisexual and transgender (LGBT) persons¹ have made headlines in recent years, as human rights bodies, civil society and the media are increasingly documenting these effects in various conflicts around the world.

Looking at the accumulating reports, it is evident that LGBT individuals are exposed to violence and discrimination during peacetime and in situations of violence which do not amount to an armed conflict.² When it comes to circumstances of armed conflict, LGBT persons, who are often among the least protected of all groups,³ face additional perils created by the chaotic environment and breakdown of law and order. For example, the reality of LGBT Iraqis caught up in the conflict between the so-called Islamic State of Iraq and the Levant (ISIL) and pro-government forces has been described as follows:

While the conflict in Iraq has placed hundreds of thousands of Iraqis at risk of serious human rights violations, LGBT Iraqis face unique threats to their safety. In addition, escape to previously safer areas, such as Iraqi Kurdistan, has been curtailed by the conflict. Unlike other groups, such as women or ethnic and religious minorities, LGBT people have little communal safety or protection from family, tribal or community members. Once exposed, family and community members, along with the authorities, are often complicit in abuses against LGBT individuals.⁴

While it is clear that LGBT persons suffer serious humanitarian consequences as a result of armed conflicts, similar initiatives to those promoted under international human rights law (IHRL) with a view to improving their protection are quite rare

- 1 The practice reviewed in this article concerns the treatment of LGBT persons. The term “sexual orientation” refers to a person’s physical and emotional attraction towards others, while “gender identity” concerns a person’s self-perceived identity, as well as its expression, which may be different from the sex assigned at birth: see United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR), *Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, UN Doc. A/HRC/72/172, 19 July 2017, para. 2. For further explanation of key terms and concepts, see OHCHR, *Living Free and Equal*, New York and Geneva, 2016, pp. 18–19, available at: www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf (all internet references were accessed in March 2019).
- 2 See OHCHR, “Azerbaijan: UN Rights Experts Alarmed by Reports of Persecution of People Perceived to be Gay or Trans”, 13 October 2017, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22230&LangID=E; Human Rights First, “Raids in Belarus, Death in Chechnya Continue Alarming Assault on LGBT Community”, 24 October 2017, available at: <https://www.humanrightsfirst.org/press-release/raids-belarus-death-chechnya-continue-alarming-assault-lgbt-community>; Human Rights Watch (HRW), “Egypt: Mass Arrests Amid LGBT Media Blackout”, 6 October 2017, available at: www.hrw.org/news/2017/10/06/egypt-mass-arrests-amid-lgbt-media-blackout; Georgetown Law Human Rights Institute, *Uniformed Injustice: State Violence Against LGBT People in El Salvador*, Washington, DC, 21 April 2017, available at: www.law.georgetown.edu/human-rights-institute/our-work/fact-finding-project/uniformed-injustice/; Owen Bowcott, “Uganda Anti-Gay Law Led to Tenfold Rise in Attacks on LGBTI People, Report Says”, *The Guardian*, 12 May 2014.
- 3 Haeyoun Park and Iaryna Mykhyalshyn, “LGBT People Are More Likely to Be Targets of Hate Crimes than Any Other Minority Group”, *The New York Times*, 16 June 2016, available at: www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html.
- 4 Outright Action International, *Exposing Persecution of LGBT Individuals in Iraq*, 19 November 2014, available at: www.outrightinternational.org/content/exposing-persecution-lgbt-individuals-iraq.

in the context of international humanitarian law (IHL). It is therefore important to elaborate on the exact manner in which IHL applies to and protects LGBT people.

This article begins with a description of some of the humanitarian hardships experienced by LGBT communities in times of armed conflict. As both IHL and IHRL are relevant to their protection, it continues with an overview of prominent positive developments under IHRL in this regard. The article then examines the application of IHL to LGBT persons, considering both legal and practical aspects. Finally, it highlights the challenge of negative societal attitudes, hampering the protection of LGBT groups from violence and discrimination, including in the context of armed conflict.

LGBT persons in armed conflict and other situations of violence

Recent reports demonstrate the humanitarian suffering of LGBT people during armed conflict. In Syria, among other places, information has been gathered on the persecution of individuals assumed to be gay or lesbian.⁵ Many of the reports concern sexual violence, including forced stripping, rape and forced anal or vaginal examinations, perpetrated both by government forces and by armed groups, in particular in detention facilities.⁶ Incidents of physical assault and harassment against men and women, on the basis of their actual or perceived sexual orientation or gender identity, were also recorded in areas controlled by armed groups, notably ISIL and Al-Nusrah Front.⁷ Testimonies of LGBT individuals revealed that in some cases, as the conflict in Syria escalated, their neighbours, friends, former schoolmates and even family members had threatened them or “sold them out” to various armed groups.⁸

Indeed, the risk to LGBT persons in areas controlled by armed groups seems particularly grave. In Iraq and Syria, men accused of homosexuality or same-sex sexual relations were executed by ISIL, usually by throwing them off the roofs of high-rise buildings.⁹ A United Nations (UN) report recently submitted to the UN Security Council discusses violence against LGBT people in the context of

5 Human Rights Council (HRC), *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/25/65, February 2014, paras 67, 70.

6 OHCHR, *Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity*, UN Doc. A/HRC/29/23, 4 May 2015, para. 31; Graeme Reid, “The Double Threat for Gay Men in Syria”, *Washington Post*, 25 April 2014.

7 Reports of the UN Secretary-General, *Conflict-Related Sexual Violence*, UN Doc. S/2015/203, 23 March 2015, para. 61, and UN Doc. S/2016/361, 20 April 2016, para. 69; Michelle Nichols, “Gay Men Tell UN Security Council of Being Islamic State Targets”, *Reuters*, 25 August 2015.

8 G. Reid, above note 6; Heartland Alliance International, *No Place for People Like You: An Analysis of the Needs, Vulnerabilities, and Experiences of LGBT Syrian Refugees in Lebanon*, Chicago, IL, December 2014, p. 15, available at: www.heartlandalliance.org/wp-content/uploads/sites/13/2016/02/no-place-for-people-like-you_hai_2014.pdf.

9 Outright Action International, “Timeline of Publicized Executions for ‘Indecent Behavior’ by Islamic State Militias”, 2 April 2016, available at: www.outrightinternational.org/dontturnaway/timeline; OHCHR, above note 6, para. 29; Office of the United Nations Assistance Mission for Iraq and OHCHR, *The Protection of Civilians in the Armed Conflict in Iraq: 1 November 2015–30 September 2016*, December 2016, p. 10.

violent extremism, suggesting that it is employed by radical armed groups in Syria, Iraq and elsewhere as a tactic of terror and control (i.e., spreading fear in order to suppress any resistance, ensure compliance of the local population, gain information or punish those who seem to support the adversary).¹⁰ Conflict-related sexual violence against men and boys has been documented during recent and ongoing armed conflicts in the Central African Republic, the Democratic Republic of the Congo and elsewhere.¹¹ In Afghanistan, pro-government militias subjected boys to sexual slavery and abuse, while the Taliban has used child sex slaves to infiltrate Afghan security ranks.¹² While an assailant may not consider a male victim to actually be an LGBT person, the motivation behind the violent act is to gain power and dominance over the enemy by imputing a feminine identity or “homosexual behaviour” to the victim, which is conceived as weakening and dishonouring the latter.¹³

Numerous complaints have been collected regarding attacks on the LGBT community, including against LGBT activists and human rights defenders, by government security forces and their militias, as well as by insurgent armed groups. These complaints have come from places like Colombia and Peru (during the 1980s and 1990s) in addition to the countries listed above, and have involved killings, torture and enforced disappearances.¹⁴ It has been reported that armed groups which have gained control over territory, for instance in Colombia and in Iraq, have distributed pamphlets demeaning those perceived to be LGBT persons or LGBT defenders, threatening to kill them or declaring them military targets.¹⁵

10 Report of the UN Secretary-General, 2015, above note 7, paras 6, 82–83.

11 *Ibid.*, paras 14, 23; Sandesh Sivakumaran, “Sexual Violence against Men in Armed Conflict”, *European Journal of International Law*, Vol. 18, No. 2, 2007 (discussing sexual violence against men in a number of conflicts, including in the former Yugoslavia).

12 Anuj Chopra, “Taliban Use Child Sex Slaves to Kill Afghan Police”, *AFP*, 19 June 2016, available at: www.yahoo.com/news/taliban-child-sex-slaves-kill-afghan-police-031230996.html.

13 Dustin Lewis, “Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law”, *Wisconsin International Law Journal*, Vol. 27, No. 1, 2009, pp. 7–9; S. Sivakumaran, above note 11, pp. 270–272; Jamil Santos, “Duterte’s Claim that 40% of NPA Rebels Are Gay ‘Most Unbelievable’, Says Joma”, *GMA News*, 26 February 2019, available at: www.gmanetwork.com/news/news/nation/686188/duterte-s-claim-that-40-of-npa-rebels-are-gay-most-unbelievable-says-joma/story/.

14 Simon West, “Colombia’s LGBTQ Community: Victims of Armed Conflict”, *NBC News*, 7 September 2016, available at: www.nbcnews.com/feature/nbc-out/colombia-s-lgbt-population-victims-armed-conflict-n643861; Michael K. Lavers, “Colombian LGBT Groups Endorse Peace Deal”, *Washington Blade*, 27 August 2017, available at: www.washingtonblade.com/2016/08/27/colombian-lgbt-groups-endorse-peace-deal/; Rael Mora, “Peru: LGBT Community Targeted During Armed Conflict”, *Telesur*, 21 November 2014, available at: www.telesurenglish.net/news/Peru-LGBT-Community-Targeted-During-Armed-Conflict-20141121-0038.html.

15 Iraqueer *et al.*, *Dying to Be Free: LGBT Human Rights Violations in Iraq*, 2015, p. 4, available at: www.law.cuny.edu/academics/clinics/hrj/publications/ICCPR-Iraq-Shadow-Report-LGBT-ENG.pdf; HRW, *Audacity in Adversity: LGBT Activism in the Middle East and North Africa*, 2018, pp. 17–18, available at: www.hrw.org/sites/default/files/report_pdf/lgbt_mena0418_web_0.pdf; Inter-American Commission on Human Rights (IACHR), *Violence against LGBTI Persons in the Americas*, 12 November 2015, pp. 166–167, para. 296; IACHR, *Truth, Justice and Reparation*, 2013, pp. 406–408. Interestingly, the November 2016 Peace Agreement in Colombia recognizes that LGBT groups are among “the most vulnerable populations” who were victimized during the armed conflict, stressing the need to ensure their protection.

Reports by human rights bodies and civil society maintain that LGBT persons, especially trans women, are more vulnerable to violence by armed groups and organized crime in Central America.¹⁶ Among other forms of violence, many cases of “corrective rape” against lesbians and trans women have been documented, for example, in Colombia.¹⁷

Violence against LGBT persons has also led to their displacement – for instance, from the territory under armed groups’ control in eastern Ukraine¹⁸ and in Bangladesh.¹⁹ In Iraq and Colombia, LGBT individuals were specifically targeted due to their sexual orientation, gender identity and gender expression. They were forced to leave their homes after they had suffered intimidation and death threats in the course of “corrective violence” or “population cleansing” campaigns carried out by armed groups.²⁰ In some cases, the persecution of LGBT persons continued following their displacement. For example, Syrians who fled to Lebanon were later harassed on suspicion of being gay, and in some cases were arrested and allegedly tortured by Lebanese security forces while in detention.²¹ LGBT refugees in Kenya reported that they were assaulted and their shelters were set alight by members of the host community and by fellow refugees.²²

For the most part, the parties to armed conflict, if not themselves involved in the commission of these abuses, have failed to prevent them from occurring in the first place or to take appropriate accountability measures, namely an adequate investigation of the incidents and the prosecution of those responsible.²³ While

- 16 IACHR, *Violence against LGBTI Persons in the Americas*, above note 15, p. 159, para. 279, and p. 186, para. 345.
- 17 *Ibid.*, pp. 109, 194. In these cases, the individuals concerned were raped because of their actual or perceived sexual orientation or gender identity, with the perverse intention of “correcting” the individual’s sexual orientation or making them behave according to what is considered in conformity with their assigned biological sex.
- 18 Kate Bond and Anastasia Vlasova, *Gay and Displaced on the Frontlines of Ukraine’s Conflict*, UN Office of the High Commissioner for Refugees (UNHCR), Donetsk, 15 September 2017, available at: www.unhcr.org/news/stories/2017/9/597ef1fc4/gay-displaced-frontlines-ukraines-conflict.html?query=LGBT; Justice for Peace in Donbas Coalition, *LGBT Representatives in Donetsk Region Leave Their Homes Because of Persecution*, 22 January 2016, available at: www.jfp.org.ua/rights/porushennia/violation_categories/henderno-obumovlene-nasylstvo/rights_violations/lbti-persecution-yenakiyevo?locale=en.
- 19 HRW, *Country Profiles: Sexual Orientation and Gender Identity*, 23 June 2017, available at: www.hrw.org/news/2017/06/23/human-rights-watch-country-profiles-sexual-orientation-and-gender-identity (referring to an April 2016 killing of LGBT persons by Al-Qaeda in the Indian Subcontinent).
- 20 Report of the UN Secretary-General, 2015, above note 7, paras 20, 30; IACHR, *Violence against LGBTI Persons in the Americas*, above note 15, paras 29, 296, 360; Outright Action International, *When Coming Out is a Death Sentence: Persecution of LGBT Iraqis*, November 2014, available at: www.outrightinternational.org/sites/default/files/ComingOutDeathSentence_Iraq_0.pdf. According to Human Rights Watch, dozens of men were abducted and killed during 2009 by Ahl Al-Haq and Mahdi militias as part of this “social cleansing” campaign; see HRW, “*They Want Us Exterminated*”: Murder, Torture, Sexual Orientation and Gender in Iraq, August 2009, available at: www.hrw.org/report/2009/08/17/they-want-us-exterminated/murder-torture-sexual-orientation-and-gender-iraq.
- 21 G. Reid, above note 6; Heartland Alliance International, above note 8, pp. 21–22. For the risks faced by LGBT refugees in camps and urban settings, see Women’s Refugee Commission, *Mean Streets: Identifying and Responding to Urban Refugees’ Risks of Gender-Based Violence*, February 2016, p. 69, available at: www.womensrefugeecommission.org/gbv/resources/1272-mean-streets; UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities*, December 2015, p. 28.
- 22 Nita Bhalla, “UN Moves LGBT+ Refugees to Safe Houses after Kenya Camp Attacks”, *Reuters*, 13 December 2018.

during peacetime such abuses – especially cases of sexual violence – are under-reported, it seems that armed conflicts make it even harder for the victims to seek justice. In peacetime, victims are often reluctant to complain due to, *inter alia*, the attached stigma, the risk of alienation by family members, fear for their personal safety and distrust of law enforcement authorities.²⁴ The circumstances of armed conflict present additional challenges to victims who wish to complain. These include security problems, disruption to essential services such as medical care, damage to infrastructure and to means of transportation and communication, and limited capacity of the local authorities, overwhelmed by the upsurge in violence, to assist victims and ensure their safety. In the context of an inter-State conflict, victims may need to interact with the authorities of the warring party and other individuals supporting the enemy. In this regard, reporting may be further curtailed by language barriers, cultural differences and hostile attitudes towards victims.

Positive developments within the international human rights law framework

Against this background, it is important to note the considerable effort by human rights bodies to strengthen the protection of LGBT persons. Although not necessarily in the context of armed conflict, the issue has gained momentum in both the legal and diplomatic spheres, especially in the last decade.

A number of treaty bodies, while interpreting specific provisions of their respective instruments, have pointed out that sexual orientation and gender identity are prohibited grounds of discrimination.²⁵ Despite the fact that human rights treaties do not contain an explicit reference to sexual orientation or gender identity, it has been increasingly recognized that existing rights and protections, enshrined in IHRL and granted “to all members of the human family”,²⁶ apply

23 E.g., Iraqueer *et al.*, above note 15; OHCHR, above note 6, para. 76.

24 Interestingly, outside the context of armed conflict, a survey conducted in the European Union in 2013 found that over a quarter of LGBT respondents were violently attacked or threatened in the preceding five years. This figure increases to more than one third (35%) for trans respondents, who appear to be the most victimized among LGBT persons. The survey further shows that most cases are not reported to law enforcement authorities as the victims assume the authorities will ignore the complaint, or they fear homophobic or transphobic reactions from the police. European Union Agency for Fundamental Rights, *Professionally Speaking: Challenges to Achieving Equality for LGBT People*, Luxembourg, March 2016, pp. 48–49, available at: www.fra.europa.eu/en/publication/2016/professional-views-lgbt-equality.

25 E.g., Committee Against Torture (CAT), General Comment No. 2, “Implementation of Article 2 by States Parties”, UN Doc CAT/C/GC/2, 24 January 2008, and General Comment No. 3, “Implementation of Article 14 by States Parties”, UN Doc. CAT/C/GC/2, 13 December 2012; Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20, “Non-discrimination in Economic, Social and Cultural Rights (Art. 2)”, UN Doc. E/C.12/GC/20, July 2009; Committee on the Elimination of Discrimination against Women (CEDAW), “General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention”, UN Doc. CEDAW/C/GC/28, 16 December 2010.

26 Universal Declaration of Human Rights (adopted and proclaimed by UNGA Res. 217A(III) of 10 December 1948), Preamble.

also to LGBT persons. It was thus established that LGBT persons are protected from arbitrary deprivation of life and liberty, and from torture, cruel, inhuman or degrading treatment or punishment.²⁷ It was also confirmed that they are entitled to the equal protection of the law, to freedom of association, assembly and expression, and to health, employment, education, housing and other economic, social and cultural rights.²⁸

Human rights treaty bodies, such as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women (CEDAW), have considered the criminalization of homosexuality and same-sex intimate relations between consenting adults to violate certain rights embodied in their respective treaties, namely the right to privacy and the prohibition against discrimination, as well as the protection from arbitrary deprivation of liberty in cases where arrest was effected on account of sexual orientation or gender identity.²⁹

It has further been affirmed that the use of lethal force on the basis of real or perceived sexual orientation or gender identity, including the imposition of the death penalty by domestic penal laws, constitutes arbitrary deprivation of the right to life.³⁰ Denouncing the violence against LGBT communities and the imposition of the death penalty for homosexual acts by a number of States Parties, both the Human Rights Committee and the Committee Against Torture have upheld LGBT persons' right to life and physical integrity and protection from ill-treatment, including from deportation to a State where there is a fear of the death penalty or torture.³¹

Regional human rights mechanisms have adopted a similar approach. The European Court of Human Rights (ECtHR) has opined that the European Convention on Human Rights applies to LGBT persons, who are accordingly

27 Human Rights Committee, *X. v. Sweden*, Communication No. 1833/2008, 1 November 2011; CAT, General Comment No. 2, above note 25, paras 21–22.

28 OHCHR, *Ending Violence and other Human Rights Violations Based on Sexual Orientation and Gender Identity: A Joint Dialogue of the African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and United Nations*, Pretoria, 2016, pp. 12–13, 29, available at: www.ohchr.org/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf.

29 Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, 31 March 1994, and *G. v. Australia*, Communication No. 2172/2012, 28 June 2017 (noting that the prohibition against discrimination encompasses discrimination on the basis of gender identity, and highlighting the protection of the transgender complainant from arbitrary interference with her privacy and family life); Human Rights Committee, *Concluding Observations: Ethiopia*, UN Doc. CCPR/C/ETH/CO/1, 2011, para. 12, and General Comment No. 35, "Article 9 (Liberty and Security of Person)", UN Doc. CCPR/C/GC/35, 16 December 2014; CESCR, *Concluding Observations: Kyrgyzstan*, UN Doc. E/C.12/ETH/CO/1-3, 2012, para. 8; CEDAW, *Concluding Observations: Uganda*, UN Doc. CEDAW/C/UGA/CO/7, 2010, paras 43–44; OHCHR, *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2003/8, 2002, paras 68–70, 76.

30 UNGA Res. 71/198, 19 December 2016, para. 6; HRC, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Gender-Sensitive Approach to Arbitrary Killings*, UN Doc. A/HRC/35/23, June 2017, paras 45, 47–48.

31 Human Rights Committee, *X. v. Sweden*, above note 27; CAT, *J. K. v. Canada*, Communication No. 562/2013, 25 November 2015; Human Rights Committee, General Comment No. 36, "Article 6 (Right to Life)", UN Doc. CCPR/C/GC/36, 30 October 2018, paras 30, 36.

protected from violence, ill-treatment and discrimination.³² The High Contracting Parties are therefore required to provide LGBT victims an effective remedy in cases where their Convention rights are violated, in particular to conduct an effective investigation.³³ The Strasbourg Court has further concluded that the criminalization of same-sex sexual acts between consenting adults constitutes unjustified interference with the right to respect for a person's private life.³⁴ Notably, the Court has also recognized LGBT persons' right to family life.³⁵

In the Americas, the General Assembly of the Organization of American States (OAS) has adopted several resolutions calling for the effective protection of LGBT persons from violence and discrimination,³⁶ and in 2013 it included explicit references to sexual minorities, sexual orientation and gender identity and expression in the Inter-American Convention against All Forms of Discrimination and Intolerance.³⁷ Similarly, the Inter-American Court of Human Rights (IACtHR) has held that sexual orientation and gender identity of persons is a category protected by the American Convention on Human Rights.³⁸ Hence, any regulation, act or practice which is considered discriminatory based on a person's sexual orientation is prohibited. In 2014, the Inter-American Commission on Human Rights (IACHR) created a rapporteurship on the rights of LGBT persons whose mandate is to monitor their situation in the region.³⁹

The issue of human rights violations committed on the basis of sexual orientation or gender identity has also been addressed by the African Commission on Human and Peoples' Rights (ACHPR), monitoring compliance with the African Charter on Human and Peoples' Rights. In 2011, the Commission adopted the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter, making direct references to gender and sexual orientation as prohibited grounds of discrimination, and considering LGBT people among "vulnerable and

32 E.g., ECtHR, *Identoba and Others v. Georgia*, Appl. No. 73235/12, 12 May 2015; ECtHR, *Karner v. Austria*, Appl. No. 40016/98, 24 July 2003. For a comprehensive overview, see Paul Johnson, "The Council of Europe and the European Court of Human Rights" in Andreas R. Ziegler (ed.), *International LGBTI Law: Sexual Orientation and Gender Identity Law from an International-Comparative Perspective*, forthcoming.

33 ECtHR, *Identoba*, above note 32; ECtHR, *Alekseyev v. Russia*, Appl. No. 4916/07, 21 October 2010; ECtHR, *M. C. and A. C. v. Romania*, Appl. No. 12060/12, 12 April 2016.

34 ECtHR, *Dudgeon v. United Kingdom*, Appl. No. 7525/76, 23 September 1981.

35 ECtHR, *Vallianatos and Others v. Greece*, Appl. No. 29381/09, 7 November 2013; ECtHR, *Oliari and Others v. Italy*, Appl. No. 18766/11, 21 July 2015. The Court observed that the European Convention does not grant a right to same-sex marriage, but only access to "registered partnership" or "civil union". See also Council of Europe, Parliamentary Assembly Res. 1728, 2010.

36 E.g., AG/RES. 2435 (XXXVIII-O/08), 3 June 2008; AG/RES. 2887 (XLVI-O/16), 14 June 2016, sec. xix.

37 Available at: www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance.asp (not yet entered into force).

38 IACtHR, *Atala Riffo and Daughters v. Chile*, Judgment, 24 February 2012, para. 91. See also, recently, the Court's advisory opinion recognizing the right to rectify public records and identity documents in accordance with the person's self-perceived gender identity, as well as the equal rights of same-sex couples, including their right to marry: IACtHR, *Advisory Opinion OC-24/17 on Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, 24 November 2017.

39 OAS, "Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons", available at: www.oas.org/en/iachr/lgtbi/.

disadvantaged groups” that face significant impediments to their enjoyment of economic, social and cultural rights.⁴⁰ Notably, in 2014 the Commission adopted a resolution condemning systematic attacks by State and non-State actors against LGBT persons, and calling on States to ensure proper investigation and diligent prosecution of perpetrators and to establish judicial procedures responsive to the needs of victims.⁴¹

In the UN System, in 2003 the General Assembly urged States to ensure the effective protection of the right to life of those targeted because of their sexual orientation or gender identity, and to properly investigate all killings, including those committed in the name of honour.⁴² It further instructed States to ensure that such killings are not tolerated whether committed by security forces, police and law enforcement agents, paramilitary groups or private forces.⁴³ The Security Council acknowledged in a 2013 resolution on “Women, Peace and Security” that sexual violence in armed conflict and post-conflict situations is “also affecting men and boys”.⁴⁴ It is noteworthy that this statement, while important in itself, does not directly address the vulnerability of LGBT persons, given that men and boys are not necessarily assaulted because of their actual or perceived sexual orientation or gender identity.

In 2011, the UN Human Rights Council (HRC) adopted, for the first time, a resolution expressing grave concern “at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity”.⁴⁵ Recently, the HRC appointed a first-ever UN Independent Expert to monitor, raise awareness and report on violence and discrimination against LGBT people.⁴⁶ As part of this trend, twelve UN entities called on States to act urgently to end violence and discrimination against LGBT adults, adolescents and children,⁴⁷ and the UN Secretary-General, amid criticism from some member States, urged the international community to continue working for equal rights and fair treatment for LGBT people.⁴⁸

40 Available at: www.achpr.org/instruments/economic-social-cultural/. For a detailed overview, see OHCHR, above note 28, p. 20.

41 ACHPR Res. 275, “Protection against Violence and other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity”, 2014, available at: www.achpr.org/sessions/55th/resolutions/275/.

42 UNGA Res. 57/214, 25 February 2003, para. 6.

43 *Ibid.* See also UNGA Res. 59/197, 10 March 2005; UNGA Res. 61/173, 1 March 2007; UNGA Res. 64/182, 16 March 2009; UNGA Res. 65/208, 30 March 2011; UNGA Res. 67/168, 15 March 2013; UNGA Res. 69/182, 30 January 2015.

44 UNSC Res. 2106, 24 June 2013.

45 HRC Res. 17/19, 17 June 2011; HRC Res. 27/32, 26 September 2014.

46 HRC Res. 32/2, 30 June 2016. The issue was also addressed by the Council’s Special Procedures: see OHCHR, above note 28, p. 19. For example, the Special Rapporteur on violence against women, its causes and consequences pointed out that sexual orientation is a contributory factor to the risk of violence against women: *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences: Mission to India*, UN Doc. A/HRC/26/38/Add.1, 1 April 2014, para. 19.

47 Joint UN Statement on Ending Violence and Discrimination against LGBTI People, 2015, available at: www.ohchr.org/EN/Issues/Discrimination/Pages/JointLGBTIstatement.aspx.

48 Remarks by the UN Secretary-General at High-level Side Event of the LGBT Core Group, 21 September 2016, available at: www.un.org/sg/en/content/sg/statement/2016-09-21/secretary-generals-remarks-high-level-side-event-lgbt-core-group.

Finally, a prominent civil society initiative, led by human rights experts, culminated in the Yogyakarta Principles, affirming the application of IHRL to LGBT persons in a manner which is sensitive to their specific needs.⁴⁹

The process of enhancing the protection of LGBT persons is not without difficulties or sensitivities. Suffice it to say that many States still criminalize homosexuality or same-sex intimate relations.⁵⁰ Violence and discrimination against LGBT persons, as well as their displacement, are often tolerated and even encouraged by the authorities on the grounds of protecting public decency, morality or religious values.⁵¹ This seemed to be clear to the HRC in its effort to promote the protection of LGBT people, as well as to obtain the necessary political support. The wording chosen to this end in its respective resolutions is an attempt to square the circle. For example, the 2016 resolution on “Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity” reiterates the duty of all States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁵² The resolution should be implemented “in full conformity with universally recognized international human rights”.⁵³ Yet, the HRC subjected such implementation to the concerned State’s “national laws” and to the “various religious and ethical values and cultural backgrounds of its people”.⁵⁴

Given the composition of the HRC, this compromise is understandable. Nonetheless, from a legal perspective, both religious convictions and societal customs cannot be pursued without limitation. The right to manifest one’s religion or belief may be restricted if necessary to protect, *inter alia*, the fundamental rights and freedoms of others.⁵⁵ Accordingly, discrimination, hostility or violence cannot be used in order to compel others to accept a certain religion or adhere to its rules.⁵⁶ It has been repeatedly affirmed by human rights bodies that cultural, religious and moral practices and beliefs, or mere negative social attitudes, cannot be invoked in order to justify human rights violations against any group, including LGBT persons.⁵⁷ This

49 The Yogyakarta Principles were updated in 2017. Available at: www.yogyakartaprinciples.org.

50 Same-sex sexual activity is currently criminalized in seventy States. In eleven States, the offence carries the death penalty. See International Lesbian, Gay, Bisexual, Trans and Intersex Association and Lucas Ramon Mendos, *State-Sponsored Homophobia 2019*, Geneva, March 2019, available at: https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf.

51 E.g., HRW, above note 15; HRC, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on His Mission to the Gambia*, UN Doc. A/HRC/29/37/Add.2, May 2015, paras 78–79. See also Jeremy Sharon, “200 Leading Rabbis Call Gays ‘Perverts’, Oppose Gay Surrogacy”, *Jerusalem Post*, 25 July 2018.

52 HRC Res. 32/2, 30 June 2016.

53 *Ibid.*

54 *Ibid.*

55 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, 16 December 1966, Art. 18(3).

56 Human Rights Committee, General Comment No. 22, “Art. 18 (Freedom of Thought, Conscience or Religion)”, UN Doc. CCPR/C/21/Rev.1/Add.4, 27 September 1993, paras 5, 7, 9.

57 E.g., ECtHR, *Lustig-Prean and Beckett v. UK*, Appl. No. 31417/96, 27 September 1999, para. 90; Joint UN Statement, above note 47; cf. Human Rights Committee, General Comment No. 28, “Article 3 (The Equality of Rights between Men and Women)”, UN Doc. CCPR/C/21/Rev.1/Add.10, 29 May 2000, para. 5 (“States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights”).

was firmly expressed by the UN Secretary-General in a denunciation of discrimination and violence against LGBT persons:

Where there is tension between cultural attitudes and universal human rights, universal human rights must carry the day. Personal disapproval, even society's disapproval, is no excuse to arrest, detain, imprison, harass or torture anyone – ever.⁵⁸

The tension between respecting religious and cultural attitudes and protecting the rights of LGBT persons also arises under the IHL framework, and will be discussed further in the following section.

The legal framework under IHL

Turning to the distinct situation of armed conflict and to IHL, while the latter is silent on sexual orientation and gender identity, its provisions pertain to *all* persons affected by armed conflict, in particular those who do not, or no longer, take active part in the hostilities. In addition, IHL recognizes that certain groups, such as women, children and the elderly, as well as the wounded and sick, become particularly vulnerable during armed conflict, and accordingly grants them special protection, instructing the belligerent parties to pay proper attention to their needs.⁵⁹ The same rationale is valid for LGBT persons. The following subsections will clarify the legal basis for their protection in time of armed conflict and present the IHL provisions relevant to their case.

It is widely accepted today that IHRL continues to apply during armed conflict and may complement IHL and inform its interpretation.⁶⁰ Although similar protective notions can be found in both legal regimes, at times it is the IHL framework – rather than the IHRL one – which is the most relevant or offers some advantages to LGBT persons in situations of armed conflict. It is recalled that in some instances IHL may take priority as the *lex specialis* and supersede otherwise applicable norms of IHRL,⁶¹ for example in matters related to the use

58 Statement by UN Secretary-General Ban Ki-Moon, 10 December 2010, available at: www.un.org/press/en/2010/sghsm13311.doc.htm.

59 E.g., Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 14; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 14, 16, 89, 132; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Arts 70, 76–77; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 134–135, 138.

60 International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, para. 25; Human Rights Committee, General Comment No. 31, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11.

61 See, for example, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, para. 106.

of force or detention during armed conflict. Further, the extent to which IHRL binds armed groups – which, as noted earlier, are infamously involved in various abuses committed against LGBT persons – is less clear. This is particularly true in circumstances where they do not control a territory in a stable and effective manner that allows them to exercise government-like functions.⁶² In comparison, IHL, notably Article 3 common to the four Geneva Conventions and customary law, binds both State and non-State parties to armed conflict.⁶³

Another reason for exploring the application of IHL to LGBT persons, notwithstanding their already-established protections under IHRL, is that there are several important elements which are specific to IHL and might have an important bearing on their protection. For example, IHL instructs States not only to respect but also to ensure respect for IHL – including for the norms which can be seen as pertaining to the safety and well-being of LGBT persons – by all those acting under their control and by other States involved in armed conflicts.⁶⁴ In addition, IHL presents concrete requirements regarding detention procedures and conditions, and treatment of persons held by the opposing party; it gives the International Committee of the Red Cross (ICRC) its authority to visit detainees and monitor detention conditions in international armed conflicts;⁶⁵ it considers certain harmful acts as grave breaches of the Geneva Conventions and Additional Protocol I (AP I) and regards them as war crimes;⁶⁶ and it imposes responsibility on the perpetrators of breaches of the Conventions or AP I, as well as on commanders and superiors who knew, or had reason to know, about the breaches but failed to take all reasonable measures in their power to prevent their commission or to punish those responsible.⁶⁷ Finally, IHL can be used to

62 E.g., Andrew Clapham, “Human Rights Obligations for Non-State-Actors: Where Are We Now?”, in Fannie Lafontaine and François Larocque (eds), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour*, forthcoming 2019, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2641390; Marco Sassòli, “Two Fascinating Questions: Are All Subjects of a Legal Order Bound by the Same Customary Law and Can Armed Groups Exist in the Absence of Armed Conflict? Book Discussion”, *EJIL: Talk!*, 4 November 2016, available at: www.ejiltalk.org/book-discussion-daragh-murrays-human-rights-obligations-of-non-state-armed-groups-3/; Geneva Academy, *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council*, December 2016, available at: www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf.

63 ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., 2017 (ICRC Commentary on GC II), para. 526 (Art. 3).

64 See subsection “Obligation to Respect and Ensure Respect for the Geneva Conventions” below. Article 1 common to the four Geneva Conventions; ICRC Commentary on GC II, above note 63, paras 165–205 (Art. 1); ICRC Customary Law Study, above note 59, Rule 139.

65 GC III, Art. 126; GC IV, Art. 76; ICRC Customary Law Study, above note 59, Rule 124. In non-international armed conflicts, the ICRC may offer its services to the parties to the conflict: see Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 18(1).

66 E.g., GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 147; AP I, Arts 11, 85; ICRC Customary Law Study, above note 59, Rule 156.

67 AP I, Art. 86(2). For war crimes specifically, see ICRC Customary Law Study, above note 59, Rules 151–153; Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998 (entered into force 1 July 2002), Arts 8, 28.

establish the jurisdiction of international and domestic courts in order to initiate criminal proceedings against persons suspected of the commission of war crimes.⁶⁸ Given that most of these obligations constitute customary IHL, they apply in all armed conflicts and bind all parties to the conflict, including armed groups, irrespective of their treaty obligations.⁶⁹

As elaborated below, IHL protections may be afforded to LGBT persons simply based on their status as persons who do not, or no longer, take active part in the hostilities, as well as based on their membership in a certain group which becomes particularly vulnerable in circumstances of armed conflict. But in order to treat an incident in which an LGBT person was harmed as an IHL violation perpetrated on the basis of the victim's sexual orientation or gender identity, such an incident must satisfy two cumulative requirements. Firstly, there must be a causal link between the abuse and real or presumed sexual orientation or gender identity. Secondly, and given that IHL violations are distinct from ordinary crimes, there must be a sufficient nexus to the armed conflict.⁷⁰ The nexus requirement should be interpreted broadly in order to cover the range of circumstances in which a party to the conflict (or those operating under its control) takes advantage of the conflict situation to target LGBT persons. In other words, as submitted by this author, the existence of the armed conflict needs to be material to the perpetrator's ability to commit the harmful act, to his decision to commit it, to the manner in which it was committed or to the purpose for which it was committed.⁷¹ The concerned abuse needs to be linked, directly or indirectly, to the conflict, taking into account, for instance, its temporal and geographical dimensions, the profiles of the perpetrator and the victim, and the surrounding climate of persecution and impunity.⁷² While the common understanding is that IHL violations are committed against a person affiliated with the opposing party, there is some support for the position that at least a breach of the fundamental protections embodied in common Article 3 can be also directed at a person of the same

68 GC IV, Art. 146; ICRC Customary Law Study, above note 59, Rule 157.

69 See, generally, Jean-Marie Henckaerts, "Study on Customary IHL: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict", *International Review of the Red Cross*, Vol. 87, No. 857, 2005, pp. 177–178.

70 Gloria Gaggioli, "Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law", *International Review of the Red Cross*, Vol. 96, No. 894, 2014, pp. 514–517.

71 Cf. International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, paras 572–573 ("The only question, to be determined in the circumstances of each individual case, is whether the offences were closely related to the armed conflict as a whole"); ICTY, *Prosecutor v. Kunarac*, Case No. IT-96-23&23/1 (Appeals Chamber), 12 June 2002, para. 58; but see International Criminal Tribunal for Rwanda, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment (Trial Chamber), 21 May 1999, paras 599–604, 623 (noting that the fact that the alleged crimes were committed during armed conflict is insufficient, and requiring a *direct link* between these crimes and the armed conflict).

72 Cf. Report of the UN Secretary-General, 2015, above note 7, para. 2 (defining conflict-related sexual violence).

party who is not taking active part in the hostilities.⁷³ For example, if during hostilities a soldier in enemy territory sexually assaults a detained member of the same armed forces or its allies because of his sexual orientation, the act might be considered a breach of common Article 3.

Underlying principles of IHL relevant to the protection of LGBT persons

As noted above, certain groups enjoy special protection under treaty and customary IHL.⁷⁴ Similar references to LGBT persons cannot be found in IHL instruments, but they can be inferred from the fundamental principles of humane treatment and the prohibition against adverse distinction.

The duty of humane treatment applies in all circumstances and extends to *all* persons taking no active part in hostilities – i.e., civilians and persons *hors de combat*. This obligation is absolute and prohibits, *inter alia*, murder, torture and outrages upon personal dignity, in particular humiliating and degrading treatment, at any time and in any place whatsoever.⁷⁵ The principle of humane treatment encompasses the obligation to respect the honour of those who do not, or no longer, fight and to protect them against violence (including sexual violence), insults and public curiosity.⁷⁶

The exact meaning of humane treatment in a given scenario is to be adapted to the situation of LGBT persons, taking into account their vulnerability and needs. Indeed, the requirement to consider the specific vulnerabilities of a certain group is reflected in the authoritative ICRC Commentary on the Geneva Conventions:

There is a growing acknowledgement that women, men, girls and boys are affected by armed conflict in different ways. Sensitivity to the individual's inherent status, capacities and needs, including how these differ among men and women due to social, economic, cultural and political structures in society, contributes to the understanding of humane treatment.⁷⁷

Apart from the obligation to afford humane treatment, IHL prohibits adverse distinction between protected persons based on race, colour, religion, sex, political or other opinion, birth or other status, or any other similar criteria.⁷⁸ Similarly, Article 13 of Geneva Convention IV (GC IV) states that Part II of the Convention covers “the whole of the populations of the countries in conflict,

73 ICRC Commentary on GC II, above note 63, para. 569 (Art. 3); International Criminal Court, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-1962, Judgment (Appeals Chamber), 1 June 2017. But see Kevin Jon Heller, “ICC Appeals Chamber Says a War Crime Does Not Have to Violate IHL”, *Opinio Juris*, 15 June 2017, available at: www.opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/.

74 See above note 59.

75 Common Art. 3; GC IV, Art. 27; AP I, Art. 75; AP II, Art. 4; ICRC Customary Law Study, above note 59, Rule 87.

76 GC III, Arts 13–14; GC IV, Art. 27.

77 ICRC Commentary on GC II, above note 63, para. 575 (Art. 3).

78 GC III, Art. 16; GC IV, Art. 27; AP I, Arts 9, 75; AP II, Art. 2; ICRC Customary Law Study, above note 59, Rule 88.

without any adverse distinction based, in particular, on race, nationality, religion or political opinion". Hence, the list of prohibited discriminatory grounds is not exhaustive.⁷⁹ It has been recognized that sexual orientation or gender identity could be deduced from the grounds of "sex" or "any other similar criteria".⁸⁰

Importantly, the prohibition against adverse distinction is not absolute: it applies only with respect to discriminatory practices on the basis of certain impermissible grounds (e.g., race, religion, sex or, as submitted, sexual orientation or gender identity). Distinction with the aim of affording more favourable treatment may be justified by the different characteristics and needs of certain protected persons, in particular the vulnerable ones. Depending on the circumstances, this favourable treatment may include additional protective measures or better access to certain food and hygiene items, education or medical care. In light of their condition, such distinction may be required precisely in order to ensure that protected persons are treated fairly and humanely.⁸¹

As is the case under IHRL, some tension may arise between the duty to treat protected persons humanely and without adverse distinction and the duty to afford protection to people's religious convictions, manners and customs.⁸² Indeed, negative attitudes towards LGBT persons and their resultant legal exclusion are often justified by religious and traditional values. As already noted under IHRL, the fundamental protections of humane treatment and non-discrimination are granted to *everyone* in a universal manner, and they cannot be restricted on the basis of religious or public morals.⁸³ In a similar vein, the inclusion of the principles of humane treatment and non-adverse distinction in common Article 3 – as opposed to respect for religious convictions and customs – is consistent with the status of these principles as a "‘minimum yardstick’ that is binding in all armed conflicts as a reflection of elementary considerations of humanity".⁸⁴ Indeed, the importance and respect attached to the religious convictions and customs of certain protected persons cannot result in violence, discrimination or persecution against other protected persons. Harming a person's human dignity and denying him/her equal protection of the law on the basis of sexual orientation or gender identity run counter to the *raison d'être* of minimum humanitarian protections which apply to *all* persons who do not take part in hostilities.

In addition to the principles of humane treatment and non-discrimination, a number of legal and practical issues relating to the protection of LGBT groups in

79 ICRC Commentary on GC II, above note 63, paras 591–592 (Art. 3).

80 Cf. Human Rights Committee, *Toonen*, above note 29, para. 8.7; CESCR, above note 25, para. 32.

81 See ICRC Commentary on GC II, above note 63, paras 595–598 (Art. 3).

82 E.g., Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 205 CTS 277, 1907 (entered into force 27 January 1910) (Hague Regulations), Art. 46; GC IV, Art. 27; AP I, Art. 75(1); AP II, Art. 4.

83 ICCPR, Preamble and Arts 2(1), 4, 6, 26.

84 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *ICJ Reports* 1986, para. 218; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva, 1958 (ICRC Commentary on GC IV), p. 204 ("The obligation to grant protected persons humane treatment is in truth the 'leitmotiv' of the four Geneva Conventions").

armed conflict deserve elaboration. These issues, as well as the manner in which specific IHL provisions should apply to LGBT persons, are discussed below.

Obligation to respect and ensure respect for the Geneva Conventions

Serious violations of IHL are often perpetrated against LGBT persons with impunity and even with the endorsement of governmental authorities.⁸⁵ It is, however, recalled that the parties to the conflict have an obligation to respect and ensure respect for IHL.⁸⁶ This duty is of special importance when it comes to the treatment of all civilians and persons *hors de combat* – including LGBT persons – in a humane manner and without adverse distinction, given the fundamental character of IHL principles.

The obligation to ensure respect for the Geneva Conventions entails taking appropriate measures to prevent violations from happening in the first place.⁸⁷ In this context, proper orders and training should be given to the armed forces, and awareness-raising activities should be held among commanders, members of the security forces and the general public.⁸⁸ In cases where LGBT persons have been, or may have been, treated in breach of IHL, States must investigate the incident and prosecute those responsible for serious violations, if there is sufficient evidence.⁸⁹ This involves a due diligence obligation to use reasonable means available to prevent and repress IHL violations by private persons over which a State exercises authority or control.⁹⁰ Hence, the concerned State is not only responsible for IHL violations committed against LGBT persons by its armed forces and other persons acting under its directions or control, but may also be liable for its failure to take appropriate measures to prevent, investigate or prosecute these violations.

In accordance with Article 1 common to the four Geneva Conventions, States may neither encourage nor aid or assist the armed forces of a party to a conflict – e.g., in financing, equipping, arming, training or providing operational support – in the knowledge that such support will be used to commit violations by that party.⁹¹ This might be the case, for example, when such support facilitates monitoring and tracking down individuals due to their real or perceived sexual

85 Outright Action International, above note 20, p. 10; Iraqueer *et al.*, above note 15; OHCHR, above note 6, para. 76; Nick Duffy, “Russian Police Won’t Protect Gay People from Violent Threats”, *Pink News*, 19 September 2018, available at: www.pinknews.co.uk/2018/09/19/russia-police-homophobic-hate-speech/.

86 Common Art. 1; ICRC Customary Law Study, above note 59, pp. 495–498 (Rule 139).

87 ICRC Commentary on GC II, above note 63, para. 167 (Art. 1).

88 On commanders’ responsibility to suppress IHL violations, see AP I, Arts 86(2), 87; ICRC Customary Law Study, above note 59, Rule 153.

89 E.g., GC IV, Art. 146; ICRC Customary Law Study, above note 59, Rule 158.

90 ICRC Commentary on GC II, above note 63, para. 172 (Art. 1). See also Human Rights Committee, above note 60, para. 8.

91 ICRC Commentary on GC II, above note 63, para. 142 (Art. 1); ICRC Customary Law Study, above note 59, pp. 511–513 (Rule 144).

orientation or gender identity, followed by their arrest and abuse while in detention.⁹²

Further, third States have a positive obligation to exert their influence, to the degree possible, to stop IHL violations by other States and by non-State actors. They must do everything reasonably in their power to prevent such violations and bring them to an end.⁹³ States' ability to influence the parties to the conflict should not be underestimated. While an assertive political will is essential, the toolbox available to States contains various appropriate measures, both with regard to the responsible party (e.g., bilateral dialogue, denunciation, diplomatic pressure, suspension of membership or other privileges in international organizations, economic sanctions, armed embargos and other lawful measures under international law)⁹⁴ and with regard to individuals involved in serious violations of IHL (e.g., travel bans, asset freezes, arrest and the initiation of criminal proceedings in domestic or international courts).

Protection of LGBT persons in armed conflict: Applicable norms and practical challenges

Conduct of hostilities

When it comes to the use of force during hostilities, the fact of belonging to the LGBT community does not make any difference for the purposes of determining whether the person in question is protected by IHL provisions. LGBT persons may be lawfully attacked during armed conflict in accordance with the ordinary IHL rules governing targeting.⁹⁵ Clearly, actual or perceived sexual orientation or gender identity have no bearing on the question of whether a person is considered a civilian or a fighter. As will be seen below, most of the challenges related to the treatment of LGBT persons arise when the person is in the hands of a party to the conflict, as opposed to situations of conduct of hostilities.

Detention

Notwithstanding that homosexuality or same-sex intimate relations are criminalized in many States,⁹⁶ human rights mechanisms have concluded that detention on the

92 E.g., Hagar Shezaf and Jonathan Jacobson, "Revealed: Israel's Cyber-Spy Industry Helps World Dictators Hunt Dissidents and Gays", *Haaretz*, 20 October 2018; Nico Lang, "The Danger of Tinder's LGBT-friendly Upgrade: How the Dating App Could Be Used to Target Trans Users", *Salon*, 18 November 2016, available at: www.salon.com/2016/11/17/the-danger-of-tinders-lgbt-friendly-upgrade-how-the-dating-app-could-be-used-to-target-trans-users/ (describing the exploitation of dating apps by security forces in order to identify LGBT users and their exact location).

93 ICRC Commentary on GC II, above note 63, paras 142, 176, 182, 189 (Art. 1).

94 E.g., Outright Action International, "U.S.-Africa Trade Summit Must Not Ignore Cost of Denying LGBT Human Rights", 29 July 2014, available at: <https://outrightinternational.org/content/us-africa-trade-summit-must-not-ignore-cost-denying-lgbt-human-rights>.

95 In particular, see AP I, Arts 51, 57 (reflective of customary IHL).

96 See above note 50.

basis of sexual orientation, gender identity or same-sex consensual relations between adults amounts to arbitrary and discriminatory deprivation of liberty.⁹⁷ While this remains true during armed conflict, it is noteworthy that LGBT persons may be detained on other grounds, in line with IHL rules regulating internment.

LGBT individuals can be lawfully interned for security reasons, namely as prisoners of war or as civilians who pose a security threat.⁹⁸ In addition, LGBT civilians may be detained in the context of a criminal trial. They may be prosecuted for directly participating in the hostilities or for another conflict-related offence under domestic law.⁹⁹ Lastly, LGBT individuals, like any other person, may be prosecuted and punished in cases where they have committed a war crime.¹⁰⁰

Some additional issues associated with the detention of LGBT persons during armed conflict are addressed further below.

Ill-treatment

LGBT persons are particularly vulnerable while in detention. Various reports have documented ill-treatment, especially sexual violence, against LGBT persons held by government forces or by armed groups, including cases of rape, sexual slavery, forced genital and anal examinations, forced nudity, harassment and humiliation.¹⁰¹ The abuse may be perpetrated by the detention facility staff (e.g., guards, doctors) or by fellow detainees.

Under IHL, all detainees, including LGBT detainees, are entitled to humane treatment and protection from torture and humiliating or degrading treatment, including from sexual violence and unnecessary medical procedures which are not justified by the medical condition of the detainee.¹⁰² IHL also prohibits disciplinary penalties which are inhuman, brutal or dangerous for the health of internees, taking into account, among other factors, the internee's sex,¹⁰³ and by implication, his/her sexual orientation or gender identity.

In order to ensure the protection of LGBT detainees and minimize the risk of physical or sexual assault, it might be necessary to hold such individuals separately from other detainees or from specific staff members, in particular those who seem hostile to LGBT persons, and at least when it comes to sleeping or shower and toilet arrangements.¹⁰⁴ Information regarding such practice in the

97 E.g., OHCHR, above note 29; OHCHR, above note 2; OHCHR, "The Gambia: Zeid Criticizes Harsh Legal Amendment, Violence and Arrests Targeting Gay Men and Lesbians", 20 November 2014, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15318&LangID=E.

98 GC III, Art. 21; GC IV, Arts 42, 78.

99 Common Art. 3; GC IV, Arts 68, 71, 76; AP I, Art. 75.

100 GC IV, Art. 146.

101 Report of the UN Secretary-General, 2015, above note 7, para. 6; OHCHR, above note 6, para. 36.

102 GC III, Art. 13; GC IV, Arts 27, 32, 37; AP I, Arts 11, 75; AP II, Art. 5; ICRC Customary Law Study, above note 59, Rules 89–91, 93.

103 GC IV, Arts 100, 119.

104 Similar detention standards apply to women and children: see GC III, Arts 25, 97, 108; GC IV, Arts 76, 85, 124; AP I, Art. 77; ICRC Customary Law Study, above note 59, Rules 119–120.

context of armed conflict is scarce. One example concerns the Israeli Prison Service, which recently issued a policy directive on dealing with transgender detainees.¹⁰⁵ The directive also applies to Palestinians held in Israeli detention on security grounds. The policy directive instructs that transgender detainees will be held separately from other detainees during the first five days of their detention in order to ensure their safety. During this period, the staff will assess the personal situation of the detainee, including his/her appearance and stage of transition, and consider any possible risks and the detainee's own views in order to determine whether to hold the detainee in a male or female facility. The directive mentions the possibility of placing the detainee in a separate cell in appropriate cases, bearing in mind the importance of his/her participation in well-being activities and social interaction enjoyed by other detainees.¹⁰⁶ Given that resources are limited, such a thorough assessment and other arrangements may not always be possible, especially during armed conflict. A high-intensity conflict may result in a high number of detainees who are held in various locations and for different periods of time. That said, the responsibility for the safety of the detainees lays with the detaining authorities. Due diligence efforts should therefore be made, in particular when the detainee has already raised safety concerns or complained about abusive treatment while in detention.

The importance of mitigating the suffering and distress experienced by detainees while held by the adversary is reflected in the requirement to accommodate internees, as far as possible, according to their nationality, language and customs.¹⁰⁷ The assumption here is that such an arrangement offers better social support to the detainee and eases tension between inmates and between detainees and staff. This provision can inspire a similar arrangement to accommodate LGBT detainees together, as a protective measure and given that “a moral solidarity” might have a positive effect on their mental health and elevate the suffering caused by internment.¹⁰⁸ An LGBT detainee should also have the possibility of choosing whether to be searched by a man or a woman, while searches must be conducted in a manner that is respectful of the dignity and privacy of the individual being searched.¹⁰⁹ The Israeli Prison Service's directive

105 Israel Prison Service, *Admission of Transgender Detainees and Guidelines for Their Admission: Policy*, 5 March 2018, available at: <https://tinyurl.com/y66ktvxl>; Lee Yaron, “Transgender Inmates Will No Longer Be Kept in Isolation, Israel Prison Service Announces”, *Haaretz*, 17 April 2018, available at: www.haaretz.com/israel-news/premium-transgender-prisoners-won-t-be-put-in-isolation-anymore-1.6009178.

106 Israel Prison Service, above note 105, Arts 3, 6, 11–12; Supreme Court of Israel, *Doreen Biliya v. IPS*, HCJ 5480/17, 4 July 2018; cf. IACHR, *Violence against LGBTI Persons in the Americas*, above note 15, pp. 102–103, para. 155 (describing the practice in OAS member States). See also US Federal Bureau of Prisons, *Transgender Offender Manual*, 18 January 2017, available at: www.documentcloud.org/documents/4327113-Bureau-of-Prisons-Transgender-Offender-Manual.html (recent changes to the Manual are available at: www.bop.gov/policy/progstat/5200-04-cn-1.pdf).

107 GC III, Art. 22; GC IV, Art. 82.

108 For a note on the importance of morale of internees, see ICRC Commentary on GC IV, above note 84, p. 380 (Art. 82).

109 Cf. the requirement to be searched by a person of the same sex as the detainee, in GC IV, Art. 97; see also UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), UNGA Res. 70/175, 17 December 2015, Rules 50, 52.

notes that a transgender detainee must be asked whether he/she prefers to be searched by a male or female guard. The directive also foresees the possibility of a two-person body search, conducted by both male and female staff members, each examining different parts of the body depending on the stage of the detainee's transition process.¹¹⁰ Lastly, the vulnerability of LGBT individuals may also be taken into account in the context of the obligation of the parties during hostilities to endeavour to conclude agreements for the release of certain classes of internees, given that such vulnerability might prioritize and support early release.¹¹¹

Detention staff should receive appropriate instructions and training designed to improve staff interaction with LGBT detainees and awareness of their needs, as well as the ability to prevent ill-treatment and detect signs of distress on behalf of LGBT detainees.¹¹² Preferably, training should already take place during peacetime, anticipating the possibility that the detention staff will have to deal with LGBT detainees at some point.¹¹³ It might be difficult, at times impossible, to carry out such training in States that criminalize homosexuality, same-sex activity or gender expressions which do not align with a person's assigned sex at birth. This, however, does not detract from the obligation of the detaining authorities to treat all detainees humanely and to prevent any abuse, including sexual violence, while in detention. Depending on the level of their engagement with the detaining authorities, the appropriate training may be provided by the ICRC, local or foreign humanitarian relief personnel (e.g., social workers, health professionals), or civil society groups.

While the detainees themselves shall be allowed to raise their concerns regarding the conditions of detention before the detaining authorities,¹¹⁴ the fear of being stigmatized, bullied or abused by staff or other detainees may prevent them from proactively disclosing their sexual orientation or gender identity and from expressing their related needs while in detention. The detaining authorities should therefore have a screening procedure in place to address any risk to the health and safety of vulnerable detainees.¹¹⁵ Visits by the ICRC are of the utmost importance in assessing the safety and well-being of LGBT detainees. While the obligation of humane treatment of detainees is binding in both international and non-international armed conflicts, it is recalled that the ICRC is mandated to visit detainees only in an international armed conflict.¹¹⁶ During a non-international armed conflict, the ICRC can offer its services to the detaining party.¹¹⁷ When the

110 Israel Prison Service, above note 105, Art. 14.

111 E.g., GC IV, Art. 132. See also GC III, Arts 109–110.

112 Mandela Rules, above note 109, Rules 75–76, 78.

113 For State practice in this context (not necessarily in the context of armed conflict), see above notes 105–106 (Israeli and US policy); IACHR, *Violence against LGBTI Persons in the Americas*, above note 15, p. 106, para. 161; United Nations Office on Drugs and Crime (UNODC), *Handbook on Prisoners with Special Needs*, 2009, Chap. 5, available at: www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf.

114 GC III, Art. 78; GC IV, Art. 101.

115 For examples, see above notes 105–106 (Israeli and US policy).

116 GC III, Art. 126; GC IV, Arts. 78, 143.

117 Common Art. 3.

offer is refused, visits may still be held by independent inspectors appointed under domestic law,¹¹⁸ as well as by private or court-appointed lawyers, representatives of the national human rights commission, court judges, members of the local parliament or designated civil society groups.

Family life

The family life of protected persons shall be respected as far as possible and cannot be the object of arbitrary interference.¹¹⁹ Given the prohibition against adverse distinction, this applies also to LGBT protected persons. A number of entitlements granted to a protected person by IHL are dependent upon recognizing that his/her same-sex spouse is a member of the family.

As a result of such recognition, an LGBT individual should be able to correspond with his/her spouse wherever they may be, including while the former is in detention.¹²⁰ Other matters in this context concern the duty of the parties to the conflict to facilitate the restoration of family links, in cases where the couple has been separated because of the armed conflict.¹²¹ In addition, respect for LGBT family rights dictates that a party to the conflict should enable visits to a same-sex spouse in detention,¹²² accommodate same-sex couples together wherever possible in cases where both partners are interned,¹²³ and allow individuals to receive information when an LGBT spouse has gone missing¹²⁴ and to receive his/her human remains in the unfortunate eventuality that the spouse has died.¹²⁵

Granting these entitlements does not necessarily compel the formal recognition of same-sex couples under domestic law. They form part of the detaining party's obligations under IHL, and in this respect are limited to the situation of armed conflict. In fact, during times of armed conflict it might be easier to justify these entitlements by invoking the need to comply with the requirements of international law amid local opposition to such recognition. In addition, the ICRC and other humanitarian organizations may assist the authorities in implementing their obligations in this area.

118 E.g., Israeli Prisons Ordinance (New Version), 1971, Arts 71–72 (appointing official inspectors who are allowed to visit detention facilities at any time, inspect the detention conditions and conduct private and confidential interviews with any detainee). Such inspections are carried out in the United Kingdom by Her Majesty's Chief Inspector of Prisons (see: www.justiceinspectorates.gov.uk/hmiprisoners/about-hmi-prisons/terms-of-reference/), and in the United States by the Office of the Inspector General at the Department of Justice, which is responsible for monitoring the Federal Bureau of Prisons (see: <https://oig.justice.gov/reports/bop.htm>).

119 Hague Regulations, Art. 46; GC IV, Art. 27; ICRC Customary Law Study, above note 59, Rule 105; ICRC Commentary on GC IV, above note 84, p. 202 (Art. 27).

120 GC III, Arts 70–71; GC IV, Arts 25, 106; ICRC Customary Law Study, above note 59, Rule 125.

121 GC IV, Art. 26; AP II, Art. 4(3)(b); ICRC Customary Law Study, above note 59, Rule 117.

122 GC IV, Art. 116; ICRC Customary Law Study, above note 59, Rule 126.

123 GC IV, Art. 82; ICRC Customary Law Study, above note 59, Rules 119–120.

124 AP I, Art. 32; ICRC Customary Law Study, above note 59, Rule 117.

125 AP I, Art. 34; ICRC Customary Law Study, above note 59, Rule 114.

Non-refoulement and relocation

The issue of *non-refoulement* may arise when a State is looking to transfer a protected person, often a detainee, to another State. As noted above, LGBT persons may face heavy criminal sanctions such as prolonged imprisonment, or even the death penalty, in a significant number of States.¹²⁶ In those cases, a non-heterosexual sexual orientation or same-sex relations are grounds for the deprivation of liberty, which in many cases involves ill-treatment.¹²⁷ Even in the absence of formal criminalization, LGBT persons may suffer violence, abuse and harassment by State agents or by private actors in the receiving State, while their complaints are often ignored by law enforcement authorities.¹²⁸

According to IHL, protected persons may only be transferred to another State when the transferring State has satisfied itself of the willingness and ability of the receiving State to grant the protections embodied in the Geneva Conventions, including humane treatment and protection from adverse distinction.¹²⁹ Following the transfer, in the event that these safeguards are not granted, the transferring State shall take effective measures to correct the situation or request the return of the person transferred.¹³⁰ In any case, the transfer of a protected person – including for internment in the territory of another State, repatriation, returning to the country of residence or extradition – is prohibited where that person may have reason to fear persecution in the receiving State on the basis of his/her political opinions or religious beliefs.¹³¹ In these circumstances, the transfer cannot be effected even with the consent of the person concerned.¹³²

While these IHL provisions seem to have a limited scope of application,¹³³ they do not preclude a reference to the complementary norms of IHRL and refugee

126 See above note 50.

127 E.g., UNODC, above note 113; IACHR, *Violence against LGBTI Persons in the Americas*, above note 15, pp. 102–103, para. 155.

128 OHCHR, above note 6, paras 24–25; OHCHR, above note 2; HRW, “*They Said We Deserved This*”: *Police Violence Against Gay and Bisexual Men in Kyrgyzstan*, January 2014, available at: www.hrw.org/sites/default/files/reports/kyrgyz20114_forUpload.pdf.

129 GC IV, Art. 45.

130 *Ibid.*; see also GC III, Art. 12; AP II, Art. 5(4).

131 GC IV, Art. 45. This notion can also be found in Article 109 of GC III, noting that sick or injured prisoners of war shall not be repatriated against their will during hostilities. The Commentary explains that this is to protect them from risks and possible prosecution in case political changes have taken place in their State of nationality. It is also clarified that the rule prohibiting the Detaining State from repatriating prisoners against their will during hostilities is of a general nature and applies also to those who are not wounded or sick, Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, pp. 512–513 (Art. 109).

132 GC IV, Art. 8.

133 For example, Article 45 of GC IV only applies to aliens in the territory of a party to an international armed conflict, and Article 12 of GC III to prisoners of war.

law dealing with the principle of *non-refoulement*.¹³⁴ This principle prohibits the transfer of any person in circumstances where there are substantial grounds for believing that there is a real risk of irreparable harm, such as a threat to the right to life or the risk of being subjected to torture, either in the receiving State or in any other State to which the person may subsequently be removed.¹³⁵ Similarly, the principle of *non-refoulement* under refugee law involves a well-founded fear of being persecuted.¹³⁶ While the term “persecution” is not expressly defined in the 1951 Refugee Convention, it involves serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm. Referring specifically to the risks faced by LGBT asylum-seekers, the UN High Commissioner for Refugees (UNHCR) and IHRL treaty bodies have held that threats of serious abuse and violence, arbitrary detention and criminal sanctions (which in some cases include the death penalty), as well as discriminatory restrictions on the ability to exercise human rights, would generally meet the threshold to establish persecution.¹³⁷

In order to be covered by the principle of *non-refoulement*, the potential persecution must be on the basis of certain grounds. GC IV requires that the fear of persecution is on account of a protected person’s religious beliefs or political opinions.¹³⁸ These grounds are also recognized by the Refugee Convention, and UNHCR observes that they are relevant to LGBT individuals who may face persecution on the basis that they, allegedly, do not conform to religious values, or due to negative attitudes promoted by religious groups.¹³⁹ Similarly, LGBT individuals may be persecuted because they are perceived as challenging government policy or prevailing social norms and values, often triggering anti-LGBT statements by government officials.¹⁴⁰ Importantly, the Refugee Convention also establishes the grounds of “membership of a particular social group”; these grounds are commonly recognized by UNHCR with respect to LGBT asylum-seekers, who maintain a well-founded fear of persecution.¹⁴¹

134 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (entered into force 26 June 1987), Art. 3; Convention relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (entered into force 22 April 1954) (Refugee Convention), Art. 33. IHRL applies to all persons in peacetime, as well as during international and non-international armed conflicts: see Cordula Droege, “Transfers of Detainees: Legal Framework, *Non-Refoulement* and Contemporary Challenges”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 675–676.

135 ICCPR, Arts 2, 6–7; Human Rights Committee, above note 60, para. 12, and General Comment No. 36, above note 31, para. 30; CAT, General Comment No. 1, “Implementation of Article 3 of the Convention in the Context of Article 22”, UN Doc. A/53/44, Annex IX, 16 September 1998, para. 3.

136 Refugee Convention, Arts 1(A)(2), 33(1).

137 UNHCR, *Guidelines for 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*, 2012, paras 16–22; CAT, *Uttam Mondal v. Sweden*, Communication No. 338/2008, 23 May 2011, para. 7.7; CAT, *J. K. v. Canada*, above note 31, para. 10.5; Human Rights Committee, *M. K. H. v. Denmark*, Communication No. 2462/2014, 12 July 2016, para. 8.8. See also ICRC Commentary on GC IV, above note 84, p. 269 (Art. 45).

138 GC IV, Art. 45.

139 UNHCR, above note 137, paras 42–43.

140 *Ibid.*, para. 50.

141 *Ibid.*, para. 46.

A different scenario involves LGBT civilians who are nationals of the adverse party or of a neutral State. In this scenario they are present in the territory of a belligerent party or in occupied territory (in the latter case, with the exception of nationals of the occupied State), and may wish to leave the territory due to fear of persecution. Under GC IV, they shall be allowed to do so “unless their departure is contrary to the national interests of the State”.¹⁴² Given that the “national interests” reservation is quite broad, there is a risk that the concerned State will not limit its refusal to the departure of those individuals who actually pose a risk to its security. The ICRC Commentary on GC IV therefore opines that this reservation should be invoked with moderation and only “when reasons of the utmost urgency so demand”.¹⁴³ Accordingly, when the safety of LGBT persons is at stake or when they are continuously subjected to discrimination and harassment, the concerned State should grant their request to leave the territory and limit its refusal only to security reasons.

Another question in this context relates to the responsibility of a belligerent party to relocate an LGBT civilian or detainee from a location under its effective control due to risk of persecution. This is in the event that IHL does not grant the concerned person the right to leave the territory or that such a request has already been denied, and the State has not initiated a transfer for reasons of its own security.¹⁴⁴ A positive obligation to relocate in these circumstances can be inferred from the general responsibility of a government, including a *de facto* government in occupied territory, for the well-being and safety of all those under its effective control, including enemy nationals.¹⁴⁵ It can also stem from the call to the parties to the conflict to facilitate the evacuation of civilians – in particular vulnerable civilians – from dangerous places during hostilities.¹⁴⁶ While the latter is not compulsory, taken together with the above responsibility for the well-being and safety of protected persons, it seems that the concerned party should take all feasible measures, as far as its security allows, to facilitate the relocation of LGBT persons within the territory under its control if there is a need. In the event that transfer is not feasible, the party concerned is not relieved of its obligation to take effective measures in due diligence to protect those at risk of persecution and to prevent any violence and abuse, including by private actors.

A relevant example from State practice concerns Palestinians who claim that they are in danger while in the occupied Palestinian territory due to their sexual orientation. An Israeli policy document stipulates that in these cases the person concerned may contact the welfare coordinator at the Israel Defense

142 GC IV, Arts 35, 48.

143 GC IV, Art. 35; ICRC Commentary on GC IV, above note 84, p. 236 (Art. 35).

144 See GC IV, Arts 35, 41, 49, 78.

145 E.g., Hague Regulations, Art. 43; GC III, Arts 13, 20, 46; GC IV, Arts 49, 55, 83, 85, 127; AP I, Art. 69. See also ICCPR, Art. 2; Human Rights Committee, above note 60, para. 10.

146 GC IV, Arts 14–17, 49; ICRC Commentary on GC IV, above note 84, p. 136 (Art. 16) (the list of vulnerable individuals in Article 16 is not exhaustive and may apply to “any civilians who while not being either wounded or shipwrecked are exposed to some grave danger as a result of military operations”). For a similar duty with respect to prisoners of war, see GC III, Arts 19, 22–23.

Forces' Civil Administration.¹⁴⁷ The latter will assess the circumstances and seek assistance from local and international bodies operating in the occupied territory. In appropriate cases, relocation outside of the occupied territory can be explored (but only exceptionally to Israel).¹⁴⁸ In these cases the ICRC and other humanitarian organizations may provide psychosocial and material support, shelter, medical care and assistance in facilitating relocation outside of the occupied territory.

Repealing anti-LGBT laws in occupied territory

One of the main obstacles to the protection of LGBT persons and their ability to fully enjoy their human rights is the criminalization of homosexuality and same-sex relations under domestic law.¹⁴⁹ Apart from heavy criminal sanctions, local laws may also prescribe discriminatory policies, denying LGBT persons equal and adequate access to employment, housing, education, welfare benefits and health services. In the context of armed conflict and provided there is occupation, this raises the dilemma of repealing such laws by the Occupying Power, notwithstanding the fact that they may be supported by the majority of the local population in the occupied territory.

The law of occupation instructs the Occupying Power to exercise restraint in administrating the occupied territory, and to refrain from introducing large-scale reforms that will change the basic characteristics – i.e., the social, economic, legal and political structures – of the territory.¹⁵⁰ There are, however, some exceptions to this rule. The Occupying Power may introduce legislative changes necessary for the security of its own armed forces or for the benefit of the local population, especially in a prolonged occupation.¹⁵¹ Article 43 of the 1907 Hague Convention instructs the Occupying Power to respect the laws in force in the occupied country, “unless absolutely prevented”. Accordingly, Article 64 of GC IV allows the Occupying Power to repeal or suspend the laws of the occupied territory when they constitute “an obstacle to the application of the present Convention”.¹⁵² It may similarly subject the local population “to provisions which are essential to enable the Occupying Power to fulfil its obligations under

147 This policy document was submitted by the Israeli Government to the Supreme Court in *Anon v. State of Israel*, HCJ 5200/09, submission of 9 December 2014, available at: <https://bit.ly/2WbCC40>.

148 *Ibid.* See also Kfar Saba Court, *State of Israel v. Anon*, 32463-03-17, Decision, 5 April 2017 (allowing the accused, a Palestinian man from the West Bank, to stay in Israel given the danger to his life in the areas administered by the Palestinian Authority because of his sexual orientation).

149 See above note 50.

150 Hague Regulations, Art. 43; ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, Geneva, March 2012, p. 54. See also GC IV, Art. 64.

151 GC IV, Art. 64 and see generally, Supreme Court of Israel, *Gamiyat El-Iskan v. IDF Commander in the West Bank*, HCJ 393/82, 28 December 1983; Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 112, 115; ICRC, above note 150 p. 56.

152 While Article 64 refers to “penal laws”, the ICRC Commentary emphasizes that the legislative authority of the Occupying Power in this context concerns “the whole of the law (civil law and penal law) in the occupied territory”. ICRC Commentary on GC IV, above note 84, p. 335 (Art. 64); ICRC, above note 150, p. 58.

the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power”.¹⁵³

Undoubtedly, sensitive and controversial legislative changes may trigger tension among the local population, and even violent opposition which may threaten the security of the Occupying Power’s armed forces. Moreover, some might contend that repealing anti-LGBT laws is not for the benefit of the local population whose majority is opposed to such changes in the *status quo ante*. A common argument is that promoting the protection and equal treatment of LGBT persons in fact serves Western values, abruptly imposed on the occupied territory against the prevailing religious convictions and customs.¹⁵⁴

These concerns, however, do not justify thwarting the fundamental principles of humane treatment and the non-adverse distinction between protected persons. The ICRC Commentary on GC IV is unequivocal in this regard:

The second reservation [to the rule that the laws in the occupied territory must be maintained] is in the interests of the population and makes it possible to abrogate any discriminatory measures incompatible with humane requirements. It refers, in particular, to provisions which adversely affect racial or religious minorities, such provisions being contrary to the spirit of the Convention (Article 27), which forbids all adverse distinction based, in particular, on race, religion or political opinion. This means that when the penal legislation of the occupied territory conflicts with the provisions of the Convention, the Convention must prevail.¹⁵⁵

Repealing or suspending discriminatory laws in occupied territory, or introducing new laws in order to protect vulnerable groups, is not without precedent. Following the post-World War II occupation of Germany, the Allied forces announced that they would abolish “the cruel, oppressive and discriminatory laws and institutions” created by the Nazi Party, and determined that no German law shall be applied within the occupied territory “in any instance where such application would cause injustice or inequality”, including on the basis of “race, nationality, religious beliefs or opposition to the National Socialist Party or its

153 GC IV, Art. 64.

154 Cf. African Men for Sexual Health and Rights and Coalition of African Lesbians, *Violence Based on Perceived or Real Sexual Orientation and Gender Identity in Africa*, Pretoria, 2013, pp. 6–7; HRW, *Scared in Public and Now No Privacy: Human Rights and Public Health Impacts of Indonesia’s Anti-LGBT Moral Panic*, July 2018, p. 40, available at: www.hrw.org/sites/default/files/accessible_document/indonesia0618_lgbt_web.pdf; Rose Troup Buchanan, “Robert Mugabe Tells UN General Assembly: ‘We Are Not Gays!’”, *The Independent*, 29 September 2015; Josh Jackman, “Malaysian Prime Minister Says the Country ‘Cannot Accept LGBT+ People’”, *Pink News*, 21 September 2018, available at: www.pinknews.co.uk/2018/09/21/malaysian-prime-minister-says-the-country-cannot-accept-lgbt-people/; Tony Grew, “Nepalese Gays Face New Persecution”, *Pink News*, 4 January 2007, available at: www.pinknews.co.uk/2007/01/04/nepalese-gays-face-new-persecution.

155 ICRC Commentary on GC IV, above note 84, pp. 335–336 (Art. 64). Similarly, the Occupying Power may abolish courts or tribunals which have been instructed to apply inhumane or discriminatory laws. It should be noted that the extent to which the Occupying Power is authorized to change or repeal local legislation contrary to IHRL is a matter of dispute (e.g., ICRC, above note 150, pp. 58–59). Yet, the principles of humane treatment and non-discrimination are also part of the law of occupation and enshrined, *inter alia*, in the Geneva Conventions.

doctrines”.¹⁵⁶ The occupation forces in Iraq dismantled the Ba’ath Party, recognizing the large-scale human rights abuses suffered by the local population at the hands of the ousted regime.¹⁵⁷ The Coalition also introduced the principle of comparable pay for comparable work in the Iraqi public sector, eliminated child labour and established the Ministry of Human Rights.¹⁵⁸ More generally, the Israeli Supreme Court opined that the military commander in the occupied Palestinian territory is authorized “to take all necessary measures to ensure growth, change and development” and for this purpose to develop, among others, the education, health and welfare systems of the occupied territory, and in this context, to make necessary amendments to existing legal arrangements.¹⁵⁹

Clearly, a scenario in which the Occupying Power is inflicting and enforcing inhumane and/or discriminatory policies against women or racial or religious minorities – relying on the authorization in domestic law and on the conservationist principle of the law of occupation – cannot be accepted. The same applies to sexual minorities.

Acknowledging the constraints imposed by local customs and public opinion (to the extent that they impact the security of the Occupying Power’s forces), the Occupying Power shall endeavour to repeal, or at the very least refrain from enforcing, domestic law criminalizing non-heterosexual sexual orientation and gender identity, including same-sex relations between consenting adults. It shall therefore provide effective protection to LGBT persons from violence and detention based on these grounds. As a *de facto* government, the Occupying Power shall also abolish any adverse distinction in its own dealings with the local population, including when providing governmental services.

Resistance by States

In spite of multiple reports on violence and discrimination against LGBT persons, including during armed conflict, many States fail to implement their legal obligations in terms of prevention and accountability, a practice which results in widespread impunity and lack of protection.¹⁶⁰ Given that LGBT persons are often perceived by the dominant majority as challenging established gender patterns and the monolithic understanding of family life,¹⁶¹ even in States where

156 Control Council for Germany, Proclamation No. 1, “Establishment of Military Government”, 30 August 1945, and Law No. 1, “Abrogation of Nazi Laws”, 30 August 1945, Art. II.

157 Coalition Provisional Authority, Order No. 1, “De-Ba’athification of Iraqi Society”, 16 May 2003.

158 Coalition Provisional Authority, Order No. 30, “Reform of Salaries and Employment Conditions of State Employees”, 8 September 2003; Order No. 89, “Amendments to the Labor Code – Law No. 71 of 1987”, 30 May 2004; and Order No. 60, “Establishment of the Ministry of Human Rights”, 22 February 2004.

159 Supreme Court of Israel, *Gamiyat El-Iskan*, above note 151, paras 26, 30.

160 See above note 23.

161 E.g., Sylvia A. Law, “Homosexuality and the Social Meaning of Gender”, *Wisconsin Law Review*, Vol. 1988, No. 2, 1988; Susan Moller Okin, “Sexual Orientation, Gender, and Families: Dichotomizing Differences”, *Hypatia*, Vol. 11, No. 1, 1996; cf. OHCHR, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, UN Doc. A/HRC/16/44, 20 December 2010, paras 23, 85.

non-heterosexual sexual orientation and same-sex relations are not criminalized, many governments are reluctant to address, let alone support, ways to improve the protection of LGBT groups amid strong opposition.¹⁶² Indeed, the UN Secretary-General recently stated that the conflict-related risks faced by LGBT minorities “[have] been a blind spot in the monitoring of civilian protection concerns”, implying a lack of adequate response by the international community.¹⁶³

Notably, a number of member States declined the invitation to attend an informal – first-ever – meeting of the UN Security Council to discuss the violence against LGBT persons by ISIL, and other States have refused to cooperate with the Independent Expert on sexual orientation and gender identity appointed by the HRC.¹⁶⁴ This practice is telling, as it contributes to a protection paradox in which the most vulnerable are abandoned by States. The latter are not only failing to acknowledge that LGBT persons are vulnerable and deserve protection, but are also delegitimizing them by criminalization, incitement, violence, discrimination and impunity – thus paving the way for recurring abuses.

Conclusion

Similar to other civilians and persons *hors de combat*, members of the LGBT community are protected by IHL norms – in particular by the obligation of parties to the conflict to afford humane treatment and by the prohibition against adverse distinction. These norms are sufficiently broad to be tailored to the needs and sensitivities of LGBT individuals during armed conflict.

Efforts to better protect LGBT persons entail a delicate and strenuous process, given that negative sentiments against the LGBT community are deeply rooted in domestic beliefs, practices and national law. Such an environment is likely to become more hostile and violent in circumstances of armed conflict, especially towards individuals perceived as belonging to the enemy. A positive change can be achieved gradually by collecting reliable information on their situation, raising awareness, and persuading and educating parties to the armed conflict, their authorities and the local population. It is essential to challenge “traditional” values and narratives¹⁶⁵ while offering alternative ones which support the notions of humanity, the inherent dignity of each and every human

162 OHCHR, above note 6, paras 24–26.

163 Report of the UN Secretary-General, 2016, above note 7, para. 14. It was also submitted that the humanitarian sector has paid little attention to LGBT victims of gender-based violence: see Chris Dolan, “Letting Go of the Gender Binary: Charting New Pathways for Humanitarian Interventions on Gender-Based Violence”, *International Review of the Red Cross*, Vol. 96, No. 894, 2014.

164 M. Nichols, above note 7; Letter from the Ambassador of Egypt to the President of the Human Rights Council, 29 July 2016, available at: www.unwatch.org/wp-content/uploads/2016/07/Amb.-Egypt-letter-to-HRC-President-29jul16.pdf; OHCHR, “Deep Concern at Bid to Block UN Human Rights Expert”, 21 November 2016, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20902&LangID=E.

165 For example, by challenging the narrative that homosexuality is “un-African” or a Western concept: see African Men for Sexual Health and Rights and Coalition of African Lesbians, above note 154, pp. 6–8.

being, non-discrimination and non-violence. In the meantime, concrete legal and practical measures must follow in order to provide effective protection.

States should be repeatedly reminded of their consent to be bound by international law and its supremacy over their domestic law. It should be emphasized that refusing to protect LGBT persons from violence and adverse distinction is tantamount to denying humane and equal treatment on the ground of, *inter alia*, race, colour, sex or religion. These basic principles are embodied in treaty and customary IHL, reaffirmed by IHRL and even recognized by some as peremptory norms (*ius cogens*).¹⁶⁶ All parties to the armed conflict, including armed groups, are continuously bound by them, and LGBT persons are not excluded from their scope of application. Ultimately, States, as well as human rights mechanisms, international and regional organizations, the ICRC, civil society and the media, have an important role in integrating the LGBT perspective into the law and humanitarian action.

166 IACtHR, Advisory Opinion OC-18/03, “Juridical Condition and Rights of Undocumented Migrants”, 17 September 2003, para. 101. See also Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), Art. 53; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2001, pp. 85, 112–113; ICTY, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment (Trial Chamber), 14 January 2000, para. 520; ICRC Commentary on GC II, above note 63, paras 612, 624, 663 (Art. 3); ICRC Customary Law Study, above note 59, pp. 309–310 (Rule 88).

