

**Palacký University in Olomouc  
Faculty of Law**

**“Protection of LGTB+ people in  
times of armed conflict”**

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**Master’s thesis**

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**Olomouc, 2021**

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## **Declaration**

I hereby declare that this Master's Thesis on the topic "Protection of LGTB+ people in times of armed conflict" is my original work and I have acknowledged all sources used.

Place: Olomouc

Date: 25 April 2021

Signature: Haridian Bolaños Frasquet

## Abbreviations and acronyms

|        |  |
|--------|--|
| ACHR   | American Convention on Human Rights  |
| ACHRPR | African Charter on Human Rights and People's Rights                                      |
| ACHPR  | African Commission on Human and People's Rights  |
| App    | Application  |
| API    | Additional Protocol on the Geneva Convention I   |
| APII   | Additional Protocol on the Geneva Convention II  |
| Art.   | Article  |
| CAT    | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| CJEU   | Court of Justice of the European Union   |
| Doc.   | Document   |
| ECHR   | European Convention of Human Rights  |
| ECtHR  | European Court of Human Rights   |
| ETSP   | East Timor Special Panels  |
| EU     | European Union   |
| GC     | Geneva Conventions   |
| HRL    | Human Rights Law   |
| HRCR   | Human Rights Council Resolution  |
| IAC    | International Armed Conflict   |
| IACHR  | Inter-American Court of Human Rights   |
| IACFDI | Inter-American Convention against All Forms of Discrimination and Intolerance            |
| Ibid.  | Ibídem   |

|        |   |
|--------|---|
| ICCS   | Rome Statute (of the International Criminal Court)                      |
| ICC    | International Criminal Court  |
| ICCPR  | International Covenant on Civil and Political Rights                    |
| ICESCR | International Covenant on Economic, Social and Cultural Rights          |
| ICJ    | International Court of Justice  |
| ICTR   | International Criminal Tribunal for Rwanda                              |
| ICTY   | International Criminal Tribunal of the former Yugoslavia                |
| IGLHRC | International Gay and Lesbian Human Rights Commission                   |
| IHL    | International Humanitarian Law  |
| ILC    | International Law Commission  |
| LGBT+  | Lesbian, Gay, Bisexual, Transgender and others                          |
| NIAC   | Non-international Armed Conflict  |
| No.    | Number  |
| OAS    | Organisation of American States   |
| OHCHR  | Office of High Commissioner of Human Rights (of the UN)                 |
| ORAM   | Organization for Refugees, Asylum and Migration                         |
| p.     | Page  |
| Para.  | Paragraph   |
| SCSL   | Special Court for Sierra-Leone  |
| STC    | Sentencia del Tribunal Supremo (judgment of the supreme court of Spain) |
| TFEU   | Treaty on the Functioning of the European Union                         |
| TEC    | Treaty Establishing the European Community                              |

|        |  |
|--------|--|
| UN     | United Nations   |
| UNDHR  | United Nations Declaration of Human Rights               |
| UNGA   | United Nation General Assembly                           |
| UNHCR  | United Nations High Commissioner for Refugees            |
| UNHRC  | United Nations Human Rights Committee                    |
| UNTAET | United Nations Transitional Administration in East Timor |

## Abstract/Abstrakt

Some groups, such as women and children, have been the subject of international discussion and even have regulations specifically mentioning them. The LGBT+ collective suffers serious human rights violations even in times of peace. Although there have been advances at both the national and international level, these attacks can be increased during the course of an armed conflict. In addition, the impact of the conflict on this group is more specific as they are constantly targeted for discrimination and have special needs. To date, few studies specialise in them exclusively. This thesis examines which rules and procedures of international law can be applied in the context of an armed conflict in order to protect persons belonging to this group, including not only IHL but also HRL and international criminal law rules. It will be deduced whether there is a specific procedure or rule for this group and, in the absence of such a specific rule, whether it is considered necessary.

Keywords: LGBT+ people, sexual minorities, gender identity, sexual orientation, armed conflict, protection, international law.

Některým skupinám osob, jako jsou ženy a děti, je mezinárodním společenstvím věnována zvláštní pozornost a dokonce existují mezinárodněprávní normy zaměřené na ochranu těchto skupin. Skupina osob LGBT+ je skupinou, jež trpí závažným porušováním lidských práv v dobách míru. Ačkoli došlo k pokroku na národní i mezinárodní úrovni, útoky na tuto skupinu mohou být v průběhu ozbrojeného konfliktu ještě intenzivnější. Kromě toho je dopad ozbrojeného konfliktu na tuto skupinu závažnější z důvodu vyšší míry diskriminace a zvláštních potřeb osob LGBT+. K dnešnímu dni se tomuto tématu věnuje jen málo studií. Tato práce zkoumá, jaké normy mezinárodního práva lze použít v souvislosti s ozbrojeným konfliktem s cílem chránit osoby náležející k této skupině, a to včetně mezinárodního humanitárního práva, ale také práva lidských práv a mezinárodního trestního práva. Cílem práce je identifikovat, zda existují zvláštní pravidla mezinárodního práva chránící tuto skupinu a pokud takové zvláštní pravidlo neexistuje, zda je existence takových specifických pravidel nutná.

Klíčová slova: LGBT+ osoby, sexuální menšiny, genderová identita, sexuální orientace, ozbrojený konflikt, ochrana, mezinárodní právo.

# 1. Introduction

## 1.1. Introduction of the issue/problem

The humanisation of armed conflict has long been the subject of regulation. Among the consequences of this humanisation is the principle of differentiation between combatants and non-combatants, as well as the protection of certain vulnerable groups.<sup>1</sup> The social changes are causing the need to adjust the laws to the necessities of the international community. In recent decades the pro-LGBT+ movement has gained strength and more and more countries are legislating in this direction. This is in addition to the fact that armed conflicts are complex and particularly sensitive situations and therefore deserve special attention and analysis.

Concerning the relevance of the matter, the LGBT+ collective suffers from normalised violence in times of peace. This type of violence can increase in times of armed conflict.<sup>2</sup> Despite being an invisible group, there are numerous reported cases of violence against them in the context of an armed conflict. For example, in the Colombian conflict, a total of 2,345 events were recorded by the Unique Registry of Victims of Colombia, of which 1,818 victims are from the LGBT+ collective. Besides, LGBT persons have been targets of physical and sexual violence in Syria.<sup>3</sup> It has also been subjected to violence (including sexual violence), in countries of displacement, where they often face double stigma, as refugees and LGBT people, according to a UNHCR study.<sup>4</sup>

Violence against this group during times of conflict is selective. Other vulnerable groups have already been studied in this context, such as women and children.<sup>5</sup> Therefore, today there are special provisions for these two groups, but it is not clear for the LGTB+ group. Some authors, like Winer, believe that the UN should be

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<sup>1</sup> ALEXANDER, Amanda. A short history of international humanitarian law. *European Journal of International Law*, 2015, vol. 26, no 1, p. 109-138.

<sup>2</sup> ECP. Conflictos armados y derechos de la población LGTBI. *Universidad Autónoma de Barcelona*, 2017. Available at: <https://escolapau.uab.cat/informes-2/conflictos-armados-y-derechos-de-la-poblacion-lgtbi/>

<sup>3</sup> Ibid.

<sup>4</sup> CHYNOWETH, Sarah. *Sexual violence against men and boys: in the Syria crisis*. Geneva: United Nations High Commissioner for Refugees (UNHCR); 2017. Available at: <https://data2.unhcr.org/es/documents/download/60864>.

<sup>5</sup> MOORE, Melinda W.; BARNER, John R. Sexual minorities in conflict zones: a review of the literature. *Aggression and violent behavior*, 2017, vol. 35, p. 33-37.

more involved in the development of LGBT+ rights and emphasize the power that non (necessarily) binding elements such as UNGA resolutions have.<sup>6</sup> On the other hand, others believe that with the existing regulations it is possible to provide the necessary protection to LGBT+ members.<sup>7</sup> Thus, the analysis of the international legislation in force is relevant to know the legal protection they have.

The structure of the work is described as follows. The document is divided into six parts. The first ones are not enumerated and are those relating to formal issues such as abbreviations, summary and introduction. The first enumerated part (the introduction) will include the issues relating to the research question, hypotheses, methodology, etc. The second part will provide a brief historical review of LGBT+ rights in the international arena. In the third section, the specific impact of armed conflict on this group will be analysed in order to understand the special needs they may have during or as a consequence of it. The fourth section will analyse the different applicable international laws. This section will be divided into three subsections. The first sub-section will be human rights, as it is the most general and its rules are observed both in times of peace and in times of conflict. The second sub-section is humanitarian law, as it is important to know which specific rules protect this group in times of armed conflict. Finally, the third sub-section will analyse international criminal law to see what instruments LGBT+ people have at their disposal to enforce their rights in the event of serious violations. Finally, the fifth section will be the conclusions and the sixth the bibliography used for the development of this work.

## 1.2. Objectives

The main objective is to determine which rules of international law apply to protect the members of the LGTB+ collective. Special attention will be paid to IHL standards as the legal protection to be analysed is during wartime.

Furthermore, a secondary objective is to find out whether there are specific rules for the protection of this group or whether, on the contrary, general rules apply.

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<sup>6</sup> WINER, Anthony S. Levels of generality and the protection of LGBT rights before the United Nations General Assembly. *Wm. Mitchell L. Rev.*, 2015, vol. 41, p. 80.

<sup>7</sup> WEBER, Travis S.; LIN, L. Freedom of Conscience and New LGBT Rights in International Human Rights Law. *J. Glob. Just. & Pub. Pol'y*, 2015, vol. 2, p. 277.

Finally, the aim is to form an opinion on whether the current regulation is correct or whether, on the contrary, it would be more useful to develop new instruments or apply rules that protect other groups to the group under investigation.

### **1.3. Research questions and hypothesis**

The main question is whether there are specific regulations that can be applied to protect LGBT+ people from violence in the context of armed conflict. The secondary question is, in the absence of specific regulations, whether it is necessary to develop it.

The main hypothesis is that there is no legislation at the international level that is specifically aimed at this group and whose function is to prevent or prosecute anti-LGBT+ violence. Concerning the secondary question, the hypothesis is that the existing legislation will be unclear, so it would be helpful to develop common minimum standards to protect LGBT+ people.

### **1.4. Methodology**

Academic articles have been searched in search engines and pages such as HeinOnline, Research Gate, Google Scholar, Academia or Scielo, among others. The articles will deal with applicable regulations, experiences of LGBT+ victims of armed conflict or other relevant issues. Also, it has been analysed the legal documents related to the subject matter of the different tasks studied, namely HRL, IHL and international criminal law. In addition, international laws at the regional level that could be applied mainly in the field of human rights have been taken into account. Besides, the mention of some cases from different judicial entities may be useful for the purpose of the study. In this way, the differences between the different areas of the world can be seen. Other relevant documents are the reports of NGOs, the resolutions of the UN and its various bodies and institutions, as well as speeches made by their representatives in the course of their work. Besides, newspaper reports have been used as evidence of possible situations experienced by LGBT+ members as well as to announce new measures that governments intend to take.

This is a qualitative study, as it is not possible to carry out quantitative analysis as there is no direct access to the cases and it is not possible to carry out surveys, questionnaires or databases with the information to which the researcher has access. The descriptive and analytical method was used throughout the work. It was very useful for

understanding the specific situations experienced by LGBT+ people during armed conflict. The analytical method was also useful in compiling the standards applicable to the issue and examining the applicability of these norms. It is necessary to mention some limitations encountered during the development of this work. Many of them because the issue of LGBT+ rights has only recently come up in international bodies. Also, many countries still do not consider it an important issue. As a result, there are not many studies on the subject, especially if it is focused on armed conflict. The majority of the data is collected by NGOs and a few legal analyses on the matter have been made. Moreover, one can still find articles that openly oppose the recognition of these rights and even consider pro-LGBT currents and policies as a danger. Also, concerning the jurisprudence in the international criminal law field, there were no cases regarding the specific matter yet. Thus, it is only possible to interpret the statutes of the courts without having a binding final decision that confirms or not such interpretations. In this sense, only international criminal courts whose statutes covered relevant crimes during armed conflict (e.g. war crimes, crimes against humanity, etc.) will be studied.

## 2. LGTB+ rights on the international arena

### 2.1. Historical development

Relationships between people of the same gender are nothing new. There was a time when law, religion and morality were practically the same. In the Greco-Roman era, homosexual relations between men were considered divine.<sup>8</sup> Relations between men and women were based on the need to unite families, acquire property and gain power and wealth. Furthermore, the union between man and woman was not between equals, as women were considered inferior or even part of the husband's property. The only union based on love was the homosexual.<sup>9</sup> Thus, the perception of the union between people to form a couple has changed a lot over time.

Later on, Christianity was established in Europe and sex became taboo. Sexual practices and relationships between people were strongly linked to the morality of religion. Society was based on the supremacy of men, with the exclusion of women, slaves and children. Christianity introduced a new sexual code based on the strict difference and opposition of the binary genders and with reproduction as the only morally acceptable end.<sup>10</sup> Also, Judaism and Islamism conceived of sex as merely a tool for reproduction and not as part of an individual's freedom and identity.<sup>11</sup>

In more recent European history, the LGTB+ has been victims of discriminatory laws. During the Nazi regime, homosexuality was persecuted by law. Punishment could not only lead to imprisonment but could also be sent to concentration camps and result in the loss of all civil rights.<sup>12</sup> The change of trend in some countries came about through social movements many years after the Second World War. In 1971, the Gay Liberation Front Manifesto, published in London, is a good example. In 1978, the

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<sup>8</sup> CVIKLOVÁ, Lucie, et al. Advancement of human rights standards for LGBT people through the perspective of international human rights law. *Journal of comparative Research in Anthropology and Sociology*, 2012, vol. 3, no 02, p. 45-60.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> ĐURIC, Nevenka; VIDLIČKA, Sunčana Roksandić; BOGUSH, Gleb. Legal protection of sexual minorities in international Criminal law. *Russian Law Journal*, 2018, vol. 6, no 1.

International Lesbian and Gay Association (ILGA) was founded but its biggest influence on the EU agenda was from the '90s onwards.<sup>13</sup>

Outside Europe, the homophile movement already existed in the 1950s but the biggest turning point was the Stonewall revolts. Stonewall Inn was a New York bar run by the mafia that was famous for taking in people from the collective as well as homeless youths and other social outcasts. Police regularly raided gay-friendly bars. On 28 June 1969, people who were surrounded by the bar decided to strike back. After expelling and arresting customers and staff from the bar, the crowd started throwing objects at the police, who had to lock themselves inside the bar and wait to be rescued by another police unit. This led to further revolts in the following days, starting a movement for the rights of the marginalised (including also anti-racist and other movements) and creating the Gay Liberation Front. Today it is considered the origin of the modern LGBT+ movement. June 28 is the official LGBT+ Pride Day.<sup>14</sup>

This socialisation of sexuality put the spotlight on discrimination against sexual minorities and the need to understand human diversity.<sup>15</sup> The idea of sexuality and gender as an element of relevance to the personality and the construction of one's own identity was key to the beginning of a claim for the rights of the collective as part of the human rights journey. Since the 70s, first in Europe and America and later as a globalised phenomenon thanks to the advance of new technologies, a discussion has been created around the rights of this group and different laws and documents have been created at a national, regional and international level.<sup>16</sup> The clamour for these rights has reached such a point that there are authors like Roseman and Miller who consider that one can speak of "sexual rights" as a category in its own right. This category not only includes the right to non-discrimination (among others) of the LGBT+ collective but is also linked to the right to sexual freedom (consent) and legal abortion. In addition, the disqualification of homosexuality and transsexuality as a disease, in 1990 and 2018 respectively, by the World Health Organization, has helped advance the integration of the group in today's societies.

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<sup>13</sup> SWIEBEL, Joke. Lesbian, gay, bisexual and transgender human rights: the search for an international strategy. *Contemporary Politics*, 2009, vol. 15, no 1, p. 19-35.

<sup>14</sup> MATZNER, Andrew. Stonewall riots. *GLBTQ Archive*, 2015. Available at: [http://glbtqarchive.com/ssh/stonewall\\_riots\\_S.pdf](http://glbtqarchive.com/ssh/stonewall_riots_S.pdf)

<sup>15</sup> ROSEMAN, Mindy Jane; MILLER, Alice M. Normalizing sex and its discontents: establishing sexual rights in international law. *Harv. JL & Gender*, 2011, vol. 34, p. iii.

<sup>16</sup> Ibid.

From the 1970-80s until 2000, the vast majority of complaints were still manifest. However, since then, human rights documents have been used to demand that governments and international bodies adopt specific laws and measures to protect so-called sexual rights.<sup>17</sup> Despite this, the difficulties for this group are still very great. Some even argue that these "new" human rights do not have the same value as classic rights such as the right to life or physical integrity.<sup>18</sup> The importance of the recognition of the rights of the LGBT+ collective and its relationship with more classic rights has been mentioned above and will be detailed in the section on the specific impact of conflicts on this collective. Several UN committees as well as reports from the High Commissioner have acknowledged that even in democratic countries with a liberal view of the group, human rights violations are committed against them. However, in 2005 the UN Commission for Human Rights refused for the third time to issue a resolution concerning Human Rights and Sexual Orientation.<sup>19</sup> Human rights NGOs also included the right to non-discrimination on the basis of sexual orientation and gender identity.<sup>20</sup> Within the UN, the Yogyakarta principles document was created at the request of the former UN High Commissioner for Human Rights (period 2004-2008). Several experts, activists and jurists from different countries as well as members of the International Commission of Jurists assisted in this process.<sup>21</sup> This document was approved in 2006 and constitutes the principles applicable to the implementation of international human rights law concerning sexual orientation and gender identity. It recognises a range of classic rights (life, security, fair trial, etc.) and calls on states to include the principles of equality and non-discrimination of the group in their constitutions or other relevant laws. It is a guide of binding international standards.<sup>22</sup> In 2017, these principles were revised and new ones were added in The Yogyakarta principles plus 10. The review

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<sup>17</sup> Ibid.

<sup>18</sup> MUTUA, Makau. Standard setting in human rights: Critique and prognosis. *Human Rights Quarterly*, 2007, p. 547-630.

<sup>19</sup> SWIEBEL, Joke. Lesbian, gay, bisexual and transgender human rights: the search for an international strategy. *Contemporary Politics*, 2009, vol. 15, no 1, p. 19-35.

<sup>20</sup> REHMAN, Javaid; POLYMENOPOULOU, Eleni. Is green a part of the rainbow: sharia, homosexuality, and LGBT rights in the Muslim world. *Fordham Int'l LJ*, 2013, vol. 37, p. 1.

<sup>21</sup> CVIKLOVÁ, Lucie, et al. Advancement of human rights standards for LGBT people through the perspective of international human rights law. *Journal of comparative Research in Anthropology and Sociology*, 2012, vol. 3, no 02, p. 45-60.

<sup>22</sup> The Yogyakarta principles on the application of international human rights law in relation to sexual orientation and gender identity, Yogyakarta 2007. Available at: <https://www.refworld.org/pdfid/48244e602.pdf>

includes the right to be protected by the state, to legal recognition, to physical and mental integrity, to freedom from criminalisation or health, among others.<sup>23</sup>

The former High Commissioner for Human Rights (period 2008-2014) stated that “those who are lesbian, gay or bisexual, those who are transgender, transsexual or intersex, are full and equal members of the human family, and are entitled to be treated as such”.<sup>24</sup> Besides, the UN-designated in 2016 through HCRC A/HRC/RES/32/2, an Independent Expert on Sexual Orientation and Gender Identity, whose aim is among others, “to assess the implementation of existing international human rights instruments”.<sup>25</sup>

At the regional level, since the 1990s, the movement for LGBT rights has been gaining strength within the EU. The EU institutions seem to have embraced this movement, which was reflected in some legal documents. The former Art. 13 of the TEC (now Art. 19 of the TFEU), contains a provision stating that the Council “may take appropriate action to combat discrimination based on [...] sexual orientation”. However, this provision is just a suggestion. Besides, it needs the participation of the EP and unanimity. Even though, the Commission has submitted some proposal on the grounds of this article.<sup>26</sup> The most important moment was the adoption of the CFREU, in which Art. 21 expressly prohibits discrimination on the grounds of sexual orientation. With the ratification of this document with the Lisbon Treaty, the EU created the first Treaty explicitly prohibiting this type of discrimination.<sup>27</sup> However, unlike discrimination on the grounds of sexual orientation, the concept of transgender rights is missing in the written legislation.<sup>28</sup> Both entered into force in 2009. Furthermore, the CJEU has

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<sup>23</sup> The Yogyakarta principles plus 10, Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta principles, Geneva, 2017. Available at: [http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf)

<sup>24</sup> United Nations High Commissioner for Human Rights on the theme of gender identity, sexual orientation and human rights on the 63<sup>rd</sup> session of the General Assembly, New York, 18 December 2008.

<sup>25</sup> HRCR A/HRC/RES/32/2 on Protection against violence and discrimination based on sexual orientation and gender identity, 30 June 2016, para 3 (a). Available at: <https://undocs.org/A/HRC/RES/32/2>

<sup>26</sup> DE WAELE, Henry; VAN DER VLEUTEN, Anna. Judicial Activism in the European Court of Justice-The Case of LGBT Rights. *Mich. St. U. Coll. LJ Int'l L.*, 2010, vol. 19, p. 639.

<sup>27</sup> MOS, Martijn. Conflicted normative power Europe: The European Union and sexual minority rights. *Journal of Contemporary European Research*, 2013, vol. 9, no 1. It should be noted that there were some secondary provisions in where the explicit discrimination provision was contained. E.g. Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>28</sup> DE WAELE, Henry; VAN DER VLEUTEN, Anna. Judicial Activism in the European Court of Justice-The Case of LGBT Rights. *Mich. St. U. Coll. LJ Int'l L.*, 2010, vol. 19, p. 639.

decided on many issues concerning discrimination on the grounds of gender identity or sexual orientation.<sup>29</sup>

As for European countries not subject to EU rules in 2009, the ECtHR considered for the first time the treatment on the grounds of sexual orientation as a breach of Art. 3 (prohibition of torture) and 14 (prohibition of discrimination) of the ECHR.<sup>30</sup> The ECHR came into force in 1953 but do not contain the specific clause of discrimination on the grounds of sexual orientation or gender identity. In 2013, the ECtHR stated that where a country gives legal recognition to unmarried heterosexual couples in a form of civil unions, same-sex couples also must be able to benefit from the same rights.<sup>31</sup>

On the American continent, North America has better regulations on LGBT+ equality than Central or South America. The most advanced country is Canada, which has pioneered the recognition of equal rights globally. The Inter-American Commission on Human Rights approved Action Plan 4.6 (i) in 2011, which specifically addresses discrimination against the group. It states that the IACHR will decide on cases of discrimination and issue reports on them.<sup>32</sup>

In Africa, few initiatives have been taken in favour of LGBT+. On the contrary, since about 2014, there has been a wave of anti-LGBT+ speeches. Some authors believe that this is a direct reaction from political leaders to the wave of campaigning for gay marriage in Europe. So far, the African Commission on Human Rights has not dealt with this issue although there are organisations that are responsible for informing about diversity and raising awareness about the suffering of these people throughout the country.<sup>33</sup>

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<sup>29</sup> See as examples cases Case C-13/94 *P. v. S. and Cornwall County Council* [1996] ECR I-02143, Case C-249/96 *Grant v. South-West Trains* [1998] ECR I-00621, Case C-267/12 *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* [2012] Digital Reports, Case C-673/16 *Coman v. Inspectoratul General pentru Imigrări* [2018] Digital Reports, Case C-507/18 *NH v. Associazione Avvocatura per i diritti LGBTI — Rete Lenford* [2020] Digital Reports, among many others.

<sup>30</sup> Case X v Turkey App No. 24626/09, 9 October 2012.

<sup>31</sup> Case of *Vallianatos and others v. Greece* Apps Nos. 29381/09 and 32684/09, 7 of November 2013. See also ILGA Annual review 2014. Available at: [https://www.euskadi.eus/contenidos/informacion/news\\_lgtb/eu\\_definici/adjuntos/ILGA.pdf](https://www.euskadi.eus/contenidos/informacion/news_lgtb/eu_definici/adjuntos/ILGA.pdf)

<sup>32</sup> Inter-American Commission on Human Rights, *Action plan 4.6.i concerning LGTBI people*, 2011. Available at: <http://www.oas.org/es/cidh/lgtbi/>

<sup>33</sup> IBRAHIM, Abadir M. LGBT rights in Africa and the discursive role of international human rights law. *African Human Rights Law Journal*, 2015, vol. 15, no 2, p. 263-281.

The case of Asia is a bit particular, as it is the national courts of each country and not international organisations that are promoting the acceptance of civil rights and the rejection of non-discrimination on the continent. Taiwan was the first jurisdiction in Asia to accept same-sex marriage in 2019.<sup>34</sup> In Oceania the situation depends very much on the region, so you can find very safe countries and countries where it is still a crime to have homosexual relations or to express different gender identity. However, there have been international institutions that have spoken out, such as the UNCHR on the case *Toonen v. Australia*. The UNCHR noted that discrimination based on sexual orientation is covered by the UN Charter and the ICCPR.<sup>35</sup>

At the national level, the evolution of these rights varies. In Europe, Northern Cyprus was the last country to decriminalize homosexuality (in 2014).<sup>36</sup> In 2020, the last country to decriminalize has been Gabon and the last country to abolish the death penalty has been Sudan. It should also be noted that there are countries that have never criminalized homosexuality but may or may not have discriminatory laws in relation to civil rights (marriage, work, adoption, etc.).<sup>37</sup>

Currently, 71 countries consider homosexual relations between men to be a criminal offence, 43 also include relations between women, 15 consider transgender expressions to be a crime and in 11, the penalty for any of them can be death.<sup>38</sup>

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<sup>34</sup> LAU, Holning. Courts, the Law, and LGBT Rights in Asia. *UNC Legal Studies Research Paper*, 2020. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3573177](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3573177)

<sup>35</sup> *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), para. 8.7. Available at: <http://hrlibrary.umn.edu/undocs/html/vws488.htm>

<sup>36</sup> See ILGA Annual Review 2014. Available at: [https://www.euskadi.eus/contenidos/informacion/news\\_lgtb/eu\\_definici/adjuntos/ILGA.pdf](https://www.euskadi.eus/contenidos/informacion/news_lgtb/eu_definici/adjuntos/ILGA.pdf)

<sup>37</sup> See ILGA Annual Review 2020. Available at: <https://www.ilga-europe.org/annualreview/2020>

<sup>38</sup> Map of Countries that Criminalise LGBT People | Human Dignity Trust, 2021. *Humandignitytrust.org* [online]. Available at: [https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/?type\\_filter=crim\\_lgbt](https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/?type_filter=crim_lgbt)

### 3. Impact of armed conflict on the LGBT+ community

To understand the importance of the rules applicable to the protection of the LGBT+ collective in times of armed conflict, it is necessary to have an overview of how conflicts affect this group. Many consequences are arising from a conflict situation apart from the obvious ones such as risk to physical and moral integrity as well as life. During times of armed conflict, the structural violence against certain sectors of society becomes more cruel and widespread.<sup>39</sup> This includes, for example, violence against the LGBT community. The specific violence suffered by this group will then be examined about the different consequences of living in a conflict territory (IAC or NIAC).

#### 3.1. Social cleaning and discrimination

One of these consequences is social cleaning and discrimination. In Zea et al.'s study, several participants in the collective stated that social cleansing was taking place in their places of origin, involving several marginalized groups, including gay men with HIV. In fact, patients in the most conflictive areas were referred to Bogotá, as if armed groups became aware of their status, they would be executed. Other examples were reported by Amnesty International, for instance, the case of 14 years old girl in 2002, who was exposed on the street naked and with a sign that said she was a lesbian. She was raped by men from the paramilitary groups and later found dead with her breasts amputated. Similar cases occurred in other cities as well. In Barrancabermeja, two lesbians were raped, allegedly by paramilitaries, according to them, "to show these girls what it is like to feel a man".<sup>40</sup>

Colombia is not the only case. In countries such as Syria, which had laws punishing homosexuality before entering into armed conflict, the situation of the group has worsened. The presence of ISIS in the territory means that the penalty if sexual orientation is discovered, is death. The way to execute them is to put them on top of a building and throw them away. Furthermore, they have started a campaign against them as they are considered to be sexual deviants. Executions are public, and drawings about executions and videos are posted on the Internet. ISIS implemented this systematic

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<sup>39</sup> ANGARITA, Dubán Rincón. Violencia de género contra la población lgbti en el contexto del conflicto armado colombiano. Insuficiencias regulativas del ámbito de protección jurídico-penal. *Criterios*, 2017, vol. 10, no 1, p. 163-190.

<sup>40</sup> Ibid.

persecution in all areas it controls, including territories in Iraq or Libya, apart from Syria.<sup>41</sup>

Not only homosexuals but other members of the LGBT+ community are specific targets of the terrorist group because they do not conform to its extremist interpretation of Sharia. The ORAM advocate, a Syrian gay man said in his speech before the UN Security Council: “I watched in fear as the Al Qaida branch, Jabhat Al Nusra, took Idlib in October 2012. After arresting and torturing one effeminate man, they announced at a mosque that they would cleanse the town of those involved in sodomy. More arrests followed, and many more men were tortured to confess their sins. Some were killed. They and other Islamist groups executed more accused homosexuals that year. [...] Then in 2014, after ISIL took over, it stepped up the violent attacks on suspected LGBTI people, publishing images of their exploits”.<sup>42</sup> He also stated that “In 2011, at the start of the uprising in Syria, government media launched a campaign accusing all dissidents of being homosexuals. Soon after, authorities waged systematic raids on locales where gay people met. Many were arrested and tortured. Some were never heard from again”.<sup>43</sup> It is common to attack sexual minorities to divert the focus from the real problems behind the conflict.<sup>44</sup> Thus, the members of the LGBT+ community had to flee not only from the terrorist group but also from the government of their own country. Moreover, some testimonies point to their own relatives and acquaintances selling them to armed groups.<sup>45</sup>

### 3.2. Sexual and physical violence

It should be noted that, as with women, sexual violence against this group is increasing. The so-called "corrective rape" has been documented, for example in the Colombian conflict. This violence is due, among other things, to the fact that, both in

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<sup>41</sup> VENIER, Silvia; VENTURI, Denise. Isis and the Violations of Human Rights of Sexual Minorities: Is the International Community Responding Adequately? In *The Asian Yearbook of Human Rights and Humanitarian Law*. Brill Nijhoff, 2017. p. 109-135.

<sup>42</sup> NAHAS, Subhi. United Nations Security Council address by ORAM advocate Subhi Nahas – ORAM refugee, 24 August 2015. Available at: <https://oramrefugee.org/2015/08/united-nations-security-council-address-by-oram-advocate-subhi-nahas/>

<sup>43</sup> Ibid.

<sup>44</sup> MOORE, Melinda W.; BARNER, John R. Sexual minorities in conflict zones: a review of the literature. *Aggression and violent behavior*, 2017, vol. 35, p. 33-37.

<sup>45</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

Colombia and in other countries such as Iraq, pamphlets were distributed in which LGBT people were considered to be military targets.<sup>46</sup>

In the section on social cleansing and discrimination, several serious situations of physical and sexual violence were contemplated, which will also be seen in other sections. The reason for putting a specific section on the most serious forms of violence is to highlight the extent to which it can increase the risk of the group in the conflict and emphasise that it is a group whose violence is highly sexualised. This is because discrimination and hatred of this group, like machoism, is based on gender issues.<sup>47</sup>

### 3.3. Discrimination in the armies

It is no secret that the military corps has been the territory of male stereotypes that exist in warfare. There have been many cases of aggression or mistreatment of LGBT people in different countries. LGBT+ people tend to be more at risk of being assaulted, threatened and harassed while on duty than non-LGBT+ people.<sup>48</sup> These aggressions would not cease in the context of an armed conflict, so the collective military would have to face war and discrimination within its own institution at the same time.<sup>49</sup>

Thus, discrimination in the military is another problem, as acts of physical, sexual or psychological aggression could also occur in times of war. Carmen, a trans woman who before her conversion had to do military service in Colombia before peace was signed with the guerrillas. She says that she was sexually forced by her superior as he got the rumour "that she liked men", despite his attempts to explain to her that this was not her condition. After that, she became the prostitute of some army officers.<sup>50</sup>

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<sup>46</sup> Ibid.

<sup>47</sup> ANGARITA, Dubán Rincón. Violencia de género contra la población LGBTI en el contexto del conflicto armado colombiano. Insuficiencias regulativas del ámbito de protección jurídico-penal. *Criterios*, 2017, vol. 10, no 1, p. 163-190.

<sup>48</sup> See SCHUYLER, Ashley C., et al. Experiences of Sexual Harassment, Stalking, and Sexual Assault During Military Service Among LGBT and Non-LGBT Service Members. *Journal of Traumatic Stress*, 2020. It is an study comparing the risk of LGTB people to suffer different kinds of attacks during service in the US army.

<sup>49</sup> ROKVIĆ, Vanja; STANAREVIĆ, Svetlana. Toward gender and LGBT equality in the Serbian armed forces. En *Women's Studies International Forum*. Pergamon, 2016. p. 26-34.

<sup>50</sup> ZEA, Maria Cecilia, et al. Armed conflict, homonegativity and forced internal displacement: implications for HIV among Colombian gay, bisexual and transgender individuals. *Culture, health & sexuality*, 2013, vol. 15, no 7, p. 788-803.

### 3.4. Internal displacement

This type of displacement is difficult to ascertain, given the bureaucratic difficulty of being considered an internally displaced person. There may also be a situation where there is very limited access to this type of registration or where the refusal is a political strategy of the government itself.<sup>51</sup> This situation of displacement, even within the country itself, creates barriers to accessing certain basic services. For example, in Colombia, it was found that internally displaced LGBT+ persons had more difficulties in accessing the health system than other vulnerable groups, in most cases due to lack of information. This may be of particular relevance in relation to certain diseases. Given the lack of information and limited access to contraceptive methods, in many Latin American countries, HIV remains more prevalent among men who have relations with men.<sup>52</sup> Other countries in which LGBT+ people had to internally displaced due to the violence against them by armed groups are Ukraine<sup>53</sup> and Bangladesh.<sup>54</sup>

### 3.5. International displacement

Host countries to which people fleeing war are seldom friendly to members of the LGBT+ community. One example is Mala, an Iraqi-born trans woman with refugee status in Munich, who has spent some time in Lebanon. Even though Germany is an EU country with a legal system in which nationals of the collective can have a certain confidence, the facts show that in these countries too they are subject to double victimization. While in a shelter, her trans identity was revealed and she was attacked by other refugees. She requested a change of house but was refused. Due to constant threats and attacks, she decided to return to Beirut. She is now an activist for an NGO

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> BOND, Kate & VLASOVA, Anastasia. *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](http://www.unhcr.org/news/stories/2017/9/597ef1fc4/gay-displaced-frontlines-ukraines-conflict.html?query=LGBT)

<sup>54</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

that helps refugees from the LGBT+ collective.<sup>55</sup> Other cities also declare attacks against LGBT+ people in their refugee camps as Turkey,<sup>56</sup> Greece<sup>57</sup> or Kenya.<sup>58</sup>

Also, during the asylum proceedings, they have the burden of proof concerning their pertinence to the group.<sup>59</sup> Therefore, those who want to base their request for refuge not only on the situation of armed conflict in their place of origin but also on their belonging to a persecuted group (and having more possibilities) face certain difficulties. How can one prove one's gender orientation or identity without undermining other rights? As an example in 2014, a very controversial case (*A, B, C v. Staatssecretaris*)<sup>60</sup> come to the CJEU. Three nationals from third states were applying for asylum and residence in the Netherlands. One of the arguments for this application was the risk posed by being a sexual minority in their respective countries. As a result, the national authorities decided to carry out a series of questions and tests beyond the evidence provided by each of them. They understood those extra tests were violating their privacy and, in addition, many of the questions were based on stereotypes. The CJEU agreed with them. Moreover, in some countries, the time provided for the presentation of the evidence is short, so it put stress on them and affects their mental health.<sup>61</sup>

### 3.6. Other medical necessities and special needs

It is clear that people who have been involved in armed conflict can have serious psychological consequences, but LGBT+ people are under even greater pressure. This double victimization (victims of war and LGBTphobia) further affects their mental

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<sup>55</sup> REDA, Ali; PROUDFOOT, Philip. Against Abandonment Activist-Humanitarian Responses to LGBT Refugees in Athens and Beirut. *Journal of Refugee Studies*, 2020.

<sup>56</sup> GRUNGRAS, Neil; LEVITAN, Rachel; SLOTEK, Amy. Unsafe haven: Security challenges facing LGBT asylum seekers and refugees in Turkey. *Praxis*, 2009, vol. 24, p. 41-61.

<sup>57</sup> REDA, Ali; PROUDFOOT, Philip. Against Abandonment Activist-Humanitarian Responses to LGBT Refugees in Athens and Beirut. *Journal of Refugee Studies*, 2020.

<sup>58</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

See also ZHU, APRIL, Share on Twitter Share via Email Print this page Africa Kenya's LGBTQ Refugees Face Threats, Attacks at Kakuma Camp. *Voanews* [online]. 2020. [Accessed 1 January 2021]. Available at: <https://www.voanews.com/africa/kenyas-lgbtq-refugees-face-threats-attacks-kakuma-camp>.

<sup>59</sup> KAHN, Sarilee; ALESSI, Edward J. Coming out under the gun: Exploring the psychological dimensions of seeking refugee status for LGBT claimants in Canada. *Journal of refugee studies*, 2018, vol. 31, no 1, p. 22-41.

<sup>60</sup> Joined Cases C 148/13 to C 150/13, *A (C 148/13), B (C 149/13), C (C 150/13) v. Staatssecretaris van Veiligheid en Justitie* [2014] Digital reports.

<sup>61</sup> KAHN, Sarilee; ALESSI, Edward J. Coming out under the gun: Exploring the psychological dimensions of seeking refugee status for LGBT claimants in Canada. *Journal of refugee studies*, 2018, vol. 31, no 1, p. 22-41.

health. Moreover, the psychologist who treats them should have knowledge of the group and at least not be shocked by its existence; otherwise, this double victimisation could occur due to a psychologist who is homophobic, transphobic, etc. Psychologists and doctors may try to treat their sexual orientation or gender identity as a mental disorder, part of their anxiety or depression, or otherwise, believe that their condition can be "treated".<sup>62</sup> Besides, members of the group feel the pressure of having to hide their identity in order not to be victims of violence, which increases their mental health symptoms.<sup>63</sup>

On the other hand, it has been shown that the way of dealing with psychological trauma is different depending on whether the subject is male or female, so gender is important when dealing with mental health.<sup>64</sup> This data is relevant concerning the LGBT+ population since gender is a concept that is very much related to them. Few studies address whether there are differences between people in the group and those who are not. For example, a trans person could be treated incorrectly. The lack of information and research on this subject may mean that their care is of lower quality and less appropriate to their needs. It should be borne in mind that some studies relate the stress of being part of this group to an increased risk of suicide.<sup>65</sup> Therefore, if good psychological care saves lives in times of peace and without belonging to a minority group, in times of war and being part of a persecuted social group it becomes indispensable.

Physical medical problems should also be mentioned. Here too, a professional with knowledge of the LGBT community would be needed. Trans men, for example, may continue to have their periods and contract uterine related diseases and therefore require gynaecological care. Trans women, on the other hand, would need the services of a urologist. Besides, trans people may be undergoing hormonal treatment and this should be taken into account for diagnosis and other treatment. Finally, intersex people are special cases as they have sexual characteristics of both sexes. Health care providers

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<sup>62</sup> HEARTLAND, A. No place for people like you": an analysis of the needs, vulnerabilities, and experiences of LGBT Syrian refugees in Lebanon. *Retrieved August*, 2014, vol. 15, p. 2017.

<sup>63</sup> KISS, Ligia, et al. Male and LGBT survivors of sexual violence in conflict situations: a realist review of health interventions in low-and middle-income countries. *Conflict and health*, 2020, vol. 14, no 1, p. 1-26.

<sup>64</sup> *Ibid.*

<sup>65</sup> MEREISH, Ethan H.; O'CLEIRIGH, Conall; BRADFORD, Judith B. Interrelationships between LGBT-based victimization, suicide, and substance use problems in a diverse sample of sexual and gender minorities. *Psychology, health & medicine*, 2014, vol. 19, no 1, p. 1-13.

themselves recognize this need for training. During the Syrian conflict, health care providers reported that they were uncomfortable treating men and LGBT+ survivors of conflict-related sexual violence because they had specialised in women and felt they could not meet the needs of other groups.<sup>66</sup>

Besides, many countries affected by armed conflict still have rules that criminalise members of the LGBT+ community, so victims are retaliated against when they report sexual abuse. Moreover, in many countries when the health care provider detects a case of abuse, he or she is obliged to inform the competent authority (in many cases the police). This keeps victims from going to the health care system for fear of being exposed and punished.<sup>67</sup> There are even people who argue that members of the LGBT+ collective are deviants and deserve sexual assault as punishment for their immorality.<sup>68</sup>

### 3.7. Access to job

Trans people are the largest risk group here. Among those displaced by the Colombian conflict, both trans men and women reported engaging in sex work because it gave them a sense of control and choice, as well as finding a community in times of conflict. After displacement, they said that it was not possible to find a job as a transgender person. Economic necessity coupled with social isolation and discrimination meant that they remained in sex work, with no possibility of improving their living conditions in relation to the conflict zone from which they came. The stigmas existed before the conflict, but the conflict made them more visible.<sup>69</sup> Unlike other groups, LGBT+ people often do not have a fixed community or group to turn to for help, nor do they have family support.<sup>70</sup>

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<sup>66</sup> CHYNOWETH, Sarah. Sexual violence against men and boys: in the Syria crisis. Geneva: United Nations High Commissioner for Refugees (UNHCR); 2017, pp. 44 and 50. Available at: <https://data2.unhcr.org/es/documents/download/60864>.

<sup>67</sup> Ibid, p. 57.

<sup>68</sup> GOLD, Sari D.; MARX, Brian P. Gay male sexual assault survivors: The relations among internalized homophobia, experiential avoidance, and psychological symptom severity. *Behaviour Research and Therapy*, 2007, vol. 45, no 3, p. 549-562.

<sup>69</sup> MOORE, Melinda W.; BARNER, John R. Sexual minorities in conflict zones: a review of the literature. *Aggression and violent behavior*, 2017, vol. 35, p. 33-37.

<sup>70</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

### 3.8. Conclusion

Given the different forms of specific violence against the group, they have several special needs. Firstly, access to information about safe places and access to the health system. Within the health system, there must be staffs who know about the health conditions that most affect this group, including psychological conditions. Secondly, these staff should be trained and keep the gender orientation or identity of those in risk areas absolutely secret. Although it is difficult to maintain secrecy because it is often the individual's acquaintances who are the ones who spread the word, so it would also be necessary to give them priority when they are transferred to a safe place. Thirdly, it is difficult to access information on the conditions of these people even in peacetime, so creating a mandatory reporting system in this area would help to better understand the situation and create protocols for care.

On the other hand, the relevance of double victimization is highlighted. Not only must they survive and overcome the horrors of the armed conflict, but they are doubly exposed by their LGBT+ status. Moreover, not only does it increase the risk of double victimization with respect to the side that can be considered the enemy, but also within their own side (for example, among refugees).

## 4. International law applicable to the protection of LGBT+ people

### 4.1. Human rights law

#### 4.1.1. Relationship between IHL and HRL

A brief mention of the relationship between these two branches of international law is necessary. Initially, no connection was made between these two fields, as HRL was considered to apply in peacetime and IHL in wartime. Thus, the application of one excluded the other.<sup>71</sup> However, it is possible to establish a certain relationship between the two laws. The most important impact of the HRL on the IHL is reflected in the two 1977 Protocols (API and APII). The reason is that several of its articles are based on the ICCPR, which will be discussed later. Moreover, some provisions are common in both fields, as the prohibition of inhumane treatment.<sup>72</sup>

The extent of the applicability of HRL in times of armed conflict is a discussion that remains unanswered. On the one hand, it is true that the application of IHL entails the limitation of many human rights. For example, it is permissible to attack the lives of enemy combatants. Indeed, the application of HRL is very limited during armed conflict.<sup>73</sup> However, this does not apply to all human rights (the right to live has to be respected for non-combatants as the humane treatment mentioned above for combatants and non-combatants). Moreover, some of these exceptions are not only provided for in times of conflict, but also in other special states that do not necessarily involve armed conflict (state of alarm, state of emergency, etc.). Therefore, the fact that exceptions exist does not necessarily mean that they are exclusive. Indeed, even if limited, the ICCPR and the ECHR are applicable during armed conflict.<sup>74</sup> Concerning the ICCPR, it is not applicable outside the territory of a State party but taking into account the large number of States which have ratified the convention (currently 173 States parties), it is possible to argue that the ICCPR is relevant in the context of an armed conflict.

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<sup>71</sup> SCHINDLER, Dietrich. Human rights and humanitarian law: interrelationship of the laws. *Am. UL Rev.*, 1981, vol. 31, p. 935.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> KRIEGER, Heike. A conflict of norms: the relationship between humanitarian law and human rights law in the ICRC customary law study. *Journal of Conflict and Security Law*, 2006, vol. 11, no 2, p. 265-291.

Besides, in NIAC the influence of HRL is more evident as the IHL is not applicable as a whole. Thus, in all the remaining areas where the GC or other IHL provisions are not applicable, the HRL must be respected without limitations.<sup>75</sup>

To conclude, IHL is usually considered as *lex specialis* concerning HRL.<sup>76</sup> Thus, HRL will be applicable as far as there is nor a specific provision on IHL for the concrete subject. Even if the application of HRL remains unclear in some cases and the discussion remains unresolved, the consideration of *lex specialis* seems the best way to address this relationship, as it at least gives a framework of preference to one of the camps (the IHL) during armed conflicts. However, it is not possible to deny that some countries will argue that HRL is just not applicable.

#### 4.1.2. Sources of Human Rights at the universal level

It is important to emphasize that human rights are based on the dignity of the person and that they apply to every human being. In other words, the rights of these people must be respected not because they are LGBT+ people themselves, but because they are human beings.<sup>77</sup> This statement is related to the origin of human rights in natural law. From a subjective point of view, natural law could be defined as power, force, ability or faculty inherent in humans. Natural law was closely related to the concept of justice. Originally, they were rights granted by God and nature, with no human action involved in the recognition of the right. It is the minimum granted to a person by the mere fact of existence and was even argued to be a limit to absolutism. It is an idea very similar to the current definition of HRL, only that the religious connotations have disappeared and the rights have been concretised in different treaties and laws.<sup>78</sup>

Therefore, the problem in question is not that they have no human rights but that they are not respected. However, it is not that easy. While no one could dispute that human rights apply to humans, throughout history (and today) some countries have

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<sup>75</sup> SCHINDLER, Dietrich. Human rights and humanitarian law: interrelationship of the laws. *Am. UL Rev.*, 1981, vol. 31, p. 935.

<sup>76</sup> KRIEGER, Heike. A conflict of norms: the relationship between humanitarian law and human rights law in the ICRC customary law study. *Journal of Conflict and Security Law*, 2006, vol. 11, no 2, p. 265-291.

<sup>77</sup> WEBER, Travis S.; LIN, L. Freedom of Conscience and New LGBT Rights in International Human Rights Law. *J. Glob. Just. & Pub. Pol'y*, 2015, vol. 2, p. 277.

<sup>78</sup> TIERNEY, Brian. The idea of natural rights-origins and persistence. *Nw. UJ Int'l Hum. Rts.*, 2004, vol. 2, p. 2.

directly dehumanised or pathologised the collective.<sup>79</sup> For example, for many years, homosexuality and being transgendered was considered a disease that justified all kinds of conversion therapies that in many countries are considered torture (although in others they are considered "help"). Therefore, although it may seem obvious, it is important to emphasise that LGBT+ people are human beings and that nothing justifies unequal or denigrating treatment.

The basis of the international rights of the LGBT+ group is the UNDHR, as subsequent documents are based on it.<sup>80</sup> In its Art. 1 claims that "all human beings are born free and equal in dignity and rights". Also, the ICCPR and ICESCR should be mentioned. The importance of the HRL is based not only on the fact that they might be respected also in war times, but the ICCS interpretations and application should be according to it and follow the principle of non-discrimination.<sup>81</sup>

Theoretically, LGBT+ people have the same human rights as everyone else. As an example, we have the case of *Toonen v. Australia*, where criminalising same-sex relationships (between two consenting adults) was found to be contrary to the right to privacy and intimacy.<sup>82</sup> Therefore, some aspects of their lives may be covered by general rights. In this case, it was a broad interpretation by the UNHRC of the term "sex" in Art. 2(1) and 26 of the ICCPR that allowed for the inclusion of sexual orientation within the right to privacy in Art. 17 (1) and the right to non-discrimination in Art. 2 (1) ICCPR.<sup>83</sup>

As mentioned above in the history section, there are documents related to human rights laws that do specifically address the protection of LGBT+ people, such as the principles of Yogyakarta and Yogyakarta plus 10. However, there is not a specific provision for times of armed conflict, as it is for woman and children.<sup>84</sup> There was

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<sup>79</sup> ĐURIC, Nevenka; VIDLIČKA, Sunčana Roksandić; BOGUSH, Gleb. Legal protection of sexual minorities in international Criminal law. *Russian Law Journal*, 2018, vol. 6, no 1.

<sup>80</sup> Ibid.

<sup>81</sup> Art. 21 (3) of the ICCS.

<sup>82</sup> SWIEBEL, Joke. Lesbian, gay, bisexual and transgender human rights: the search for an international strategy. *Contemporary Politics*, 2009, vol. 15, no 1, p. 19-35.

<sup>83</sup> BOHLANDER, Michael. Criminalising LGBT persons under national criminal law and Article 7 (1)(h) and (3) of the ICC Statute. *Global Policy*, 2014, vol. 5, no 4, p. 401-414

<sup>84</sup> See the UNGA Resolution 3318 (XXIX) Declaration on the protection of women and children in emergency and armed conflict of 14 December 1974. Available at: [https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.19\\_declaration%20protection%20women%20armed%20conflict.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.19_declaration%20protection%20women%20armed%20conflict.pdf)

neither a UNGA resolution concerning LGBT+ rights in peace times until very recently and taking into account the influence that the UN has had on developing other human rights (for instance, the self-determination of people during the decolonization process), the UNGA resolutions promoting those rights are very helpful.<sup>85</sup> In 2011, there was a report from the High commissioner for human rights concerning discrimination based on sexual orientation and gender identity.<sup>86</sup> It reports various forms of discrimination and violence against this group. It includes torture, rape, discriminatory laws, etc. Later 2014, the UNGA resolution concerning extra judiciary, summary or arbitrary executions called all states to protect the right to life, to investigate impartially the killings, including those which target a specific group like sexual orientation or gender identity.<sup>87</sup> All stated in that resolution was repeated two years later on UNGA resolution 71/198.<sup>88</sup> The UNHRC produced reports concerning these resolutions. The conclusion is that states continue to fail to respect the right to life and freedom of homosexuals and transgender people.<sup>89</sup>

Coming back to Yogyakarta principles, these simply interpret the human rights already recognised, relating them to the LGBT+ collective. For example, the first principle states the principles of equality and freedom among all human beings with the difference that it stresses that these rights are to be enjoyed regardless of gender identity or sexual orientation. Each principle establishes a series of general measures addressed to states so that the enjoyment of the right can become a reality. These measures are often aimed at getting states to adapt their legislation to ensure the rights of LGBT+ people, to undertake educational or political programmes, etc. The interpretation of some of these rights from an LGBT+ perspective is particularly relevant for states to

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<sup>85</sup> WINER, Anthony S. Levels of generality and the protection of LGBT rights before the United Nations General Assembly. *Wm. Mitchell L. Rev.*, 2015, vol. 41, p. 80.

<sup>86</sup> HRCR, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General. Session 19<sup>th</sup>, UN doc. A/HRC/19/41, 17 November 2011. Available at: [https://www.ohchr.org/documents/issues/discrimination/a.hrc.19.41\\_english.pdf](https://www.ohchr.org/documents/issues/discrimination/a.hrc.19.41_english.pdf)

<sup>87</sup> UNGA Resolution A/RES/69/182 adopted by the General Assembly on 18 December 2014 [on the report of the Third Committee (A/69/488/Add.2 and Corr.1)] 69/182. Extrajudicial, summary or arbitrary executions, 69<sup>th</sup> session, para. 6 (b). Available at: [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/69/182](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/182)

<sup>88</sup> UNGA Resolution A/RES/71/198 adopted by the General Assembly on 19 December 2016 [on the report of the Third Committee (A/71/484/Add.2)]. Extrajudicial, summary or arbitrary executions, 71<sup>st</sup> session, para. 6 (b). Available at: <https://undocs.org/en/A/RES/71/198>

<sup>89</sup> UNHRC, 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 45–48.

begin to rule out certain behaviours that have hitherto been considered lawful in many countries. Principle 3 talks about the right to recognition as a person before the law, which is of great importance when making decisions and being able to defend oneself within the country's legal system. Principle 9 includes the right to be treated humanely when deprived of liberty and this includes access to HIV treatment and information and hormone treatment, among others. Another particularly relevant principle is principle 18, which concerns protection against medical abuse, in the sense that no medical treatment or any other procedure should be used to “cure” them. As can be seen, the novelty of this document is that it addresses the specific group but the rights had already been generally recognised. The more classic rights such as life, physical integrity, freedom, security, etc. are also included. Some of them are also included in the Yogyakarta plus 10 principles, as well as other more specific ones such as principle 33, in which is stated the right to be free of any criminalization or punishment based on “sexual orientation, gender identity, gender expression, or sex characteristics”. Other rights are also included that are not as consolidated as protection against poverty (principle 34), the right to the enjoyment of human rights concerning information and communication technologies (principle 36) or the right to practise, protect, preserve and revive cultural diversity (principle 38).

However, although it is a very complete document, it is not legally binding, since it has not been produced within any negotiation between states nor has it emerged from an international organisation but a group of experts. Despite this, the importance of this document should not be underestimated, as several states have used it as a guide to adopting national laws.<sup>90</sup> Also, both international and national courts may use them to interpret existing rights.

It should be noted that although the document itself is not binding, some of the principles it interprets are binding in other ways. For example, the first two principles are the right of every human being to enjoy human rights and the principle of equality and non-discrimination. Both are part of established international custom in human rights matters. It is possible to find several documents including these rights but two of

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<sup>90</sup> Los Principios de Yogyakarta diez años después, 2021. *Promoviendo los derechos humanos y la inclusión de las personas LGBTI: Una plataforma de recursos para parlamentarios y parlamentarias* [online]. Available at: <https://www.pgaction.org/inclusion/es/blog/yogyakarta-principles.html>.

the most important ones are the UN Charter and the UDHR, which are universally recognised as the minimum standards of HRL.<sup>91</sup> Further evidence is the fact that the different regions have developed human rights instruments like the ECHR, ACHR or ACHRPR. In all of these documents, the principle of universality of human rights and the principle of non-discrimination are included. Thus, some of the rights interpreted by the principles may be legally binding because they are customary law or because they are binding in the region like in the EU. UN institutions have found discrimination based on sexual orientation to be unlawful on several occasions. They consider that this type of discrimination is covered by both the concept of "sex" and "other status" in the ICCPR.<sup>92</sup>

Therefore, it could be concluded that, while there is a fairly universal consensus among the stakeholders (and in recent years supported by the UN) that LGBT+ people enjoy the same human rights as anyone else, there is less consensus on implementation. As part of international custom, both in times of peace and war, LGBT+ people should not be victims of slavery, torture or extra-judicial killings simply because they belong to that group. Treaties such as the ICCPR do not allow exclusions based on public morals or public order, which could be used as an exception to HRL by some countries. However, treatments to "cure" their condition are torture,<sup>93</sup> and in the section, on specific impacts, it was mentioned that some of them were sold by their own families. On the other hand, the UN focuses on extrajudicial executions, which are many, but forgets that there are countries where it is the state that condemns people to death merely because they belong to the group. The prohibition of arbitrary arrest in relation to the right of non-discrimination (both part of customary law) should be enough to argue that detentions on the grounds of membership of LGBT+ group are against HRL,<sup>94</sup> but, unfortunately, is still a common practice in many countries. Furthermore, not all rights interpreted by the Yogyakarta experts are part of international custom. The

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<sup>91</sup> BROWN, David. Making room for sexual orientation and gender identity in international human rights law: An introduction to the Yogyakarta Principles. *Mich. J. Int'l L.*, 2009, vol. 31, p. 821.

<sup>92</sup> Ibid.

<sup>93</sup> See CARPENTER, Morgan. The human rights of intersex people: addressing harmful practices and rhetoric of change. *Reproductive Health Matters*, 2016, vol. 24, no 47, p. 74-84; BRACKEN, Mason D. Torture Is Not Protected Speech: Free Speech Analysis of Bans on Gay Conversion Therapy. *Wash. UJL & Pol'y*, 2020, vol. 63, p. 325 and BRINTON, Sam. I Was Tortured in Gay Conversion Therapy. And It's Still Legal in 41 States. *Nytimes.com* [online], 2018. [Accessed 9 January 2021]. Available at: <https://www.nytimes.com/2018/01/24/opinion/gay-conversion-therapy-torture.html>.

<sup>94</sup> BROWN, David. Making room for sexual orientation and gender identity in international human rights law: An introduction to the Yogyakarta Principles. *Mich. J. Int'l L.*, 2009, vol. 31, p. 821.

right to privacy, for example, is not established as such.<sup>95</sup> Despite that some rights may not be part of customs, it may be possible to find them in binding documents like ICESCR or ICCPR, where the right of privacy was already interpreted as protecting from law criminalizing same-sex adults consenting relations.<sup>96</sup>

On the other hand, even if human rights should not be limited by certain legal or cultural traditions,<sup>97</sup> there is still a lack of agreement on the recognition of LGBT+ rights as HRL.<sup>98</sup> There is a lot of resistance to making documents like the Yogyakarta principles legally binding. Some believe that the acceptance of some rights specifically would mean that there would be no limit on what to consider a human right and whatnot. For example, if rights based on sexual or gender preferences were accepted, there would be nothing to prevent other practices from also being subject to claims of HRL status, such as polygamy or polyandry.<sup>99</sup> However, this argument is perfectly refutable. In reality, no new rights are being created for this group, only that the interpretation given to human rights allows LGBT+ people to have exactly the same possibilities of survival and dignified life as those who do not belong to the group. Besides, as mentioned above, the basis of this claim is not their membership of the group, but the fact that they are human beings. But group membership is important because, while it is not the basis for claiming the application of HRL, it is the reason why they are not being respected. Furthermore, the problem with the example of polygamy and polyandry is more cultural, as many times these practices exist in countries where people are forced to married or where only one gender (usually male) has a privileged position comparing with the other. There is no power relationship between two consenting adults of the same sex, and many of the rights demanded to affect only the individual (such as the right to have the gender with which an individual feels identified recognised), so there is no danger to the human rights of any other person. Moreover, LGBT+ people exist all over the world, what is cultural is not their

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<sup>95</sup> Ibid.

<sup>96</sup> UNHRC, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Opinions adopted by the Working Group on Arbitrary Detention, No 22/2006 (Cameroon)*, U.N. Doc. A/HRC/4/40/Add.1, p. 93, para. 19, 2 February 2007. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/106/04/PDF/G0710604.pdf?OpenElement>

<sup>97</sup> BROWN, David. Making room for sexual orientation and gender identity in international human rights law: An introduction to the Yogyakarta Principles. *Mich. J. Int'l L.*, 2009, vol. 31, p. 821.

<sup>98</sup> ĐURIC, Nevenka; VIDLIČKA, Sunčana Roksandić; BOGUSH, Gleb. Legal protection of sexual minorities in international Criminal law. *Russian Law Journal*, 2018, vol. 6, no 1.

<sup>99</sup> WEBER, Travis S.; LIN, L. Freedom of Conscience and New LGBT Rights in International Human Rights Law. *J. Glob. Just. & Pub. Pol'y*, 2015, vol. 2, p. 277.

existence but for their greater or lesser social acceptance. Respect for LGBT+ is therefore required for a universal issue, not in order to demand a practice from a particular country or region.

#### 4.1.3. Regional protection of Human Rights

While in the EU the legal framework regarding the human rights of the collective has advanced over time, in the UN it seems to be slower.<sup>100</sup> Furthermore, within the EU framework, the concept of sexual orientation has been accepted without much discussion even though there is no concept of sexual orientation in the law itself. In contrast, in the UN it is precisely this lack of a common definition that serves as an excuse to claim that it is a non-existent concept or that one does not know what it is. Certainly, in many countries, the words "gay", "lesbian", "gender" or "transgender", among others, are unknown, as are the social currents that seek the visibility and universality of their rights.<sup>101</sup>

The ECtHR (which decides over more countries in Europe apart from the EU Member States) has already decided in favour of LGBT+ on several occasions.<sup>102</sup> In other regions, some international treaties and courts have dealt with LGBT+ cases. For example, the IACHR has recognised the principle of non-discrimination and equality as *ius cogens*<sup>103</sup> and has stated that sexual orientation and gender identity are categories protected by the ACHR.<sup>104</sup> Besides, there is the IACFDI (created in 2013, entered into force in February 2020), where sexual orientation and gender identity are explicitly named as prohibited grounds for discrimination in obtaining fundamental human rights. Thus, discrimination on grounds of sexual orientation or gender identity should be respected and the membership of LGBT+ should not be used as an exception or justification for the violation of HRL neither in peace or conflictive times.

Besides, Art. 2 of ACHRPR has a non-closed clause concerning the non-discrimination principle. Also, in Art.3 it is covered the right to equality under the law and the right to be equally protected by the law. The African Commission has been

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<sup>100</sup> SWIEBEL, Joke. Lesbian, gay, bisexual and transgender human rights: the search for an international strategy. *Contemporary Politics*, 2009, vol. 15, no 1, p. 19-35.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> BROWN, David. Making room for sexual orientation and gender identity in international human rights law: An introduction to the Yogyakarta Principles. *Mich. J. Int'l L.*, 2009, vol. 31, p. 821.

<sup>104</sup> Case *Atala Riffo and Daughters v. Chile*, Judgment, para. 91, IACHR, 24 February 2012. Available at: [https://corteidh.or.cr/docs/casos/articulos/seriec\\_239\\_ing.pdf](https://corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf)

working on the issue and has included sexual orientation and gender identity issues in soft law documents. Like the Yogyakarta principles, they are not directly binding but can be influential.<sup>105</sup> In this regard, they created in 2011 the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter, which explicitly states that LGBT+ people are considered as a vulnerable group facing greater problems in the enjoyment of their economic, cultural and social rights.<sup>106</sup> Furthermore, in 2014, the African Commission approved a resolution that condemned the systematic attacks against the collective and urged the states to pursue and investigate these attacks.<sup>107</sup> However, despite all these steps, in many African countries, LGBT+ people's human rights continue to be violated and even criminalised. Along with the Middle East, it is the region with more countries providing for the death penalty.<sup>108</sup>

As seen above, in the case of Asia, some courts have decided to take steps in favour of the collective but there are no regional legal documents written beyond the international treaties already mentioned. Protection depends on the country.<sup>109</sup> This can lead to considerable legal uncertainty as to the standard that can be expected and fewer opportunities to appeal to higher instances.

In the event that acts contrary to the human rights of LGBT+ people occur during an armed conflict, the mechanisms for declaring such a human rights violation will depend on the scene. Regional courts dealing with human rights violations in the different continents of the world may or may not allow for these remedies. For example, in the ECHR an individual could claim against a state, as the court has already interpreted articles from a perspective favourable to this group. But this does not have to be the

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<sup>105</sup> BROWN, David. Making room for sexual orientation and gender identity in international human rights law: An introduction to the Yogyakarta Principles. *Mich. J. Int'l L.*, 2009, vol. 31, p. 821. See also WENDY, Isaack. African Commission Tackles Sexual Orientation, Gender Identity. *PambazukaNews.*, 2017. Available at: <https://www.pambazuka.org/gender-minorities/african-commission-tackles-sexual-orientation-gender-identity>

<sup>106</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

<sup>107</sup> ACHPR Res. 275(LV), 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: <https://www.achpr.org/sessions/resolutions?id=322>.

<sup>108</sup> ILGA. Maps-Sexual orientation laws, 2020[online] [accessed 5 February 2021]. Available at: <https://ilga.org/maps-sexual-orientation-laws>.

<sup>109</sup> LAU, Holning. Courts, the Law, and LGBT Rights in Asia. *UNC Legal Studies Research Paper*, 2020. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3573177](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3573177).

case in all courts. However, some NGOs and the UN report that although the parties to the conflict are aware of attacks on LGBT+ human rights, they do nothing to prevent them and investigations are clearly deficient<sup>110</sup> or governments are encouraging the attacks.<sup>111</sup> Thus, they are not meeting HRL standards as parties to the conflict (including governments) are neither preventing attacks on the collective nor providing resources for the proper care of victims. Other examples already mentioned include the lack of protocols within the military<sup>112</sup> or the great extra difficulties faced by LGBT+ displaced persons in accessing health professionals as part of governmental policy.<sup>113</sup>

#### 4.1.4. Asylum

The right to asylum deserves special mention, as many civilians who have been involved in armed conflict will try to use this route to escape their situation. The principle of *non-refoulement*, established by the ICCPR in its Arts. 2, 6 and 7, must be taken into account. This principle prohibits the transfer of people when is considered to have reason to fear for its safety in the host country, i.e. there is a high risk of irreparable harm.<sup>114</sup> Concerning the LGBT+ asylum seekers, the UNHCR has stated that the high risk of violence, arbitrary detention (based on LGBT+ status), the death penalty for LGBT status and other forms of discrimination in the enjoyment of human rights must be considered as persecution (and therefore a risk of irreparable harm).<sup>115</sup> Besides, the Refugee Convention contemplates persecution on the grounds of “the membership of a particular social group or political opinion”.<sup>116</sup> The UNHCR has developed this line

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<sup>110</sup> OHCHR, U. N. Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity. *Report of the United Nations High Commissioner for Human Rights.*(Geneva.), 2015. Available at: <https://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNReports.aspx>.

<sup>111</sup> Iraqueer & IGLHRC. *Dying to Be Free: LGBT Human Rights Violations in Iraq*, 2015. Available at: [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRQ/INT\\_CCPR\\_CSS\\_IRQ\\_21864\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRQ/INT_CCPR_CSS_IRQ_21864_E.pdf).

<sup>112</sup> ROKVIĆ, Vanja; STANAREVIĆ, Svetlana. Toward gender and LGBT equality in the Serbian armed forces. En *Women's Studies International Forum*. Pergamon, 2016. p. 26-34.

<sup>113</sup> ZEA, Maria Cecilia, et al. Armed conflict, homonegativity and forced internal displacement: implications for HIV among Colombian gay, bisexual and transgender individuals. *Culture, health & sexuality*, 2013, vol. 15, no 7, p. 788-803.

<sup>114</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

<sup>115</sup> 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*, para. 16 and 22, 2012. Available at: <https://www.unhcr.org/509136ca9.pdf>

<sup>116</sup> Art 1 (A) (2) of the Convention and Protocol relating to the Status of refugees, 1951.

considering that LGBT+ asylum seekers may claim well-founded fear of persecution in hostile States.<sup>117</sup>

The possibility that certain HRL provisions may not apply in situations of armed conflict was mentioned earlier. It could therefore be questioned whether the aforementioned articles of the ICCPR could be derogated from. Some countries have even argued that the HRL does not apply extraterritorially. However, this interpretation seems to have been rejected by the international community.<sup>118</sup> Furthermore, the rights of refugees would apply within the territory where they seek asylum, i.e. it would not apply extraterritorially. Moreover, derogation from some HRL provisions could be justified in the conflict territory, where the IHL applies, but not in the host country.

On the other hand, if the grounds for refugee status did not apply and states could return refugees to countries of origin knowing that their most fundamental rights would not be respected, then the refugee status itself would be meaningless. Indeed, without the guarantees of the ICCPR, it would not even exist. Its essence is the possibility of being received and residing in a safe country since in one's own country there is a situation of persecution. Without this possibility, the figure is illusory. The articles mentioned referring to fundamental rights such as life, non-discrimination, the prohibition of torture, access to a remedy when these rights are affected, etc. As mentioned above, many are contained in IHL's own rules, especially concerning civilians.

All this would imply that LGBT+ refugees have the possibility to apply for asylum both because of the situation of armed conflict and because of the persecution suffered as a member of the community. However, even if the convention is well spread, there are reservations on the part of some states (e.g. Spain with regard to Art.8 on the exemption from exceptional measures against foreigners). Other states have

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<sup>117</sup> 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*, para. 46, 2012. Available at: <https://www.unhcr.org/509136ca9.pdf>

<sup>118</sup> MILANOVIC, Marko. *Extraterritorial Derogations from Human Rights Treaties in Armed Conflict. The Frontiers of Human Rights: Extraterritoriality and its Challenges, Collected Courses of the Academy of European Law*, Nehal Bhuta ed., Oxford University Press, Forthcoming, 2014.

adopted geographical limitations (Congo, Madagascar, Monaco and Turkey) and others have signed the convention but not the protocol (Madagascar).<sup>119</sup>

Each region may have its norms concerning the grant of asylum. Within the EU, the CJEU has already dealt with cases related to asylum and LGBT+ people. The CJEU stated that the Directive 2004/83/EC<sup>120</sup> must be interpreted as:

1. “precluding, in the context of that assessment, the competent national authorities from carrying out detailed questioning as to the sexual practices of an applicant for asylum [...]
2. precluding, in the context of that assessment, the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to ‘tests’ with a view to establishing his homosexuality or, yet, the production by him of films of such acts [...]
3. precluding, in the context of that assessment, the competent national authorities from finding that the statements of the applicant for asylum lack credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution”.<sup>121</sup>

As it has seen above in the *A, B, C v. Staatssecretaris* case, the exercise of the right of asylum must comply with the respect of other rights, as the right of privacy.

However, not all countries accept refugees because of their LGBT+ status. It is up to each country to decide whether to include membership of this group as a ground for persecution (and asylum). For example, the US allowed this possibility since 2011.<sup>122</sup> Again, there is no binding regulation obliging states to take in members of the

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<sup>119</sup> Convention relating to the Status of refugees, 1951 and its Protocol, 1967

<sup>120</sup> Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

<sup>121</sup> Joined Cases C 148/13 to C 150/13, *A (C 148/13), B (C 149/13), C (C 150/13) v. Staatssecretaris van Veiligheid en Justitie* [2014] Digital reports, p.11-12, paras. 72-73.

<sup>122</sup> BERDARD, Paul. Obama Offers Asylum to Overseas Gays. *U.S. News & World Report*, [online] 6 December 2011 [accessed 21 January 2021]. Available at: <https://www.usnews.com/news/blogs/washington-whispers/2011/12/06/obama-offers-asylum-to-overseas-gays>

collective, which means that victims will have to know very well in advance from which countries to seek help. This means that their ability to escape is limited because, although they can seek asylum based on the armed conflict in which their home country has been involved, if they are found to be LGBT+ in a hostile host country, they may be exposed to attacks or even persecution within the host country. For example, LGBT+ refugees in Kenyan refugee camps report that they are constantly being attacked and the authorities do nothing to stop this. They even complain that the police threaten them and that they are discriminated against by UNHCR staff.<sup>123</sup>

Moreover, even in countries where the right to asylum is guaranteed by national law, situations like the one in Mala in Germany<sup>124</sup> show that the implementation of the law is not satisfactory. It does not seem that countries are paying particular attention to the safety of this group once they are in the host country. There are no security protocols in place and NGOs report attacks in several countries<sup>125</sup> and denounce that the authorities neglect or even participate in these attacks. For example, many Syrians who fled to Lebanon were accused of homosexuality by the Syrian government and some victims report that they were detained and treated in a degrading manner by the Lebanese authorities.<sup>126</sup>

#### 4.1.5. Conclusion

Although in the last two decades both the UN and various states have shown increased interest in LGBT+ people HRL, there is still no uniform implementation of them. This ambiguity is dangerous not only because they are the most basic rights that every human being should respect, but also because their application is relevant to other areas of international law such as IHL. The difference between what LGBT+ refugees can theoretically claim and what is reported from refugee camps is evidence of the lack of enforcement of HRL.<sup>127</sup>

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<sup>123</sup> ZOMORODI, Gitta. Responding to LGBT forced migration in East Africa. *Forced Migration Review*, 2016, no 52, p. 91.

<sup>124</sup> See section 3.5 above

<sup>125</sup> See as examples GRUNGRAS, Neil; LEVITAN, Rachel; SLOTEK, Amy. Unsafe haven: Security challenges facing LGBT asylum seekers and refugees in Turkey. *Praxis*, 2009, vol. 24, p. 41-61, REDA, Ali; PROUDFOOT, Philip. Against Abandonment Activist-Humanitarian Responses to LGBT Refugees in Athens and Beirut. *Journal of Refugee Studies*, 2020 or MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265

<sup>126</sup> REID, Graeme. The Double Threat for Gay Men in Syria. *Washington Post*, 2014, vol. 28.

<sup>127</sup> PINCOCK, Kate. UNHCR and LGBTI refugees in Kenya: The limits of 'protection'. *Disasters*, 2020.

## 4.2. International humanitarian law

The IHL is the law that will apply specifically in times of armed conflict. In addition, it may serve as a basis for the declaration of an international crime (as war crimes). The IHL is based on the principle of distinction between civilians and combatants and, also, already contains certain provisions concerning groups that are particularly vulnerable during armed conflict. Furthermore, it is important to highlight the duty of the States not only to respect but to ensure the IHL.<sup>128</sup>

### 4.2.1. General protection for civilians

First, the IHL, which applies to all civilians and non-combatants, will be analysed to see what general rules can protect LGBT+ people.

#### A) Principle of distinction and non-discrimination

It is a well-established right that the principle of distinction between combatants and non-combatants results in the prohibition of attacking civilian targets. The highest expression of this principle is the GC IV.<sup>129</sup> Targeting civilians is prohibited also in Art. 48 of the API, which says that parties must differentiate between combatants and civilians. This principle is also covered by Art. 51, which states general protection for civilians, prohibiting violent attacks or threats against them, as well as targeting them. The only exception is in the case they participate directly in hostilities.

Although this protocol refers to IAC, the principle of distinction is international customary law.<sup>130</sup> Thus, this principle is also reflected in the APII for NIAC. Art. 13 states the prohibition of targeting civilian in a very similar wording as Art. 51 of API.

It is clear that a breach of IHL may be committed by the people affiliated with the opposite party within the armed conflict. However, there are doubts about if such a breach can be committed by someone of the same party. The ICRC stated that many provisions, such as GC III and GC IV, are applicable only against the enemy, as the idea

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<sup>128</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

<sup>129</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

<sup>130</sup> ICRC, *Commentary of 1987, Protection of the civilian population, General remarks*, p.1448. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=2C8494C2FCAF8B27C12563CD0043AA67>.

is to prevent abuse of power.<sup>131</sup> Concerning common Art. 3 of the GC (referring to NIAC), the ICRC stated that it is possible if the attack is directed against someone who is not taking part in the hostilities at the moment.<sup>132</sup> For instance, it will be the situation where members of armed conflicts are being prosecuted for war crimes or ordinary crimes in the context of the armed conflict. Also, it covers members of the army who has been abused (sexually or otherwise) by other member or members of the same party, for example, when they are detained in enemy territory.<sup>133</sup> As noted in the section on the impact of conflict on LGBT+ people, it is not uncommon for abuse to occur within the military itself, so this interpretation of Art.3 would help cover these situations. It should be noted that the fact that these events would likely end up in national jurisdiction does not prevent the article from being applied, as this is a mandatory minimum that all states and parties to the conflict must comply with.<sup>134</sup>

However, it remains to be seen whether the same interpretation would apply to IAC, although given that the ICRC refers in its interpretation to the armed forces, there seems to be no reason not to apply it to those involved in an IAC rather than a NIAC. Moreover, there is an obligation not only to respect but to ensure all GC, including taking necessary measures to prevent a breach of IHL. Also, if there is evidence of a violation of the IHL, states have a legal duty to investigate it.<sup>135</sup> This is reflected in common Art. 1 of GC where it is established that parties have to ensure the GC in any circumstance. This implies that states would not only be legally responsible for their official armed forces but, theoretically, could also be held accountable for failing to take the necessary measures to prevent the violation of the IHL (for example, to prevent systematic attacks on LGBT+ people during the armed conflict).<sup>136</sup> Besides, it is

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<sup>131</sup> 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. 566. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=D84E8D5C5EB782FAC1258115003CEBE5>

<sup>132</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

<sup>133</sup> Ibid and 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. 569. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=D84E8D5C5EB782FAC1258115003CEBE5>.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid, para. 167.

<sup>136</sup> Ibid, para. 172.

prohibited for any State to support, encourage, or assist a party if it is aware that this party is not complying with the IHL.<sup>137</sup> For instance, it would not be the first time that new technologies are used to track and target a group.<sup>138</sup> If the support of the state means that armed groups have a great facility to persecute LGBT+, this would also be the responsibility of the state. The case of Syria has already been discussed in this paper, where the government did not facilitate the persecution but was one of the main actors as well as other parties to the conflict. Therefore, singling out a group as the enemy not because they are combatants but because they belong to a social group is contrary to the principles of distinction and non-discrimination, as well as to the duty to prevent violations of the GCs. However, the accusations against the Syrian government for targeting civilians only refer to chemical weapons but not to the persecution of this group or any other group.<sup>139</sup> Besides, examples have been seen in previous sections where superiors of the Colombian army abused a trans woman and similar cases could be found mostly in armed groups. Both were members of the army, i.e. they were on the same side and were combatants. Being in a hierarchical military organisation or an armed group gives power to individuals in a higher position. The armed forces are directly related to the conflicts, particularly insurgent, rebel or terrorist groups, but the possibility of prohibited behaviour against the enemy also occurring within the ranks has not been studied much. The fact that these articles do not apply unless you are under detention in enemy territory leaves many cases out.

There is another problem, and it is that often the victims do not feel safe to report, especially in hostile environments where reporting can carry a great social stigma. On the other hand, the ICRC's interpretations refer to attacks within the armed group itself. There are no provisions regarding possible attacks between non-combatants, for example between internally displaced persons. In the latter case, it would probably depend on national or international criminal law in the application of human rights standards.

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<sup>137</sup> Ibid, para. 142.

<sup>138</sup> LANG, Nico. 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/](http://www.salon.com/2016/11/17/the-danger-of-tinders-lgbt-friendly-upgrade-how-the-dating-app-could-be-used-to-target-trans-users/)

<sup>139</sup> ANDERSON, Kenneth. Legality of Intervention in Syria in Response to Chemical Weapon Attacks. *American Society of International Law*, 2013, vol 17, no 21.

There is also a lack of effective implementation. In all the conflicts that have been exposed (Syria, Colombia, Ukraine, etc.)<sup>140</sup> there have been reported cases of military or armed groups in case of NIACs openly attacking LGBT+ people (being civilians) and even governments encouraging it (e.g. Syria<sup>141</sup> or Iraq<sup>142</sup>). Therefore, the most fundamental principle of IHL, which is that of distinction, is not being complied with.

## B) Situation of detention

Some GC (III and IV) require that the person is under the power of the enemy and many complications with LGBT+ people comes in this situation. It was already stated that HRL considers detention on the basis of sexual orientation or gender identity as arbitrary. This is applicable also in times of conflict and procedural guarantees must be respected.<sup>143</sup> In addition, they may be protected under GC III concerning prisoners of war and GC IV relative to civilians in times of war. The former, in its Art. 12 states that, if individuals are under the control of the group of individuals or the military who have captured them, the general rules of IHL and HRL still apply and only if they are in the power (e.g. in detention) of the enemy the GC III will apply. Thus, combatants are legal targets under IHL. Nevertheless, LGBT+ people can demand that other international standards, such as the prohibition of torture covered by the CAT when not in detention or provisions of GC III while in detention, continue to be respected. In the case they are civilians; general protection of civilians by IHL is still applicable as well as HRL.

Prisoners of war could be people who have been part of an army, armed group, and militia, or have taken part in hostilities. Also, civilians may be considered as prisoners of war if they were working with the armed force without being part of them (e.g. part of the aircraft crew, war correspondents, members of the labour unions,

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<sup>140</sup> For relevant examples see section 3 concerning the impact of armed conflict on the LGBT+ community above.

<sup>141</sup> NAHAS, Subhi. United Nations Security Council address by ORAM advocate Subhi Nahas – ORAM refugee, 24 August 2015. Available at: <https://oramrefugee.org/2015/08/united-nations-security-council-address-by-oram-advocate-subhi-nahas/>

<sup>142</sup> Iraqueer & IGLHRC. *Dying to Be Free: LGBT Human Rights Violations in Iraq*, 2015. Available at: [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRQ/INT\\_CCPR\\_CSS\\_IRQ\\_21864\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRQ/INT_CCPR_CSS_IRQ_21864_E.pdf)

<sup>143</sup> PEJIC, Jelena. Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence. *Int'l Rev. Red Cross*, 2005, vol. 87, p. 375 and MURRAY, Daragh. Non-state armed groups, detention authority in non-international armed conflict, and the coherence of international law: searching for a way forward. *LJIL*, 2017, vol. 30, p. 435.

etc.).<sup>144</sup> In the case of NIAC, the applicable provisions would be common Art. 3 of the GC and the APII instead of the GC III. In Art 3 of the GC, it is prohibited the inhuman treatment while under the enemies hands.

LGBT+ people are especially vulnerable in a situation of detention. Annual reports of the UNSC admitted that LGBT+ people are especially targeted for physical and sexual assault and gave examples as the conflict in Colombia and the Syrian war.<sup>145</sup> Theoretically, with the current IHL regulation, these practices are prohibited and illegal. This would also include any medical procedure that is not justified by health issues, which is especially relevant as it is common for some members of the collective to be victims of these procedures.<sup>146</sup>

### C) Family life

Several international norms recognise the right to family life.<sup>147</sup> In addition, it is considered customary law.<sup>148</sup> Because of the principle of non-discrimination discussed above, LGBT+ persons should not be excluded from this right. However, the concept of family is closely linked to the national sovereignty of each state. It is not a concept that is defined at the international level. Therefore, only in those countries where homosexual marriage or *de facto* (civil) union is contemplated would these couples have the possibility to exercise this right. The family life rights include the right to visit a family member in detention, the right to restoration of family ties if they have been separated by war, the right for couples to be accommodated together when both are prisoners, etc. For example, a homosexual married prisoner of war in the US would be able to exercise these rights but the same individual in Siria would not.

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<sup>144</sup> Art. 4 of the GC.

<sup>145</sup> Report of UNSC Secretary General on Conflict-related sexual violence. UN Doc. S/2015/203, 23 March 2015, para. 20. Available at: [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2015/203](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/203) and Report of UNSC Secretary General on Conflict-related sexual violence. UN Doc. S/2016/36, 20 April 2016, para. 69. Available at: [https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2016\\_361.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2016_361.pdf)

<sup>146</sup> CARPENTER, Morgan. The human rights of intersex people: addressing harmful practices and rhetoric of change. *Reproductive Health Matters*, 2016, vol. 24, no 47, p. 74-84. See also SERRANO-AMAYA, José Fernando. Homophobia in apartheid and post-apartheid South Africa. En *Homophobic Violence in Armed Conflict and Political Transition*. Palgrave Macmillan, Cham, 2018. p. 57-83.

<sup>147</sup> Art. 82 of the GC IV, Art. 74 of the API and 4 (3) (b) APII, among others.

<sup>148</sup> ICRC. IHL database Customary IHL [online] [accessed 19 January 2021]. Available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule105#refFn\\_4C716F6A\\_00014](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule105#refFn_4C716F6A_00014)

Some authors say that homosexual couples do not need to be recognised in municipal law. It would be sufficient to call for the application of international law (in this case the custom of the IHL).<sup>149</sup> However, even at the international level, there is no clear provision that universally recognises homosexual couples, nor is there a unanimous interpretation of the civil rights they can claim. More basic rights such as the right to life or physical integrity are clear. A broad interpretation would be needed so that those countries that do not recognise these couples would grant them the same rights. In many countries, homosexual couples are not officially recognised and do not even have the right to form a family. Thus, it is highly probable that they cannot exercise this right among themselves. They could in relation to other blood relatives.

This may be particularly relevant when couples have children, as the right to family reunification as some countries would not recognise the parents as such. This situation could lead to the abandonment of children, as there are no international regulations that oblige the recognition of LGBT+ families as they are recognised in their State of origin. Thus, the right to family life in detention during armed conflict is not very effective concerning LGBT+ people. A specific provision recognising this right for this group universally or an extensive and binding interpretation would solve this problem.

#### D) Non-refoulement and relocation

The principle of *non-refoulement* also applies for IHL. Under this principle, the transference of people is allowed only if the receiving State has the ability and will to accomplish with the GC, including the principles of humane treatment and non-adverse discrimination (it has to be party of the GC).<sup>150</sup> This means that detainees cannot be transferred to a hostile state, where they are likely to suffer violations of IHL and HRL. However, this poses a problem. The ambiguity in applying certain provisions (both in HRL and in IHL) to LGBT+ people has already been discussed. For example, the right to family life as a prisoner of war has not been established. Nor is it established that transgender people will be treated according to their gender. It is therefore unclear whether this principle applies only as a guarantee of the right to life and physical

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<sup>149</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

<sup>150</sup> Art. 45 of the GC IV.

integrity and it would only be unlawful to transfer them to countries where they would simply not be killed, tortured or raped, or whether discriminatory but not as dangerous treatment would be sufficient. Thus, LGBT+ people are still at a disadvantage while applying the principle of *non-refoulement*.

Another application of this principle is the situation when nationals of the enemy party or from a neutral State find themselves in the territory where an armed conflict is occurring. One or more parties in the territory may be hostiles with the LGBT+ people and they have a fear of persecution. According to GC IV, they should be allowed to leave the country and come back to their State of nationality. The only exception is when the leave of those civilians is contrary to the “national interest of the State”.<sup>151</sup> The ICRC narrowed this exception establishing that the prevention of departure must be justified by reasons of urgency and national interest of the State.<sup>152</sup> Nevertheless, the reality is still not in line with the law. The Syrian government argued that all rebels were homosexuals and therefore every homosexual was a threat to the state.<sup>153</sup> Here the Syrian government could have used this exception to prevent LGBT+ people from leaving the territory.

If the principle of non-refoulement cannot be applied, another useful legal tool is relocation. The responsible state can relocate vulnerable people (in this case LGBT+ people) within its territory to guarantee their safety and respect for the IHL. This possibility is deducted from several GC provisions.<sup>154</sup>

These principles may be difficult to apply to the LGBT+ community. Most countries involved in armed conflict are currently hostile to them. There may be a situation where both host states and state of nationality are hostile. The possibility of being hosted by a neutral third state that complies with minimum guarantees for them. When considering the Syrian conflict, a Syrian LGBT+ person has to flee from their government, from the rebel forces the Syrian government was facing and from terrorist groups operating both on Syrian territory and in neighbouring countries. Moreover,

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<sup>151</sup> Arts. 35 and 48 of the GC IV.

<sup>152</sup> PICTET, Jean (ed.). *The Geneva Conventions of 12 August 1949: Geneva convention relative to the protection of civilian persons in time of war*. International Committee of the Red Cross, 1958, p. 236.

<sup>153</sup> NAHAS, Subhi. United Nations Security Council address by ORAM advocate Subhi Nahas – ORAM refugee, 24 August 2015. Available at: <https://oramrefugee.org/2015/08/united-nations-security-council-address-by-oram-advocate-subhi-nahas/>

<sup>154</sup> Arts. 13, 20 and 46 of the GC III; Arts. 49, 55, 83, 85, 127 of the GC IV; Art. 69 of the API.

most of the refugees are in countries close to Syria, not in the West. According to the Regional Refugee and Resilience Plan (3RP 2021-2022), 5.5 million Syrian refugees live in Turkey, Lebanon, Jordan, Iraq and Egypt.<sup>155</sup> None of them is particularly friendly to the collective. Even if they make it to Europe, they may encounter situations such as that of Mala, mentioned in the section on impacts, who after being assaulted in a shelter because she is transgender was refused a change of home. In the case of Mala, the relocation was denied despite the threats to her life. The lack of a specific protocol to ensure the safety of LGBT+ people means that in the end, even in supposedly tolerant countries, they are at risk.

#### E) LGBTphobic law introduced by the occupying power

In the case that there is a territory controlled by the forces of the enemy, the IHL has established that the occupying power cannot introduce large-scale reforms which change the social, legal, political or economic structures in the occupied territory.<sup>156</sup> But it has been accepted that they can make legal changes that benefit the armed forces of the occupying power or the local population.<sup>157</sup> Promoting anti-LGBT+ laws may be considered contrary to local values and interests depending on which countries. In some countries, it could even be argued that the promotion of these LGBT-phobic laws is in line with local culture or interest.

On the other hand, if an occupying power were to enact laws that were clearly against other groups such as women, children or racial minorities, it would be seen as a clear example of incompatibility with IHL and HRL. The same logic should apply in the case of sexual minorities and other members of the LGBT+ collective.<sup>158</sup>

However, this is particularly difficult in the case of NIACs. As the articles of the GCs and the Hague Conventions are written, it seems that these articles are applicable

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<sup>155</sup> 3RP. *Regional Strategic overview 2021-2022*. Regional Refugee and Resilience Plan, December 2020. Available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/RSO2021.pdf>.

<sup>156</sup> Art. 43 of Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

<sup>157</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

<sup>158</sup> Ibid.

in case of conflict between countries.<sup>159</sup> For example, the terrorist group ISIS has introduced laws criminalising LGBT+ people in Syria, Iraq and Lebanon. Although not particularly tolerant countries, none of these countries had the death penalty for being LGBT+ before the arrival of ISIS. Art. 43 of the Hague Conventions is part of international custom and this has been confirmed by international courts. It should therefore apply to NIACs.<sup>160</sup> An additional problem is what counts as a change in the political, legal or social structure. In the case of Syria, there were no laws punishing homosexuals with death, but because the government accused them of belonging to an armed group, there was already systematic imprisonment and persecution. It is therefore uncertain whether the move to the death penalty would really bring about a structural change. In this case, the only possible solution is to demand compliance with the principle of distinction and humane treatment.<sup>161</sup> Many armed groups, especially those of an extremist nature, do not and never will respect IHL standards. Unless there is a strong response from the international community or at least from states involved in the conflict, there will be no fight against the imposition of norms that directly attack the life and physical integrity of this group. Such a response from the international community is unlikely given that this is not a group that is widely recognised as vulnerable, as might be the case for children or the wounded.

Once again, the law seems difficult to apply and only in the case of a country with clearly LGBT+ friendly laws could these articles be used to avoid LGBTphobic laws.

#### 4.2.2. Special provisions for groups

As mentioned above, the IHL has already recognised some groups as vulnerable. Examples are women, children, the injured or the elderly. Such recognition results in special protection and the need for the parties to the conflict to pay special attention to their needs.<sup>162</sup> There is no special IHL instrument for the protection of LGBT+ people

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<sup>159</sup> UKHUEGBE, Solomon; FENEMIGHO, Alero. Article 43 of the Hague Regulations of 1907 Revisited: The Past and the Future of Belligerent Occupation in International Law, *SSRN Electronic Journal*, 2016. DOI:10.2139/ssrn.2802162

<sup>160</sup> Ibid. See also *Legality of the Threat of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226-257, para. 79. Available at: <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>

<sup>161</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

<sup>162</sup> Ibid.

but maybe it can be deduced from general principles relating to human treatment and prohibition of adverse discrimination.<sup>163</sup> The ICRC has established the necessity of adaptation to the concept of humane treatment to the specific necessities of vulnerable groups.<sup>164</sup>

Certain provisions prohibit adverse discrimination among protected people on the grounds of race, sex, religion, colour, political or other different opinions, birth, etc.<sup>165</sup> As seen in the *Toonen v. Australia* case, a broad interpretation of any of these concepts that serve as a basis for qualifying a group as vulnerable could include, for example, sexual orientation or gender identity. However, these broad interpretations have been given in the field of HRL outside the context of an armed conflict, not in the application of IHL. Furthermore, as will be seen in the following section, broad interpretations have not been successful in considering a specially protected group, for example in the application of international criminal law. On the other hand, it is important to highlight that sexual orientation and gender identity are not the only basis for the membership of the LGBT+ group. None of the provisions seen so far seems to cover attacks, for example, on intersexual people. Apart from the prohibition of adverse distinction, another legal mechanism often used to protect vulnerable groups is more favourable treatment. This special treatment is also based on the different needs and characteristics of the group in question. In the case of IHL, it could include additional protective measures. This would be the case, for example, for ensuring access to specific hygiene or food measures (women or certain religious traditions).<sup>166</sup> It is important to stress that LGBTphobia attitude is very often justified by religious beliefs. However, it is well accepted that IHL has as its main objective to ensure humane

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<sup>163</sup> Ibid.

<sup>164</sup> 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. 575. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=D84E8D5C5EB782FAC1258115003CEBE5>.

<sup>165</sup> See Art.16 of the GC III, Art. 13 and 27 of the GC IV, Art. 9 of the API, Art. 2 of the APII and HENCKAERTS, Jean-Marie; DOSWALD-BECK, Louise. *Customary International Humanitarian Law*, Volume I: Rules. *International Committee of the Red Cross*, rule 88, 2005.

<sup>166</sup> 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. 598. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=D84E8D5C5EB782FAC1258115003CEBE5>.

treatment without discrimination. Thus, it is not possible to argue religious or traditional morality to not grant humane treatment to anyone not taking part in the hostilities.<sup>167</sup>

#### A) Situation of detention

It has already been established that there are rules protecting prisoners of war in general. However, there are also special provisions for groups. In the GC III Art. 14 it is established that women should be treated equally to men and taking into account their sex. In Art. 25 of the same Convention, it is established that men and women should have separate dormitories and if women are under disciplinary punishment, they shall be under female supervision (Art. 97 and 108 of the GC III). Also, in Art. 77 of API, there is a provision concerning special protection of children prohibiting the death penalty for minors and the right of being on a separate quarter except if they reside with a family.<sup>168</sup>

A similar provision should apply to the LGBT+ collective in order to prevent and decrease the danger of assault. A separate stance could help from attacks from other detained people. Also, along with the privacy that comes with mandatory humane treatment, it could prevent attacks at times of intimacy such as when the person is in the bathroom or when he or she is sleeping.<sup>169</sup> Besides, trans and intersex people and probably non-binary (agender or gender fluid) people run the risk of being classified with a gender that does not correspond to them, which can lead to dangerous or humiliating situations. They should therefore have the option of choosing which gender they are catalogued with.

However, there are no international standards interpreting that LGBT+ should be included in the special groups' provisions or that similar measures should apply to them as to women or children. Moreover, some concepts will not even exist in certain societies, such as non-binary gender and others are confused like transgender and

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<sup>167</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

<sup>168</sup> See also HENCKAERTS, Jean-Marie; DOSWALD-BECK, Louise. Customary International Humanitarian Law, Volume I: Rules. International Committee of the Red Cross, rule 119-120, 2005.

<sup>169</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

homosexuality.<sup>170</sup> Nevertheless, some countries have taken initiatives in this direction. Israel has adopted a guideline to keep transgender people separate to ensure their safety. This guide includes those detained because of the conflict with Palestine.<sup>171</sup> This type of measure serves to ensure that IHL standards are met. Another possibility is scrutiny by international organisations. For example, in the case of IAC, the ICRC can visit detainees. This possibility is not taken up for NIACs, but the ICRC can offer its services to the detaining power.<sup>172</sup>

However, while the example of Israel gives hope, such standards are not the norm in countries currently in conflict or hosting refugees. There is no separation based on gender identity in many countries such as Kenya (indeed it is the only refugee camp that accepts LGBT+ people in the region of East Africa),<sup>173</sup> nor in Syrian, Afghan or Iraqi refugee camps around the world.<sup>174</sup> Therefore, states often do not apply the special provisions of the GCs. Neither do international organisations and their staff when managing refugee camps.<sup>175</sup>

#### 4.2.3. Conclusion

Taking all of the above into account, it can be deduced that there are situations where the IHL protects LGBT+ persons, especially with regard to general civilian protection. While it is true that some provisions are more confusing and depend on the more or less strict interpretation given to them, it can also be deduced that many states are not complying with international law, which in the case of IHL is often customary and therefore binding *erga omnes*.

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<sup>170</sup> GRUNGRAS, Neil; LEVITAN, Rachel; SLOTEK, Amy. Unsafe haven: Security challenges facing LGBT asylum seekers and refugees in Turkey. *Praxis*, 2009, vol. 24, p. 41-61.

<sup>171</sup> YARON, Lee. Transgender Inmates Will No Longer Be Kept in Isolation, Israel Prison Service Announces, *Haaretz*, 16 April 2018. Available at: <https://www.haaretz.com/israel-news/premium-transgender-prisoners-won-t-be-put-in-isolation-anymore-1.6009178>. See also the original document of the Israel Prison Service, Admission of Transgender Detainees and Guidelines for Their Admission: Policy, 5 March 2018, available at: <https://tinyurl.com/y66ktvxl>

<sup>172</sup> Art. 126 of the GC III and Art. 78 and 143 of the GC IV, Art. 3 of the GC.

<sup>173</sup> ZHU, APRIL, Share on Twitter Share via Email Print this page Africa Kenya's LGBTQ Refugees Face Threats, Attacks at Kakuma Camp. *Voanews* [online]. 2020. [Accessed 1 January 2021]. Available at: <https://www.voanews.com/africa/kenyas-lgbtq-refugees-face-threats-attacks-kakuma-camp>.

<sup>174</sup> REDA, Ali; PROUDFOOT, Philip. Against Abandonment Activist-Humanitarian Responses to LGBT Refugees in Athens and Beirut. *Journal of Refugee Studies*, 2020. See also GRUNGRAS, Neil; LEVITAN, Rachel; SLOTEK, Amy. Unsafe haven: Security challenges facing LGBT asylum seekers and refugees in Turkey. *Praxis*, 2009, vol. 24, p. 41-61.

<sup>175</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

### 4.3. International criminal law

International criminal law aims to ensure “peace, security and the well-being of the world”.<sup>176</sup> In the context of an armed conflict, it is easy for systematic attacks against the population to occur, which may result in crimes against humanity or genocide. Also, war crimes may occur. First, the ICCS would be analysed as it is the only one that has been interpreted from the LGBT+ perspective. Besides, it is the only international criminal court currently operative.

#### 4.3.1. The ICC

The greatest guarantor of international criminal law is the ICC and its corresponding statute. The ICCS uses the concept of gender, which must be differentiated from that of sex.

#### I. Crimes of genocide and crimes against humanity

The crimes of genocide and crimes against humanity are targeting the protection of groups. In the former, specific groups were agreed on the need for special protection from partial or whole extermination. The protected collectives from genocide in the ICCS are national, ethnic, racial or religious groups.<sup>177</sup> Thus, taking into account the narrow definition of the groups, it is not possible to consider LGBT+ people as protected by Art. 5 of the ICCS. This means that they cannot be considered victims of genocide just on the grounds of sexual orientation or gender identity. However, the fact that this group is subjected to sterilisations, sexual violence, medical treatment and forced displacement from which the objective of extermination necessary for the crime of genocide can be deduced, but which can never be considered as victims of such a crime with the current wording and interpretation of the ICCS, is to be criticised.<sup>178</sup> Only if they also belong to a racial, ethnic, national or religious group could they be protected under Art. 6 of the ICCS.

Concerning the crime against humanity, it was designed to protect the population from systematic attacks.<sup>179</sup> All groups and crimes not falling under Art. 6 can be covered by Art. 7 and this includes the LGBT+ people. In the ICCS systematic attack

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<sup>176</sup> ICC Statute, preamble, para. 3.

<sup>177</sup> Art. 6 of the ICCS.

<sup>178</sup> ĐURIC, Nevenka; VIDLIČKA, Sunčana Roksandić; BOGUSH, Gleb. Legal protection of sexual minorities in international Criminal law. *Russian Law Journal*, 2018, vol. 6, no 1.

<sup>179</sup> Art. 7 of the ICCS.

can be committed in different manners listed in Art. 6. It is included murder, serious sexual crimes, deportation, torture, etc.<sup>180</sup> It is also necessary for intentionality. In other words, there is needed knowledge of the deprivation and its purpose.<sup>181</sup> Many of these deprivations might apply to the LGBT+ collective.

*A) Murdered and extermination, enslavement, deportation and forcible transfer of population*

All the crimes in the title have been committed in situations of armed conflict. Cases of all of them have been mentioned during the Second World War, the Colombian conflict or the Syrian conflict. Other examples could be the Spanish civil war or the Ukrainian civil war. Some examples are given below:

In the case of murder, a historical example is that of the poet Federico García Lorca during the Spanish civil war, who was executed not only as a Republican but also as a homosexual. The body was never found so the difficulty of proof for possible relatives was high. The national laws of Spain prohibit prosecution of crimes of the civil war and Francoism and the facts fall outside the *ratione temporis* of the ICCS. However, if the barrier of evidentiary difficulty is overcome, it should now be possible to bring such cases before the court. At the moment, no judgement has been reached by the Spanish court concerning this matter.<sup>182</sup>

During the Second World War, while LGBT+ people were not targeted for extermination in the strictest sense, there were "methods of eradication of homosexuality", often including forced hormone treatment or even castration, as well as internment in concentration camps.<sup>183</sup> LGBT+ "treatment" therapies could also fall under the crime of other inhumane acts, which will be discussed later.

Slavery is defined in the statute as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the

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<sup>180</sup> Art. 6 (1) and (2) of the ICCS.

<sup>181</sup> Art. 6 (1) of the ICCS.

<sup>182</sup> SANTOS, Juliá. Políticas públicas de la memoria. In: SANTOS, Julia. *Informe sobre la democracia en España 2011*, Madrid: Fundación Alternativas, 2011, pp. 147-169. ISBN: 978-84-92957-63-7. The only person accused for crimes against humanity during the francoism (Juan Antonio González Pacheco, called Billy the kid) died because of COVID-19 on 2020.

<sup>183</sup> REY, Nicolás Eduardo Buitrago. El Estatuto de Roma desde una perspectiva LGBT. *Anuario Iberoamericano de Derecho Internacional Penal*, 2019, vol. 7.

course of trafficking in persons, in particular women and children”.<sup>184</sup> Thus, this would include cases where family members or acquaintances sell the victims, as selling is part of “ownership” rights.<sup>185</sup> Again, no cases have been brought under any criminal court in this regards so it is not possible to know if the ICC or any other criminal court will accept this interpretation of slavery.

Finally, forced displacement has a clear example in the Colombian conflict, the cases of which have already been examined above. Due to LGBTphobic propaganda, persecution and social and family rejection, LGBT people had to leave their villages and go to the capital, where they could be a bit safer. While the IACHR condemned the state for violating human rights and for guaranteeing the rights of internally displaced persons and ensuring their ability to return,<sup>186</sup> no individual criminal responsibility has been established for the acts of members of the government who may have caused or contributed to these displacements. Furthermore, as non-government actors, criminal responsibility for the forced displacement of LGBT+ persons has not been established, although associations are trying to bring cases to the ICC.<sup>187</sup>

Thus, despite the above examples, there have been no convictions at the ICC for the murder, enslavement or forced displacement of LGBT+ persons to date.

### *B) Imprisonment, torture and sexual violence*

Concerning torture and sexual violence, there is some controversy in its qualification. Even at the international level, it has been found that depending on whether the victim is male or female, he or she is more related to one concept or another. In other words, sexual violence against men is being categorised as torture and sexual acts against women are not usually categorised as torture. This can generate

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<sup>184</sup> Art. 7 (2) (c) of the ICCS.

<sup>185</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

<sup>186</sup> DURÁN GARCÍA, David Alfonso, et al. Desplazamiento Forzado en Colombia: Derechos, acceso a la justicia y reparaciones. *Bucaramanga*, ed. CEDHUL, 2007. Available at: <https://www.acnur.org/fileadmin/Documentos/Publicaciones/2009/6922.pdf?file=fileadmin/Documentos/Publicaciones/2009/6922>.

<sup>187</sup> Por primera vez una organización LGBT colombiana se presenta ante la Corte Penal Internacional. *Colombia Diversa*, [online]. 7 December 2019. [Accessed on 5 February 2021]. Available at: <http://www.colombia-diversa.org/2019/12/por-primera-vez-una-organizacion-lgbt.html>.

certain barriers in the discourse of law.<sup>188</sup> Men (whether members of the collective or not) find it more difficult to be recognised as victims of sexual crimes. For example, there were cases in Guantanamo, Abu Ghraid and Gujarat, where women were charged with sexually abusing men to humiliate them, acts that were labelled as torture.<sup>189</sup> On the other hand, cis and hetero women do not have as many problems in obtaining a correct qualification as victims of torture or sexual violence (or both) but LGBT+ women do. This is because the attacks are only considered to be perpetrated because of being a woman and not because of belonging to the LGBT+ collective.<sup>190</sup>

It should be noted that the concepts of torture and sexual violence are not exclusive. Sexual violence can be a method of torture. It should also be remembered that a woman's body is often a weapon of war, which explains why there are many more studies on sexual violence in women than in men. It is therefore important that the entire offence is recognised as the criminalisation of the offence will influence the legal consequences.

Thus, the qualification of the offence is unclear or incomplete. Besides, further difficulties have to be taken into account. For example, in many countries, assaults on sex workers are not investigated or even considered a crime or are ignored. This has been reported in Latin American<sup>191</sup> and African<sup>192</sup> countries. It should be remembered that many transgender people, especially women, resort to prostitution as the only way out of the difficulties they face in accessing other jobs, for instance, in the Colombian conflict. On the other hand, it should be borne in mind that being a transgender person and a sex worker carries a high social stigma, so sexual assaults will be many more than those reported.

As for the crime of imprisonment unless it is accompanied by other conduct (such as inhumane treatment in Nazi concentration camps) it is difficult to resort to an

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<sup>188</sup> MOORE, Melinda W.; BARNER, John R. Sexual minorities in conflict zones: a review of the literature. *Aggression and violent behavior*, 2017, vol. 35, p. 33-37.

<sup>189</sup> OOSTERHOFF, Pauline; ZWANIKKEN, Prisca; KETTING, Evert. Sexual torture of men in Croatia and other conflict situations: an open secret. *Reproductive health matters*, 2004, vol. 12, no 23, p. 68-77.

<sup>190</sup> MOORE, Melinda W.; BARNER, John R. Sexual minorities in conflict zones: a review of the literature. *Aggression and violent behavior*, 2017, vol. 35, p. 33-37.

<sup>191</sup> BELL, Stephanie A. Violence against sex workers in Latin America: Pervasiveness, impunity, and implications. *Human Rights and Human Welfare*, 2009, vol. 8, p. 132-50.

<sup>192</sup> SCORGIE, Fiona, et al. Human rights abuses and collective resilience among sex workers in four African countries: a qualitative study. *Globalization and health*, 2013, vol. 9, no 1, p. 1-13.

international tribunal. Otherwise, many countries (whether at war or not) could denounce the imprisonment of LGBT+ people. This is because prison sentences for mere membership of the group may exist before the conflict and extend for years afterwards. It was not until 2017 that the Chancellor decided to annul all convictions for being LGBT+ sentenced during the Nazi and subsequent years, as well as compensation for some of them. It was not a court that made this decision but the German government.<sup>193</sup> The same situation can be seen in conflict countries in the Middle East such as Syria, Iraq, Lebanon, etc. Therefore, in any country where imprisonment existed before and after the conflict, it is unlikely that recourse to the ICC would be possible, as Art. 7 (e) of the statute reads as follows “imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law”. Taking these words into account, the least favourable interpretation would be that there is considerable ambiguity as to which LGBT+ rights can be considered part of HRL and which rights apply in times of armed conflict, so it is difficult from a strictly legal point of view to argue that detention without any other accompanying offence is a violation of the most fundamental rules of international law.<sup>194</sup> Indeed, some authors even consider that is hardly possible for a trans or intersex person to be considered victims neither of genocide or crimes against humanity as independent groups. This is because the concepts of transgender or intersex are used in international writings much less than sexual orientation or homosexuality,<sup>195</sup> and are therefore unlikely to be found in any fundamental norm.

On the other hand, as it was stated in the other sections, detention based on the membership to LGBT+ group is contrary to HRL<sup>196</sup> but it seems that countries are not contemplating changing their laws to adapt them to HRL. This means that in many countries in conflict, the detention of LGBT+ persons is not even considered a crime, making the HRL of little use even in its most favourable interpretation.

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<sup>193</sup> Steinmeier asks for pardon for Germany's injustices toward homosexuals. *Deutsche Welle (DW)* [online]. 3 June 2018. [Accessed 9 April 2021]. Available at: <https://www.dw.com/en/steinmeier-asks-for-pardon-for-germanys-injustices-toward-homosexuals/a-44058320>

<sup>194</sup> BRAUN, Kerstin. Do ask, do tell: Where is the protection against sexual orientation discrimination in international human rights law. *Am. U. Int'l L. Rev.*, 2013, vol. 29, p. 871.

<sup>195</sup> KRITZ, Brian. The global transgender population and the International Criminal Court. *Yale Hum. Rts. & Dev. LJ*, 2014, vol. 17, p. 1.

<sup>196</sup> BROWN, David. Making room for sexual orientation and gender identity in international human rights law: An introduction to the Yogyakarta Principles. *Mich. J. Int'l L.*, 2009, vol. 31, p. 821.

### *C) Persecution*

In Art. 7 (h) it stated that “Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”. Persecution may be defined as the intentional deprivation of fundamental rights because of affiliation to a group.<sup>197</sup>

Apart from the general requirement of widespread or systematic attack, it is needed the connection to other international crime. This was established in order to not criminalise all kinds of discriminatory provisions.<sup>198</sup> As the protection of the collective in times of armed conflict is being considered, it is highly probable that the crimes listed in Art. 7 will be committed in relation to others, such as war crimes. If these two requirements are fulfilled, it is still necessary to see if the LGBT+ people are covered by the article. Two options are going to be explored: the interpretation of the word “gender” and the “other grounds” option.

#### Interpretation of the word gender

While negotiating the ICCS, there was a debate concerning this word. The question was whether was possible to interpret “gender” in the broader sense, which means, including sexual orientation and gender identity.<sup>199</sup> Finally, according to Art. 7 (3) of the ICCS, the meaning of gender refers to “the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above”. Thus, the possibility of protecting homosexual and intersex people based on this word may be impossible.<sup>200</sup> This is because homosexual people are targeted because of their orientation and not their identity and some intersex people may be difficult to qualify as men or women only on the basis of traditional physical

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<sup>197</sup> ĐURIC, Nevenka; VIDLIČKA, Sunčana Roksandić; BOGUSH, Gleb. Legal protection of sexual minorities in international Criminal law. *Russian Law Journal*, 2018, vol. 6, no 1.

<sup>198</sup> VON HEBEL, Herman; ROBINSON, Darryl. Crimes within the Jurisdiction of the Court. *The international criminal court: the making of the Rome statute*, 1999, vol. 79, p. 82.

<sup>199</sup> BOHLANDER, Michael. Criminalising LGBT persons under national criminal law and Article 7 (1)(h) and (3) of the ICC Statute. *Global Policy*, 2014, vol. 5, no 4, p. 401-414.

<sup>200</sup> ĐURIC, Nevenka; VIDLIČKA, Sunčana Roksandić; BOGUSH, Gleb. Legal protection of sexual minorities in international Criminal law. *Russian Law Journal*, 2018, vol. 6, no 1.

characteristics. There was an amending in the ICCS in the year 2010, but the restrictive interpretation was again imposed despite that the countries supporting the term “gender” were in the majority. They were not interested in voting.<sup>201</sup> This was criticised as the article mentions the words gender and sex so it does not make much sense to use them with the same meaning.<sup>202</sup> It is not changing or evolving the normative meaning. Thus, the definition is not transformative.<sup>203</sup>

Moreover, even if the Art. 7 (3) of the ICCS defines gender in a narrow sense, it also states “male and female, in the context of society”. Taking into account that the passage of time may have changed the concept of male and female, this provision could be an open door for transgender people, as their status as male or female trans-person has been recognised in many societies.<sup>204</sup> Some authors claim that it is not yet possible to sustain this argument, as this recognition is not global and the interpretation of the article starts from a dichotomous basis of man or woman that makes extensive interpretation very difficult.<sup>205</sup>

On the other hand, other authors believe that the phrase "within the context of society" allows ICC judges to interpret the concept broadly. Besides, in the *Mbarushimana* case, the prosecutor accused Mr Mbarushimana of contributing to the “persecution by intentionally and in a discriminatory manner targeting women and men seen to be affiliated with the FARDC based on their gender”.<sup>206</sup> This accusation was based on the fact that men affiliated with the FARDC<sup>207</sup> had been forced to rape women and that these women, apart from being victims of serious sexual crimes, had been mutilated during pregnancy. Hence, Art. 7.1 (h) covers situations where the victims are not targeted because they are men or women but on the stereotyped roles, they are assigned in the society (in this case, the dominant position of men versus the

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<sup>201</sup> BOHLANDER, Michael. Criminalising LGBT persons under national criminal law and Article 7 (1)(h) and (3) of the ICC Statute. *Global Policy*, 2014, vol. 5, no 4, p. 401-414.

<sup>202</sup> Ibid.

<sup>203</sup> OOSTERVELD, Valerie. The definition of gender in the Rome Statute of the International Criminal Court: A step forward or back for international criminal justice. *Harv. Hum Rts. J.*, 2005, vol. 18, p. 55.

<sup>204</sup> KRITZ, Brian. The global transgender population and the International Criminal Court. *Yale Hum. Rts. & Dev. LJ*, 2014, vol. 17, p. 1.

<sup>205</sup> ĐURIC, Nevenka; VIDLIČKA, Sunčana Roksandić; BOGUSH, Gleb. Legal protection of sexual minorities in international Criminal law. *Russian Law Journal*, 2018, vol. 6, no 1.

<sup>206</sup> *Prosecutor v. Callixte Mbarushimana*, Situation in the Democratic Republic of the Congo. No. ICC-01/04-01/10, 28 September 2010, para. 10, Count 10-11.

<sup>207</sup> Armed Forces of the Democratic Republic of the Congo

subjugation of women).<sup>208</sup> Thus, knowing that discrimination against transgender people is because they break the gender stereotype assigned to them at birth, it is objectionable that transgender people are not included in this interpretation. In fact, it could be argued that discrimination against LGBT+ people is based precisely on these gender stereotypes. This interpretation has not been confirmed by the ICC or any relevant international body, it has only been put forward at a theoretical level.

Besides, Art. 22.2 of the ICCS must be fulfilled, too. It states that a crime cannot be extended by analogy and when the interpretation is unclear, it should be done in the way most favourable to the accused. The prosecutor must prove that discrimination on the grounds of sexual orientation or gender identity is not analogous but gender persecution itself.<sup>209</sup>

To conclude, it seems to be generally accepted that the interpretation of the word gender is too strict, as it was raised in the negotiations, to be able to include any member of the LGBT+ collective only based on membership in that group. Some authors have directly objected to the wording of Art. 7.3, claiming that it should include members of the LGBT+ people, as they are behaving out of the stereotypes.<sup>210</sup> Moreover, this interpretation contradicts the interpretations of other international human rights courts, such as the ECtHR.<sup>211</sup> Despite this, the application of the ICCS based on gender to protect LGBT+ remains at least unclear for all stated above.

#### “Other grounds that are universally recognized as impermissible”

Some authors argue that it is possible to use this open clause to cover persecution on the grounds of sexual orientation. The first requirement in this provision is universal recognition, which should be understood as “widely recognised”.<sup>212</sup> It is therefore not necessary for all countries to recognise the basis of the attack as impermissible. Besides, the ICC has established in the *Lubanga* case, while dealing with the right of legal representation by counsel, that “such a right is a universally recognized

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<sup>208</sup> ĐURIC, Nevenka; VIDLIČKA, Sunčana Rokсандić; BOGUSH, Gleb. Legal protection of sexual minorities in international Criminal law. *Russian Law Journal*, 2018, vol. 6, no 1.

<sup>209</sup> Ibid.

<sup>210</sup> BEDONT, Barbara. Gender-specific provisions in the statute of the International Criminal Court. *Gender-specific provisions in the statute of the International criminal court*, 1999, p. 183-210.

<sup>211</sup> ĐURIC, Nevenka; VIDLIČKA, Sunčana Rokсандić; BOGUSH, Gleb. Legal protection of sexual minorities in international Criminal law. *Russian Law Journal*, 2018, vol. 6, no 1.

<sup>212</sup> Ibid.

human right (see article 21 (3) of the Statute) that finds expression in international and regional treaties and conventions”.<sup>213</sup> Also, it is necessary to prove the intentional breach of a fundamental right.<sup>214</sup> Hence, the evidence of their recognition is the crystallisation in such legal documents, so that if it is possible to find the right to free sexual orientation, it would be protected under Art. 7 (1) (h).

Several international treaties cover discrimination on the grounds of sex such as the ICCPR (Art. 26), the ICESCR (Art. 2 (2)) or the UN Charter (Art. 1 (3)). However, the term “sex” has to be discussed as the term “gender”. The ILC has interpreted the UN Charter rights as applicable to all individuals without any condition or distinction.<sup>215</sup> In this line, the interpretation of the word “sex” in the UN Charter and the ICCPR includes sexual orientation, according to the UNCHR.<sup>216</sup> Besides, the UNCHR in the *Toonen* case mentioned the jurisprudence of ECtHR, which also interpreted the term “sex” as including sexual orientation. Indeed, the ECtHR has interpreted Article 14 of the ECHR, which includes the right to non-discrimination based on sex (among others), in an open manner, to include discrimination based on sexual orientation.<sup>217</sup> Given that the rights contained in the UN Charter are part of international custom, the fact that international courts and the UNCHR have interpreted the term “sex” in this way makes it possible to consider discrimination on the grounds of sexual orientation as discrimination “widely recognised as impermissible”.

On the other hand, other authors consider that the residual clause could not be used to cover the LGBT+ group. This is due to the principle that the special rule supersedes the general rule.<sup>218</sup> As there is a special provision for “gender”, membership in a group based on other gender interpretations could not be expected. Also,

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<sup>213</sup> *The prosecutor v. Thomas Lubanga Dyilo*. Reasons for "Decision of the Appeals Chamber on the Defence application 'Demande de suspension de toute action ou procédure afin de permettre la désignation d'un nouveau Conseil de la Défense'". No. ICC-01/04-01/06 OA8, 9 March 2007, para. 12. Available at: [http://www.worldcourts.com/icc/eng/decisions/2007.03.09\\_Prosecutor\\_v\\_Lubanga.pdf](http://www.worldcourts.com/icc/eng/decisions/2007.03.09_Prosecutor_v_Lubanga.pdf)

<sup>214</sup> *Prosecutor v. Dusko Tadic aka "Dule"* (Opinion and Judgment), No. IT-94-1-T, ICTY, 7 May 1997, para. 697. Available at: <https://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>

<sup>215</sup> ILC. Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996, Art. 18, para. 11.

<sup>216</sup> *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), para. 8.7. Available at: <http://hrlibrary.umn.edu/undocs/html/vws488.htm>

<sup>217</sup> See cases *Dudgeon v. the United Kingdom*, App No. 7525/76, 22 October 1981, *Norris v. Ireland*, App No. 10581/83, 26 October 1988, or more recently *Identoba and Others v. Georgia* App No. 73235/12, 12 May 2015, *Zhdanov and Others v. Russia* App Nos. 12200/08, 16 October 2019. All of the, concerning discrimination on the grounds of sexual orientation and solved under discrimination based on sex under Art. 14 of the ECHR.

<sup>218</sup> BOHLANDER, Michael. Criminalising LGBT persons under national criminal law and Article 7 (1)(h) and (3) of the ICC Statute. *Global Policy*, 2014, vol. 5, no 4, p. 401-414.

homosexuality is still criminalised in many countries in the world. This may be an argument against the “widely recognised as impermissible”. A possible solution could be possible to allow the judge to interpret the article. However, this option seems to be unlikely as the term “gender” is not a legal word but political. Thus, allowing the judges to interpret that word would be like letting them change the conclusions of the ICCS negotiations. Besides, the ICC restricts the judicial discretion comparing with the ad hoc tribunals.<sup>219</sup> A possible manner to include the LGBT+ under Art. 7 would be the situation in which a religious, cultural, ethnical or other group covered by such article, has as one of its main characteristics the encouragement of homosexual or bisexual relationships.<sup>220</sup> This is unlikely to happen and protection would be guaranteed on the basis of cultural, religious, ethnic, etc. issues but not on the grounds of sexual orientation.

Another argument used against the use of the residual clause in Art. 7 (1) (h) is the fact that the attacks on these people are not because they belong to the LGBT+ collective, but because of the sexual practices they carry out. So there is no persecution based on membership of other groups which may be covered by recognised “other grounds”.<sup>221</sup> The argument is untenable since it is obvious that such sexual practices are carried out because they are part of the LGBT+ collective, no one who does not belong to this group would have relations with someone of the same sex. Besides, reference is made to homosexual practices but there are transgender people (who may be homosexual or bisexual, or neither) who would not be engaging in these practices and are equally targeted.

Generally, it seems that the offence of persecution as set out in the ICCs does not protect LGBT+ people either. Recalling the various attacks, including executions of homosexuals or bisexuals in Syria and Colombia, these are based on their sexual orientation or in their gender identity. With the current interpretation of the ICCS, neither the crime of genocide nor the crime against humanity in the form of persecution can be denounced. This difficulty in being categorised as a victim of an international crime results in impunity for those who commit these acts. Moreover, the fact that a systematic and widespread attack is required may pose problems as LGBT+ is a large

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<sup>219</sup> Ibid.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

enough group to meet the requirement, but if it were the case that only one of the letters of the group was to be targeted or if they are considered separate, it would be in doubt whether it could be considered widespread. For example, there are not that many intersex individuals.<sup>222</sup>

#### *D) Other inhuman acts*

Art. 7 (k) of the ICCS also considers inhuman treatment, including damage to bodily and mental health.

The case of South Africa during the apartheid policies is striking. Both female and male combatants were subjected to various electroshock therapies to "cure homosexuality" and even sex-change surgeries.<sup>223</sup> In principle, there seems to be no reason why these cases would not be covered by Art. 7(k), as long as it can be shown that they were part of a systemic or widespread attack, and were carried out against civilians.<sup>224</sup> As in previous cases, there are no provisions covering non-civilians. Unfortunately, no cases have come before the international criminal justice tribunals concerning these events.

## **II. War crimes**

Covered in Art. 8 of ICCS, war crimes include grave breaches of the GC (in the case of NIAC, Art. 3 of the GC), custom or other law applicable to armed conflicts (IAC or NIAC). Also, to establish that someone has committed this crime, the events must take place as part of a plan, policy or as part of a large-scale commission.

Therefore, there are two cumulative conditions to consider a fact as a war crime. First, it has to exist a causal link between the LGBT+ person attack and the fact that he/she belongs to the group (or the attackers presumed so). Second, as the crime must be differentiated from ordinary crimes, it has to exist a sufficient link between the attack and the armed conflict.<sup>225</sup> The interpretation of the link between the conflict and the attack must be interpreted extensively. This could include the fact that any of the parties

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<sup>222</sup> KRITZ, Brian. The global transgender population and the International Criminal Court. *Yale Hum. Rts. & Dev. LJ*, 2014, vol. 17, p. 1.

<sup>223</sup> SERRANO-AMAYA, José Fernando. Homophobia in apartheid and post-apartheid South Africa. En *Homophobic Violence in Armed Conflict and Political Transition*. Palgrave Macmillan, Cham, 2018. p. 57-83.

<sup>224</sup> REY, Nicolás Eduardo Buitrago. El Estatuto de Roma desde una perspectiva LGBT. *Anuario Iberoamericano de Derecho Internacional Penal*, 2019, vol. 7.

<sup>225</sup> GAGGIOLI, Gloria. Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law. *International Review of the Red Cross*, 2014, vol. 96, no 894, p. 503-538.

or persons operating under their control has taken advantage of the conflict situation to specifically attack this group.<sup>226</sup> Some circumstances to take into account are the position and profile of the victim and the aggressor within the conflict or the impunity of such attacks in the environment created by the conflict.<sup>227</sup> Violations of GC in both IAC and NIAC have been discussed in previous sections, particularly concerning attacks on civilians. For example, in the Syrian conflict, the government directly accused all homosexuals of belonging to rebel groups and attacks against them have been part of its policy during the conflict. Given that the excuse for targeting them was their alleged membership in enemy rebel groups, the link to the conflict is clear. The government took advantage of an internal conflict with an armed group to persecute members of the LGBT+ community. This case should be able to go to the ICC, but given that the conflict is not yet over, it will have to wait and see if it will be tried.

Finally, the term "serious breach" is somewhat ambiguous, as it depends on what kind of breach is considered serious. It is clear that certain actions must be considered, such as murder, inhumane treatment or torture, but in the case of LGBT+ people, of particular relevance are those "medical treatments" that entail great physical suffering. However, violations of HRL are not considered "serious" violations of the GCs. Therefore, mass imprisonment of LGBT+ persons would not fall under the offence even though it is a common practice in many conflicts.<sup>228</sup>

#### 4.3.2. Other international criminal courts

Some provisions of past international criminal court statutes have similar definitions to those set out in relation to the ICC. This is because the ICCS was inspired by many of these precedents in its drafting. Only courts related to armed conflict (NIAC or IAC) will be mentioned, so courts such as the International Tribunal for Lebanon will not be taken into account, as it deals only with the crime of terrorism and did not deal with crimes against groups.

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<sup>226</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

<sup>227</sup> *Prosecutor v. Dusko Tadic aka "Dule"* (Opinion and Judgment), No. IT-94-1-T, ICTY, 7 May 1997, para. 572-573. Available at: <https://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>

<sup>228</sup> VAN ELST, Richard. Implementing universal jurisdiction over grave breaches of the Geneva Conventions. *LJIL*, 2000, vol. 13, p. 815.

Starting with the Statute of the Nuremberg Tribunals, crimes against peace and war crimes would correspond to what would be ICCS war crimes and crimes of aggression.<sup>229</sup> However, the reference to serious non-compliance with the IHL standards contained in the ICCS is more comprehensive, as many of these were adopted after the events of World War II. Therefore, most of these IHL standards will be an international custom. This means that the principle of distinction between civilians and combatants did apply as well as the prohibition of inhumane treatment or unnecessary deaths.<sup>230</sup> On the other hand, the crime of genocide did not exist and only crimes against humanity were covered by the statute. The groups protected by this version of crimes against humanity were political, racial or religious.<sup>231</sup> As with the ICCS interpretation of the crime of genocide, LGBT+ groups can hardly fall within this definition.

As for the ICTR, the crime of genocide did exist but only for national, racial, ethnic or religious groups. These same groups were the ones listed for the crime against humanity in the court's statute.<sup>232</sup> Therefore, none of the crimes included the possibility of attacks against LGBT+ people. The court also had jurisdiction to try violations of Art. 3 of the GC, relating to NIAC, and APII, both mentioned in the section related to IHL. The ICTY statute also contains articles relating to violations of the GC as well as international customary humanitarian law that are very similar to those in the other statutes.<sup>233</sup> Concerning crimes of genocide and crimes against humanity, the groups remain smaller than those of the ICCS. Like the other statutes, these crimes protect national, ethnic, racial or religious groups.<sup>234</sup> The SCSL statute provides for a much broader interpretation of crimes against humanity, as it does not refer to a specific group beyond the victims being civilians, as far it is a systematic and widespread attack.<sup>235</sup> Therefore, all LGBT+ non-combatants would be protected by this statute but not based on membership of the group. It also had jurisdiction for serious violations of Art. 3 of the GC or other serious violations of the IHL.<sup>236</sup>

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<sup>229</sup> Art. 6 (a) and (b) of the Nuremberg Statute and Art. 8 and 8 bis of the ICCS.

<sup>230</sup> HENCKAERTS, Jean-Marie; DOSWALD-BECK, Louise. Customary International Humanitarian Law, Volume I: Rules. *International Committee of the Red Cross*, 2005.

<sup>231</sup> Art. 6 (c) of the Nuremberg Statute.

<sup>232</sup> Arts. 2 and 3 of the ICTR Statute.

<sup>233</sup> Arts. 2 and 3 of the ICTY Statute.

<sup>234</sup> Arts. 4 and 5 of the ICTY Statute.

<sup>235</sup> Art. 2 of the SCSL Statute.

<sup>236</sup> Arts. 3 and 4 of the SCSL Statute.

Finally, the ETSP, established after a NIAC and probably the only hybrid tribunal from the point of view of its legal origin,<sup>237</sup> also had jurisdiction to try war crimes, crimes against humanity or genocide.<sup>238</sup> The latter also in relation to ethnic, religious, national or racial groups. As for crimes against humanity, this can be a broad catalogue of attacks on the civilian population as long as they are systematic and widespread.<sup>239</sup> The words used are the same as in the ICCS as well as war crimes, the catalogue of which is also very extensive.<sup>240</sup> Moreover, the crime of torture was considered separately from other crimes, unlike in ICCS, where it is included in crimes against humanity or as a war crime depending on the context, and some offences were governed by the criminal law of East Timor (murder and sexual offences).<sup>241</sup>

Therefore, the ETSP and SCSL statutes are the least demanding in terms of qualifying as a victim of a crime against humanity. In other words, in the case of systematic and widespread attacks against the LGBT+ population in the different conflicts that took place in these countries, the level of protection would be different depending on the status. In Sierra Leone and East Timor, such attacks would be covered as long as the victims were civilians. However, in Rwanda, Nazi Germany and the former Yugoslavia, apart from being a non-combatant, one had to meet the requirement of belonging to a racial, ethnic, religious or national group that was the target of the attacks. Thus, the chances of recourse to international criminal justice were reduced if one did not belong to one of these groups. One might think that perhaps LGBT+ persons were not specifically targeted in these conflicts. However, it should be remembered that the Nazi persecution of the collective during the years of the Second World War (without necessarily being Jewish or belonging to another group) has already been mentioned.<sup>242</sup> Systematic persecution has also been reported in the former Yugoslavia. For example in Serbia during the war, homosexuality was perceived as an enemy of the nation. Activist Lepa Mladjenovic describes street attacks on women for being lesbians. Nationalisms used homosexuality as propaganda against certain

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<sup>237</sup> O'KEEFE, Roger. The types of criminal court. In *International criminal law*. OUP Oxford, 2015. pp. 85-119.

<sup>238</sup> UNTAET Regulation No. 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences of 6 June 2000. Available at: <https://www.legal-tools.org/doc/c082f8/pdf/>

<sup>239</sup> Ibid, part II, section 4 and 5.

<sup>240</sup> Ibid, part II, section 6.

<sup>241</sup> Ibid, part II, section 8-10.

<sup>242</sup> ĐURIC, Nevenka; VIDLIČKA, Sunčana Rokсандić; BOGUSH, Gleb. Legal protection of sexual minorities in international Criminal law. *Russian Law Journal*, 2018, vol. 6, no 1.

ethnicities as if it were a characteristic of the ethnicity and an excuse to attack them.<sup>243</sup> Thus, impunity goes back many years. Since the expansion of international criminal courts after the Second World War, none have dealt with specific attacks against LGBT+ people.

On the other hand, in the case of combatants, they could avail themselves of the possible violations of the IHL in the different statutes. The least protective would be the Nuremberg statute as the IHL was not as developed and is based only on international custom. For example, a prisoner of war would still be protected against torture or inhuman treatment but other specific provisions maybe could not apply (or at least they were not custom at that moment). Of course, the recourse of membership to the LGBT+ group was not possible. Indeed, many countries did (and some of them still does) not allow homosexuals to enter the army so there were fewer LGBT+ combatants than today<sup>244</sup>.

In short, the level of protection was much lower than it is today. In most statutes, international crimes did not apply to protect LGBT+ people and recourse to the courts was only possible if you belonged to other groups or for serious violations of IHL. Despite this possibility, no cases have been found that have dealt with LGBT+ persons at the international level. Nor was found any interpretations of the statutes in relation to the collective or the concept of gender, as has been done with the ICCS. One could conclude that the issue was not on the international political agenda and simply was not even considered as a possibility to study crimes committed against LGBT+ persons.

#### **4.3.3. National legislation**

While international courts may be a recourse for potential victims of violations of IHL or international crimes, the principle of universal justice also allows recourse to national courts and Art. 1 of GC obliges the parties to ensure the Conventions without specifying how. Thus, this is an extra recourse, as not all states are party to the ICCS. The principle of universal justice is recognised as an international custom. It makes it possible to try certain crimes considered to be the most serious by the international community, even if they were not committed in the territory of the state trying them. In

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<sup>243</sup> SERRANO-AMAYA, Jose Fernando. *Chiaroscuro: The uses of 'Homophobia' and Homophobic Violence in Armed Conflicts and Political Transitions*. PhD. University of Sydney, 2015.

<sup>244</sup> DEAN SINCLAIR, G. Homosexuality and the military: A review of the literature. *Journal of Homosexuality*, 2009, vol. 56, no 6, p. 701-718.

the most absolute sense, no link is necessary between the state and the crime for its courts to have jurisdiction. Absolute or pure universal jurisdiction is allowed by international law but it is not the most common.<sup>245</sup>

There is a discussion concerning the crimes that can be considered international crimes. The international practice seems to establish that genocide, crimes against humanity and war crimes are accepted as such.<sup>246</sup> The crime of aggression also seems to have been consolidated despite initial problems in defining it.<sup>247</sup>

However, states are not obliged to apply the principle of universal justice and even if they do, they do not have to do so uniformly. Therefore, each state is free to decide on the requirements necessary to base its jurisdiction on this principle. For example, until 2009, Spain had this principle in its organic law on the judiciary in its most absolute form. It was not necessary to have any kind of link with the state. It was not even necessary to have a nationality connection (neither the victim nor the perpetrator). Besides, the list of crimes considered as international crimes was broader than the crimes under ICC.<sup>248</sup> However, reforms in both Spain and Belgium mean that there is no longer such comprehensive national legislation, although the adoption of this principle has expanded geographically in other states.<sup>249</sup> Therefore, the possibility for an LGBT+ person who has been a victim of a crime during an armed conflict to have recourse to national courts will depend on each state's regulations. It could be assumed that those countries that currently have protective legislation regarding LGBT+ rights would consider admitting such complaints. This means that if a victim is able to go to court in Sweden, their complaint is likely to be successful, but if they try to go to the courts in Iran, their claims are unlikely to be upheld as Iran has a death penalty for being LGBT+,<sup>250</sup> so if the victims died the result of meeting Iranian justice would have been the same and if they are alive it could be lethal to expose themselves in court.

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<sup>245</sup> KLUWEN, Tim. Universal jurisdiction in absentia before domestic courts prosecuting International crimes: A suitable weapon to fight impunity. *Goettingen J. Int'l L.*, 2017, vol. 8, p. 7.

<sup>246</sup> Ibid.

<sup>247</sup> GILLET, Matthew. The Anatomy of an International Crime: Aggression at the International Criminal Court. *International Criminal Law Review*, 2013, vol. 13, no 4, p. 829-864.

<sup>248</sup> STC 237/2005, of 26 September 2005.

<sup>249</sup> LANGER, Maximo; EASON, Mackenzie. The Quiet Expansion of Universal Jurisdiction. *European Journal of International Law*, 2019, vol. 30, no 3, p. 779-817.

<sup>250</sup> Map of Countries that Criminalise LGBT People | Human Dignity Trust, 2021. *Humandignitytrust.org* [online]. Available at: [https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/?type\\_filter=crim\\_lgbt](https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/?type_filter=crim_lgbt)

On the other hand, it should be noted that some governments are recognising crimes against LGBT+ people in the aftermath of armed conflicts or regimes. However, these are still governmental, not judicial, decisions.<sup>251</sup>

Alternatively, national courts could be formed with international elements, such as those established in Cambodia or Bosnia-Herzegovina. In this case, although the creation of such a court is thanks to the state in question, the rules of international law could be applicable. For example, both tribunals mentioned above have jurisdiction over war crimes or serious violations of GCs as well as other serious crimes. The Cambodian court has considered gender-based crimes but only in relation to cis women.<sup>252</sup> Again, there are no examples of court rulings concerning the collective, but the possibility exists that some countries may resort to this formula in the future. Given that these courts are created based on national law, the country in question may decide to create a specific rule for crimes against LGBT+ persons or to make an expansive interpretation of provisions that already exist in international law. The situation would depend on each country.

#### 4.3.4. Conclusion

It seems to be widely accepted that international criminal law does not consider attacks based on membership of LGBT+ as a basis for initiating investigations.<sup>253</sup> Other courts such as the ICTY or the ICTR also failed to take any steps to develop the protection of LGBT+ rights in the field of international criminal law.<sup>254</sup> Some authors even think that “the treaty is written in such a way as to exclude sexual orientation and genders other than traditional (male and female) as a protected category under international criminal law”.<sup>255</sup> Moreover, the criteria for interpreting international criminal law are not the same as those applicable to HRL.<sup>256</sup>

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<sup>251</sup> Steinmeier asks for pardon for Germany's injustices toward homosexuals. *Deutsche Welle (DW)* [online]. 3 June 2018. [Accessed 9 April 2021]. Available at: <https://www.dw.com/en/steinmeier-asks-for-pardon-for-germanys-injustices-toward-homosexuals/a-44058320>.

<sup>252</sup> BEHMER-PRINZ, Katharina. *Norm Translation in the Context of Transitional Justice and the Role of Hybrid Courts: A Case Study on Gender Justice in Post-conflict Cambodia*. 2019. Tesis Doctoral. Ruhr-Universität Bochum.

<sup>253</sup> BOHLANDER, Michael. Criminalising LGBT persons under national criminal law and Article 7 (1)(h) and (3) of the ICC Statute. *Global Policy*, 2014, vol. 5, no 4, p. 401-414.

<sup>254</sup> REY, Nicolás Eduardo Buitrago. El Estatuto de Roma desde una perspectiva LGBT. *Anuario Iberoamericano de Derecho Internacional Penal*, 2019, vol. 7.

<sup>255</sup> Ibid.

<sup>256</sup> Ibid.

On the other hand, crimes against humanity are based on “a widespread or systematic attack directed against any civilian population”.<sup>257</sup> Thus, many of the crimes stated above cannot protect LGBT+ combatants.

Finally, by not recognising LGBT+ as a legal basis expressly, people whose membership is not based on more interpretable concepts such as sexual orientation or gender identity (which at least have some academic discussion) are left out of any protection (e.g. intersex or queer people). Besides, the recourse to national jurisdiction depends on the level of protection that each State has. This creates legal uncertainty.

However, the ICC has the opportunity to change the trend. Two new cases could soon come to trial. First, a Colombian LGBT organisation has brought the case to the annual session of the ICC member states and brought the ICC's attention to the crimes committed against the population during the armed conflict.<sup>258</sup> Second, another LGBT organisation announced in 2020 that it was going to denounce the members of the Tunisian government at the highest level for the systematic persecution of LGBT+ people.<sup>259</sup> The ICC may therefore have the opportunity to deal with specific cases of LGBT+ attacks in the coming years, with the possibility of clarifying or changing current restrictive interpretations.

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<sup>257</sup> Art. 7 (1) of the ICCS.

<sup>258</sup> Por primera vez una organización LGBT colombiana se presenta ante la Corte Penal Internacional. *Colombia Diversa*, [online]. 7 December 2019. [Accessed on 5 February 2021]. Available at: <http://www.colombia-diversa.org/2019/12/por-primera-vez-una-organizacion-lgbt.html>.

<sup>259</sup> EFE. Organización LGTB+ denunciará al primer ministro tunecino ante el CPI. *La Vanguardia*. [online]. 3 June 2020. [Accessed on 5 February 2021]. Available at: <https://www.lavanguardia.com/politica/20200603/481588322035/organizacion-lgtb-denunciara-al-primer-ministro-tunecino-ante-el-cpi.html>.

## 5. General conclusion

In relation to the question of whether there is any special regulation that protects LGBT+ people from the violence of the armed conflict, the main hypothesis is that there is no such regulation. The only exception that can be argued is in the area of HRL, where some treaties (such as the ICCPR) have been interpreted in a way that is inclusive of LGBT+ people. Some times the group is protected on the grounds of broad interpretations of other rights that may apply in some situation. But broad interpretations are not always accepted.<sup>260</sup> Besides, many HRL documents are not binding, such as the Yogyakarta principles or some UNGA resolutions.

In the case of IHL, the general rules should in theory be able to protect the members of the collective. However, in relation to certain situations such as attacks between combatants on the same side, or concerning attacks perpetrated by armed groups that do not effectively control territory, IHL provisions are of little use.<sup>261</sup> In addition, despite the existing international law (which may serve for protecting LGBT+ people at least from the violation of serious breaches of HRL and IHL), many States fails in fulfilling their obligations. This creates a feeling of impunity for the aggressors (either States or individuals) and defencelessness for the members of the LGBT+ collective.<sup>262</sup> The evidence is that, until now, no cases are dealing with LGBT+ people rights during an armed conflict, despite all the possible violations which have been exposed through this work.

On the other hand, international criminal law is the least useful for protecting the rights of the collective. Protection is clearly less than for other groups (such as religious or national groups) and in certain crimes, interpretations are unclear or even contradictory.<sup>263</sup> They cannot be considered victims of crimes like genocide or persecution, which limits their ability to seek justice. Furthermore, the individual responsibility settled by the international criminal law concerns breaches of HRL and IHL, so if this field of law is not effective the other two also loose effectivity.

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<sup>260</sup> WINER, Anthony S. Levels of generality and the protection of LGBT Rights before the United Nations General Assembly. *Wm. Mitchell L. Rev.*, 2015, vol. 41, p. 80.

<sup>261</sup> MARGALIT, Alon. Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence. *International Review of the Red Cross*, 2018, vol. 100, no 907-909, p. 237-265.

<sup>262</sup> Ibid.

<sup>263</sup> ĐURIC, Nevenka; VIDLIČKA, Sunčana Roksandić; BOGUSH, Gleb. Legal protection of sexual minorities in international Criminal law. *Russian Law Journal*, 2018, vol. 6, no 1.

Also, there are very few documents with legal relevance that expressly mention intersex or queer people. Usually, documents refer to sexual orientation or gender identity, but these two groups (represented by the letters I and Q or by the symbol +) are left out of many provisions. Besides, broad interpretations of the word "gender" would hardly apply to these two groups, except for a much broader interpretation than has been given so far.

Three reasons have been identified for why LGBT+ protection has remained outside the universal HRL system. Firstly, there is no international treaty that establishes a binding obligation of non-discrimination and guaranteed rights for this population. Secondly, the clash of visions between the individual dimension of the West and the collective dimension of HRL has kept gender and sexuality rights in the middle of the debate of which vision should be universal. Finally, few sexual and gender rights NGOs have been granted consultative status within the United Nations.<sup>264</sup>

Concerning the question of whether it is necessary to develop specific standards, the theory that it is necessary is confirmed. Although some general rules may apply in some cases, it has been found that countries do not respect the rights of this group. The enactment of specific LGBT+ protection standards would help to dissolve the ambiguity that countries and perpetrators often hide behind. Special standards would have the effect of reinforcing HRL and clarifying IHL and international criminal law. This effect has been seen in other protected groups such as women, the elderly or children.<sup>265</sup> Although violations of international law are still committed against these groups, their protection in the event of armed conflict is much more guaranteed, in part thanks to specific provisions. Only broad interpretations do not achieve the same effect. The adoption of an international Convention for LGBT+ rights would bring several advantages. First, no one could argue that HRL does not include LGBT+ rights because they do not appear in any treaty. Second, ambiguities about LGBT+ protection and the application of certain rights and standards would disappear, as well as dubious interpretations.<sup>266</sup>

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<sup>264</sup> D'AMICO, Francine. LGBT and (Dis) United Nations. *Sexualities in World Politics: How LGBTQ Claims Shape International Relations*, Routledge: Abingdon, UK, 2015, p. 54-74.

<sup>265</sup> BRAUN, Kerstin. Do ask, do tell: Where is the protection against sexual orientation discrimination in international human rights law. *Am. U. Int'l L. Rev.*, 2013, vol. 29, p. 871.

<sup>266</sup> Ibid.

On the other hand, it is also true that the resistance of many countries to an international convention for the protection of LGBT+ people is a major obstacle. Especially because some countries perceive the protection of LGBT+ people to be characteristic of Western countries and perceived as an imposition of their culture rather than an advance in human rights.<sup>267</sup>

Other initiatives could help to gain wider acceptance in the international community. So far, most of the proposals come from NGOs such as ORAM<sup>268</sup> but there are not many other initiatives at the international level. Admittedly, the UNHRC has done a good job in a short time despite being more activist than legal. Thanks to them, in countries such as Kenya, LGBT+ refugees have their own category and form of assistance, addressing their specific needs.<sup>269</sup> Other voices have spoken out on this issue. Even the Special Rapporteur on Violence Against Women recommended the appointment of a Special Rapporteur on Sexual Orientation to investigate the growing violence against lesbians and minorities.<sup>270</sup> Recently, some countries have considered the possibility of reparations for victims from these groups or special reception centres. For example, Germany,<sup>271</sup> Spain<sup>272</sup> or Colombia. Although some have not yet been carried out.<sup>273</sup>

To conclude, in current international law, there will be no global success in protecting the rights of LGBT people, because "universal" human rights instruments create necessary but not sufficient conditions for success, which is also present in

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<sup>267</sup> Ibid.

<sup>268</sup> See as an example the ORAM's initiative about incorporating Sexual and Gender Minorities into Refugee and Asylum Intake and Registration Systems, 2016. Available at: <https://www.refworld.org/publisher/ORAM,,,576255ea4,0.html>.

<sup>269</sup> GERBER, Paula; GORY, Joel. The UN Human Rights Committee and LGBT rights: what is it doing? What could it be doing?. *Human Rights Law Review*, 2014, vol. 14, no 3, p. 403-439.

<sup>270</sup> MOORE, Melinda W.; BARNER, John R. Sexual minorities in conflict zones: a review of the literature. *Aggression and violent behavior*, 2017, vol. 35, p. 33-37.

<sup>271</sup> JOFRÉ, José Pablo. Berlín inaugura el primer centro para refugiados del colectivo LGTB. *ABC*, [online] 23 February 2016 [accessed 27 January 2021]. Available at: [https://www.abc.es/sociedad/abc-berlin-inaugura-primer-centro-para-refugiados-colectivo-lgtb-201602232158\\_noticia.html?ref=https:%2F%2Fwww.google.com%2F](https://www.abc.es/sociedad/abc-berlin-inaugura-primer-centro-para-refugiados-colectivo-lgtb-201602232158_noticia.html?ref=https:%2F%2Fwww.google.com%2F).

<sup>272</sup> NORIEGA, David. Abre el primer centro de acogida estatal para refugiados LGTBI: "Es un espacio entre iguales". *Eldiario.es*, [online] 29 de noviembre de 2020 [accesed 27 January 2021]. Available at: [https://www.eldiario.es/desalambre/abre-primer-centro-acogida-estatal-refugiados-lgbti\\_1\\_6448711.html](https://www.eldiario.es/desalambre/abre-primer-centro-acogida-estatal-refugiados-lgbti_1_6448711.html).

<sup>273</sup> BOHORQUEZ, Laura Catalina Tovar. Reparación simbólica para mujeres trans víctimas del conflicto armado:¿ por qué no se ha iniciado?. *Trans-pasando Fronteras*, 2014, no 6, p. 83-98.

international criminal law norms or IHL.<sup>274</sup> It is therefore not possible for such norms to be a reliable shield for LGBT+ people in times of armed conflict.

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<sup>274</sup> D'AMICO, Francine. LGBT and (Dis) United Nations. *Sexualities in World Politics: How LGBTQ Claims Shape International Relations*, Routledge: Abingdon, UK, 2015, p. 54-74.

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