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Inhaltsverzeichnis

1 Introduction.....	7
1.1 Outline and Purpose	7
1.2 Research Gap, Research Question, and Limitations	11
1.3 Legal Method	12
1.3.1 Introduction	12
1.3.2 Legal Dogmatics	12
1.3.3 Critical Legal Theory	13
1.3.4 Feminist Legal Theory with a Focus on Intersectionality	14
1.3.5 Queer Legal Theory	17
1.3.6 Conclusion	18
1.4 Definition	19
1.5 Material	23
2 Developments in IHRL	24
2.1 Introduction	24
2.2 Historic Overview and Current Developments within IHRL	24
2.3 Excursus: International Criminal Law and the International Criminal Court.....	30
3 Overlap of IHRL and IHL	33
4 Current Legal Protection of LGBT+ Individuals in IHL.....	35
4.1 Introduction to IHL	36
4.2 Sources of IHL	39
4.2.1 Written Law	40
4.2.2 Customary International Law.....	41

4.2.3 General Principles of Law	42
4.2.4 Subsidiary Means	43
4.2.5 Fundamental Principles of IHL	43
4.3 Interpretative and Analytical Resources of IHL	46
4.3.1 Commentaries on the Geneva Conventions	46
4.3.2 ICRC's Customary IHL Study	48
4.3.3 The Interpretation of IHL Treaties	48
4.4 Current IHL's Protection of Queer People	53
4.4.1 Introduction	53
4.4.2 Common Article 1: to Respect and Ensure Respect for the Conventions	57
4.4.2.1 Introduction to Common Article 1	57
4.4.2.2 Queering the Duty to Respect and Ensure Respect	59
4.4.3 Common Article 3: the Principle of Humane Treatment and the Prohibition of Adverse Distinction	61
4.4.3.1 Introduction	61
4.4.3.2 Queering the Principle of Humane Treatment and the Prohibition of Adverse Distinction	63
4.4.4 Queering the Fundamental Principles of IHL	66
4.4.5 Special Protection for Queer People	69
4.4.5.1 Introduction	69
4.4.4.2 Queering the Principle of Impartiality	70
5 Development of IHL towards a Queer-Inclusive Framework	73
6 Conclusion	79
Bibliography	84

Abbreviations

APs	Additional Protocols
CIHL	Customary International Humanitarian Law
CIL	Customary International Law
CJEU	Court of Justice of the European Union
CLS	Critical Legal Studies
CoE	Council of Europe
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EU	European Union
GBV	Gender-based Violence
GCs	Geneva Conventions
HRC	Human Rights Council
HRCtee	Human Rights Committee
IACs	International Armed Conflicts
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IE SOGI	Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IL	International Law

LGBT+	Lesbian Gay Bisexual Trans+
LGR	Legal Gender Recognitions
NGOs	Non-Governmental Organisations
NIACs	Non-international Armed Conflicts
OHCHR	United Nations High Commissioner for Human Rights
OSCD	Organization for Security and Co-operation in Europe
OTP	Office of the Prosecutor
POW	Prisoners of War
SO	Sexual Orientation
SOGIESC	Sexual Orientation, Gender Identity and Expression and Sex Characteristics
UN	United Nation
VCLT	Vienna Convention on the Law of Treaties
YP	Yogyakarta Principles

Abstract

This master's thesis analyzes the legal protection afforded to persons with diverse sexual orientation, gender identity and expression and sex characteristics (SOGIESC) under international humanitarian law (IHL). This research emphasizes how historical and political contexts have led to inadequate recognition of the specific vulnerabilities and needs of queer individuals.

Since IHL neither explicitly references nor provides special protections for queer people, the research focuses on the evolutive interpretation of key provisions of the Geneva Conventions and fundamental principles of the existing IHL. It also examines developments within the IHL discourse to assess their potential for safeguarding the unique needs of queer individuals. While current IHL does provide some level of protection for queer individuals, it also allows for tailored measures that can adequately safeguard them. However, the implementation of such measures depends largely on the interpretative efforts of legal scholars and organizations such as the International Committee of the Red Cross (ICRC) and the United Nations (UN).

Consequently, the thesis investigates whether the implementation of special protections within IHL is necessary to effectively safeguard queer individuals. Lastly, it explores the potential for a queer-inclusive evolution of IHL to enhance the legal protection of queer people in times of armed conflicts. By presenting these findings, the thesis aims to contribute to a discourse within IHL which addresses the rights and needs of queer individuals in a more adequate manner.

Abstrakt

Die vorliegende Masterarbeit analysiert den im humanitären Völkerrecht (HVR) verankerten rechtlichen Schutz für Personen mit diverser sexueller Orientierung, Geschlechtsidentität und Geschlechtsausdruck sowie sexueller Merkmale (SOGIESC). Diese wissenschaftliche Untersuchung verdeutlicht, wie historische und politische Kontexte dazu geführt haben, dass die spezifischen Bedürfnisse von queeren Menschen nur unzureichend anerkannt sind.

Da das humanitäre Völkerrecht queere Personen weder explizit erwähnt noch ihnen einen besonderen rechtlichen Schutz gewährt, konzentriert sich die Masterarbeit auf eine evolutive Auslegung einiger zentraler Artikel der Genfer Konventionen und der Grundprinzipien des humanitären Völkerrechts. Darüber hinaus werden relevante Entwicklungen innerhalb des HVR-Diskurses auf ihr Potenzial zur Berücksichtigung der besonderen Bedürfnisse von queeren Menschen untersucht. In der Masterarbeit wird argumentiert, dass das geltende HVR nicht nur ein gewisses Maß an Schutz für queere Personen bietet, sondern auch maßgeschneiderte Maßnahmen ermöglicht, die einen adäquaten Schutz bieten können. Die Umsetzung solcher Maßnahmen hängt jedoch weitgehend von den Auslegungsbemühungen von Jurist:innen und Organisationen wie dem Internationalen Komitee vom Roten Kreuz (IKRK) und den Vereinten Nationen ab.

Die Arbeit untersucht daher weiters, ob die Einführung eines besonderen rechtlichen Schutzes im humanitären Völkerrecht notwendig ist, um queere Menschen wirksam zu schützen. Abschließend wird das Potenzial einer queer-inklusive Weiterentwicklung des HVR untersucht, um den Rechtsschutz für queere Menschen während bewaffneter Konflikte zu verbessern. Mit der Darstellung dieser Ergebnisse leistet die Masterarbeit einen Beitrag zu einem Diskurs innerhalb der HVR, der die Rechte und Bedürfnisse von queeren Individuen stärker berücksichtigt.

1 Introduction

1.1 Outline and Purpose

*“No pride for some of us without liberation for all of us.”*¹ – Marsha P. Johnson

LGBT+ persons² belong to a group that is discriminated against both in peacetime and in times of armed conflict. LGBT+ individuals are at a heightened risk of stigma, sexual and physical violence, and social exclusion. Behaviours and identities that do not conform to a binary, cis-gender system and heteronormativity are still criminalized, persecuted and punished. According to the Human Dignity Trust³ 63 jurisdictions currently criminalise sexual activity between men, 40 countries criminalise sexual activity between women, 14 countries criminalise the gender identity and expression of trans*⁴ people, and in 12 countries the death penalty can be imposed for private, consensual, same-sex sexual conduct.⁵ According to the International Lesbian, Gay, Bisexual, Trans and Intersex Association⁶, only 9 states worldwide have a nationwide restriction on nonessential medical interventions for intersex minors, while 2 states have a restriction at a sub-national level, and 182 courts have no restriction at all.⁷

In recent years, it has been increasingly documented that LGBT+ persons are often deliberately targeted victims of violence during armed conflict.⁸ The risk to LGBT+ persons during armed conflict is compounded by the fact that homosexuality is often criminalized at the domestic level and community and family members are frequently complicit when abuses against LGBT+ persons occur.⁹ Furthermore, states are often not able or do not want to prevent or

¹ ‘Marsha P. Johnson’ (Micah Bazant) <<https://www.micahbazant.com/marsha-p-johnson>> accessed 21 September 2024.

² See chapter 1.4 for definition; the present thesis uses the terms “LGBT+ people/persons”, queer people and people with diverse SOGIESC interchangeable.

³ Human Dignity Trust is an international human rights organization which uses strategic litigation to defend the human rights of LGBT+ people.

⁴ In the present thesis the asterisk is added to show that there are many different ways one can be trans*; for further details see chapter 1.4.

⁵ ‘Map of Jurisdictions That Criminalise LGBT People’ (Human Dignity Trust) <<https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/>> accessed 25 July 2024.

⁶ International Lesbian, Gay, Bisexual, Trans and Intersex Association is a global federation of more than 1,900 organizations from over 160 countries working to ensure that human rights are respected regardless of people's SOGIESC.

⁷ ‘Legal Bans on Interventions on Intersex Minors | ILGA World Database’ <<https://database.ilga.org/interventions-intersex-minors>> accessed 25 July 2024.

⁸ IE SOGI, ‘Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity’ (2022) A/77/235 paras 37–42 <<https://www.ohchr.org/en/calls-for-input/2022/report-independent-expert-protection-against-violence-and-discrimination-based>> accessed 30 May 2024.

⁹ OHCHR, ‘Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity’ (United Nations 2015) A/HRC/29/23 para 22 <<https://www.ohchr.org/en/documents/thematic-reports/ahrc2923-discrimination-and-violence-against-individuals-based-their>> accessed 6 July 2024.

prosecute violence against the LGBT+ community, occasionally even committing crimes themselves.¹⁰

These circumstances give rise to the pressing need for a comprehensive analysis of the legal basis of International Humanitarian Law (IHL) and the extent to which it protects LGBT+ individuals during times of armed conflict against violence and discrimination. Thus, the aim of this thesis is to examine whether there is a protection gap with respect to LGBT+ persons and, if so, how this gap can be closed. Although there are already several legal scholars who have dealt with the protection of LGBT+ persons in humanitarian interventions, armed conflicts, and IHL, there are few comprehensive analyses and attempts to queering¹¹ IHL.

Within the International Committee of the Red Cross (ICRC) discourse on IHL, the publication of Dolan's article "Letting Go of the Gender Binary: Charting New Pathways for Humanitarian Interventions on Gender-Based Violence"¹² can be seen as the moment when the protection of queer persons began to gain some traction. *Dolan* delves into the topic of gender-based violence (GBV), noting that the humanitarian sector has paid little attention to LGBT+ victims and survivors of GBV. *Dolan* refers to the increasing recognition of LGBT+ human rights by international organizations, which have taken measures such as adopting LGBT+ inclusive policies.

The United Nation's (UN) Secretary-General's 2016 report on conflict-related sexual violence notes that the risks faced by LGBT+ people have been a "blind spot"¹³ in the monitoring of civilian protection concerns. In 2018, *Margalit* discusses comprehensively this "blind spot" from a legal and scientific perspective.¹⁴

In recent years, the number of publications on IHL and its protection of people with diverse SOGIESC¹⁵ has increased. For example, *Rossouw*¹⁶ interpreted the phrase "or any other similar

¹⁰ *ibid* 12.

¹¹ For a definition of the term queer, see chapter 1.4.

¹² Chris Dolan, 'Letting Go of the Gender Binary: Charting New Pathways for Humanitarian Interventions on Gender-Based Violence' (2014) 96 *International Review of the Red Cross* 485.

¹³ Secretary-General, 'Report on Conflict-Related Sexual Violence' (United Nations 2016) S/2016/361 para 14.

¹⁴ Alon Margalit, 'Still a Blind Spot: The Protection of LGBT Persons during Armed Conflict and Other Situations of Violence' (2018) 100 *International Review of the Red Cross* 237.

¹⁵ SOGIESC is an acronym für sexual orientation, gender identity and expression and sex characteristics; chapter 1.4 defines and discusses the terms that are most relevant to this thesis, including SOGIESC.

¹⁶ Vaughn Rossouw, "'Or Any Other Similar Criteria': Towards Advancing the Protection of LGBTQI Detainees against Discrimination and Sexual and Gender-Based Violence during Non-International Armed Conflict' (2020) 102 *International Review of the Red Cross* 765.

criterion” in Common Article 3 of the Geneva Conventions to include LGBT+ people, *Winkler*¹⁷ analysed queer dimensions of IHL, *Mégret*¹⁸ describes how deeply gendered the regulation of war is, and *Nieratzky*¹⁹ looked at IHL from a queer perspective while concluding that comprehensive legal protection of prisoners of war (POW) with diverse SOGI can be derived from the Geneva Conventions (GCs).

Furthermore, studies, reports and guides²⁰ are published by various international organizations, while a number of bachelor’s and master’s theses²¹ and awareness-raising initiatives²² deal with the issue.

Academic discourse has also engaged with the landscape of International Criminal Law (ICL), in particular the International Criminal Court (ICC) and the Rome Statute, to consider the extent to which they are equipped to take into account the perspectives and experiences of queer people.²³ Several publications by the Office of the Prosecutor (OTP) are especially noteworthy because the OTP’s policy papers recognize gender as a social construct and emphasize that the

¹⁷ Matteo Winkler, ‘A Queer Eye on the Law of Armed Conflict’ (*Lieber Institute West Point*, 2 August 2022) <<https://lieber.westpoint.edu/queer-eye-loac/>> accessed 15 July 2024.

¹⁸ Frédéric Mégret, ‘Another Look at the Gendered Constitution of the Laws of War: Semantic Fields, Hegemonic Masculinities and the Reproduction of Heteronormativity’ [2023] *Journal of International Humanitarian Legal Studies* 1.

¹⁹ Hannah Nieratzky, ‘A Much-Needed Queer Look at International Humanitarian Law: An Obligation to Monitor the Situation of Prisoners of War with Diverse SOGI?’ [2024] *Völkerrechtsblog* <<https://voelkerrechtsblog.org/a-much-needed-queer-look-at-international-humanitarian-law/>> accessed 31 March 2024.

²⁰ For example: ‘Need to Know Guidance: Working with Lesbian, Gay, Bisexual, Transgender, Intersex and Queer Persons in Forced Displacement’ (*Refworld*) <<https://www.refworld.org/policy/opguidance/unhcr/2021/en/123840>> accessed 23 March 2024; ‘Addressing Sexual Violence against Men, Boys, and LGBTIQ+ Persons in Humanitarian Settings: A Field-Friendly Guidance Note by Sector - World | ReliefWeb’ (10 February 2021) <<https://reliefweb.int/report/world/addressing-sexual-violence-against-men-boys-and-lgbtqi-persons-humanitarian-settings>> accessed 23 March 2024; IE SOGI (n 8).

²¹ For example: Jim Jormanainen, ‘Does Armed Conflict Affect Violence Against the LGBT Community?’ (Uppsala Universitet 2018); Sana Sud, ‘Move towards Expansion of Special Protection under IHL to Include Other Vulnerable Groups’ (University of Essex 2019); Pinja Niskanen, ‘The Lgbt+ Lost in Shades of Grey in IHL and IHRL: A Need for Special Protection?’ (Åbo Akademi University 2024).

²² “‘That Never Happens Here’: Sexual and Gender-Based Violence against Men, Boys, LGBTIQ+ People’ <<https://www.icrc.org/en/document/sexual-gender-violence-against-men-boys-lgbtqi>> accessed 23 March 2024.

²³ Aneta Peretko, ‘Protection of LGBTQIA+ Rights in Armed Conflict: How (and Whether) to “Queer” the Crime against Humanity of Persecution in International Criminal Law?’ [2023] *Leiden Journal of International Law* 1; Valerie Oosterveld, ‘Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court’ (2014) 16 *International Feminist Journal of Politics* 563; Josh Scheinert, ‘Is Criminalization Criminal?: Antisodomy Laws and the Crime Against Humanity of Persecution’ (2015) 24 *Tulane Journal of Law and Sexuality* <<https://journals.tulane.edu/tjls/article/view/2877>> accessed 17 April 2024; Andrew Sumner Hagopian, ‘Persecution and Protection of Sexual and Gender Minorities under Article 7(1)(h) of the Rome Statute’ *SOAS Law Journal* (2016) 55; Valérie Suhr, ‘Rainbow Jurisdiction of the International Criminal Court?: Gender-Based Persecution of Gays, Bisexuals and Lesbians as a Crime Against Humanity’ [2018] *Völkerrechtsblog* <https://intr2dok.vifa-recht.de/receive/mir_mods_00003259> accessed 17 April 2024.

Rome Statute requires alignment with the changing and evolving norms of international law (IL).²⁴

Apart from these examples, the protection of and violence against LGBT+ individuals is still not monitored and often not considered in the literature and in fieldwork. Hence, all of these articles and endeavours remain outliers in a monolithic discourse and are therefore not representative of the mainstream dialogue on IHL.

Strengthening the protection of LGBT+ people has gained momentum in recent years, both in the legal and diplomatic spheres of International Human Rights Law (IHRL) and has led to many developments promoting inclusivity and diversity.²⁵ Criminalising and persecuting queer people violates IHRL in many respects.²⁶ It is now recognised that IHRL remains applicable during armed conflicts, making IHRL and IHL complementary, rather than mutually exclusive, bodies of law.²⁷ As IHRL continues to apply during armed conflicts, it is important to provide a concise overview of developments within this branch of law (2) and the overlap of IHRL and IHL (chapter 3).

IHL lags behind in recognising the differentiated experiences that people endure in conflict based on their respective SOGIESC and thus in setting rules for the protection of LGBT+ people caught up in hostilities.²⁸ Examining the application of IHL to LGBT+ persons is of particular importance due to the specificities of IHL that affect the protection of persons in armed conflict. Given that the codification of IHL began at a time when membership of the LGBT+ community as well as behaviours and identities outside the heteronormative and cisnormative scope were criminalised, it is not unexpected that none of the four GC or the Additional Protocols (APs) mention the term LGBT+ or implicitly refer to sexual and gender minorities.

Hence, the initial inquiry pertains to the examination of how queer people and their protection can be construed within the existing framework of IHL, assessing both the modalities and the

²⁴ The Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes' (2014); The Office of the Prosecutor, 'Policy on the Crime of Gender Persecution' (2022); The Office of the Prosecutor, 'Policy on Gender-Based Crimes - Crimes Involving Sexual, Reproductive and Other Gender-Based Violence' (2023) paras 16–19.

²⁵ Margalit (n 8) 242.

²⁶ For detailed accounts of IHRL and its recent developments in promoting LGBT+ protection, inclusion and non-discrimination, see chapter 2.

²⁷ Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (International Committee of the Red Cross 2022) 30.

²⁸ IE SOGI (n 8) 4.

extent of such protection (chapter 4). The inquiry goes on to examine how IHL as such is developing, and how IHL needs to develop, in order to adequately protect queer people. Furthermore, chapter 5 examines various measures which could help to develop IHL towards a queer-inclusive branch of law. Finally, chapter 6 presents the findings of the thesis.

1.2 Research Gap, Research Question, and Limitations

In order to investigate whether LGBT+ persons can be considered a protected group under IHL or whether there is a need for special protection that specifically addresses the needs of LGBT+ persons, the following research questions are posed in this paper:

1. What is the current state of protection of LGBT+ individuals under IHL?
2. Are changes and/or extensions of protection necessary to protect queer individuals adequately?

Therefore, the hypothesis of this master's thesis posits that LGBT+ individuals are not sufficiently safeguarded by IHL during armed conflict, thus warranting an expansion of protections for LGBT+ individuals under IHL based on advancements in IHRL.

This thesis does not aim to provide a comprehensive analysis of all IHL treaties; instead, it focuses on selected aspects that are particularly relevant to the protection of queer persons. In addition, certain elements of customary law and key developments within the IHL discourse will be examined in depth. The primary focus regarding written law is on the Geneva Conventions and their first two Additional Protocols. Given that the adoption of a new treaty or the amendment of existing treaties within IHL, particularly in relation to LGBT+ rights, is highly unlikely, this thesis does not explore the likelihood or potential outcomes of such a process. Furthermore, due to the scope of this study, judicial decisions concerning groups that already are entitled to special protection under IHL are not included in the analysis.

In summary, this thesis addresses selected legal developments and issues related to protecting persons with diverse SOGIESC, recognizing that comprehensive treatment of all relevant aspects is beyond the scope of this work.

Following the explanation of the legal method, the research questions and the delimitations in chapter 1, the introduction, chapter 2, elaborates on the developments and progress made in the field of IHRL. Chapter 3 provides a concise overview of the overlap between IHRL and IHL. Finally, chapters 4 and 5 focus on IHL.

Chapter 4 identifies and analyses the current state of legal protection for LGBT+ persons under IHL, including any gaps or limitations in the existing legal framework. As neither treaty nor customary IHL make any explicit reference to LGBT+ individuals, the starting point of this thesis will be an analysis of IHL, its sources and the process of interpretation. The thesis then proceeds to a critical analysis of Common Articles 1 and 3 of the GCs and the fundamental principles of IHL. Finally, it considers whether special protection is required and, if so, whether the principle of impartiality is incompatible with special protection and needs-based help for queer people.

Chapter 5 discusses various aspects of the development of IHL and how IHL has to develop to safeguard the queer community during armed conflict. Hence, it is examined from a queer perspective what IHL ought to be in the future to holistically protect queer people in armed conflict. However, due to the scope of this master's thesis, there is no discussion of what these developments should look like in concrete terms, nor is there an assessment of how feasible their adoption is. Finally, the results of the thesis are outlined in Chapter 6.

1.3 Legal Method

1.3.1 Introduction

In this thesis, the research questions are answered primarily using the methodology of legal dogmatics. The method of legal dogmatics is supplemented by critical legal theory, with a focus on feminist and queer legal theory. On the basis of a dogmatic analysis, this thesis critically examines the law currently in force and proposes what reforms are needed.

1.3.2 Legal Dogmatics

The doctrinal approach is best defined as a type of research which aims to give a systematic illustration of the principles, rules, and concepts regulating a branch of law and analyses the

relationship between them to solve ambiguities and gaps in the law.²⁹ Thus, legal dogmatics consists of determining, interpreting, and systematizing legal norms, including discussions and commentaries on the law.³⁰ In doing so, legal dogmatics concentrates on existing legal principles and rules, excluding the legislative process, sociological and political considerations, and jurisprudence.³¹ Proponents of legal dogmatics place their approach within the legal system.³² Hence, the legal system is not only the subject of the inquiry, but it is also the normative framework for analysis.

The focus of the present thesis is therefore on the analysis and examination of the relevant primary sources, including customary IHL and secondary sources of IHL, with a particular emphasis on publications and discourse within the ICRC. On the basis of an analysis of treaty and customary law, literature and case law, as well as attempts to queer IHL, the status quo is identified and critically examined. This is done through extensive legal desk research.

1.3.3 Critical Legal Theory

Critical legal theory, which is also often referred to as Critical Legal Studies (CLS), emerged in the late 1970s and its first appearance dates back to the Conference on Critical Legal Studies at the University of Wisconsin-Madison.³³ CLS was premised on legal realism, which was a reaction to the positivist school of jurisprudence and had an enormous influence on legal thought in the 1920s and 1930s.³⁴ CLS, on the other hand, had its apex in the 1970s and 1980s, particularly in the US and to a lesser extent in Europe.³⁵ The theory is inspired by *inter alia* Karl Marx and other philosophers with left-of-centre political ideas and is still a common form of legal analysis.³⁶

²⁹ Jan M Smits, 'What Is Legal Doctrine?: On The Aims and Methods of Legal-Dogmatic Research' in Rob Van Gestel, Hans-W Micklitz and Edward L Rubin (eds), *Rethinking Legal Scholarship* (1st edn, Cambridge University Press 2017) 210 <https://www.cambridge.org/core/product/identifier/9781316442906%23CT-bp-6/type/book_part> accessed 1 April 2024.

³⁰ Aleksander Peczenik, 'Empirical Foundations of Legal Dogmatics' (1969) 12 *Logique et Analyse* 32, 32.

³¹ *ibid.*

³² Smits (n 29) 5.

³³ Peter Fitzpatrick and Alan Hunt, 'Critical Legal Studies: Introduction' (1987) 14 *Journal of Law and Society* 1; 'Critical Legal Theory', in Stephan Sonnenberg, *Elgar Encyclopedia of Human Rights* (Edward Elgar Publishing 2022) para 21.

³⁴ 'Critical Legal Theory' (n 33) paras 15–16.

³⁵ *ibid.* 1.

³⁶ *ibid.* 1–2.

CLS finds that law is inherently intertwined with social issues and thus rejects the standpoint of mainstream legal theorists that law is value neutral.³⁷ From this perspective, the law functions as a tool of oppression which perpetuates a power dynamic that favours the powerful and the historically privileged and disadvantages the historically underprivileged.³⁸ Proponents of CLS argue that the political undercurrents within the law are masked by the seemingly neutral language and logic of legal reasoning, which serve to justify the political biases embedded in the legal system and maintain an unjust status quo.³⁹ CLS can contribute to uncovering the hidden assumptions and contradictory determinants of law and actions based on law, thus contributing to the realisation of equality and non-discrimination.⁴⁰

Applying CLS to this master's thesis indicates that IHL is currently inherently unjust, as it fails to recognise queer people as a vulnerable and marginalized group, thereby perpetuation discrimination and violence. CLS argues that justice for queer people within IHL can only be achieved through providing special protection. In conclusion, the need for affirmative action in terms of needs-based protection, which requires tailored and differentiated responses to address persistent oppression and marginalisation, is suggested by CLS.

1.3.4 Feminist Legal Theory with a Focus on Intersectionality

Feminist legal theory began to gain momentum in the United States in the 1970s, coinciding with the increased presence of women in law schools.⁴¹ The scholarship was a product of this time and therefore influenced by the political and legal struggles of legally trained scholars and the battles of second-wave liberal feminism.⁴²

Feminist legal theory constitutes a theoretical framework that highlights the deeply rooted gender biases in the legal system and is dedicated to exploring how the legal systems contributes to the ongoing oppression of women and how it can be employed as a means to challenge and

³⁷ 'Critical Legal Theory' (LII/ Legal Information Institute) <https://www.law.cornell.edu/wex/critical_legal_theory> accessed 25 July 2024; Fitzpatrick and Hunt (n 33) 1.

³⁸ Dagmar Schiek, 'Revisiting Intersectionality for EU Anti-Discrimination Law in an Economic Crisis - A Critical Legal Studies Perspective: Rivisitare l'intersezionalità per La Legislazione Antidiscriminatoria Europea Nella Crisi Economica. Una Prospettiva Di Critical Legal Studies.' (2016) 43 *Sociologia del Diritto* 23, 25.

³⁹ 'Critical Legal Theory' (n 33) para 7.

⁴⁰ Francisco Valdes, 'Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society' (1995) 83 *California Law Review* 1, 377.

⁴¹ Robin West, 'Women in the Legal Academy: A Brief History of Feminist Legal Theory' (2018) 87 *Georgetown Law Faculty Publications and Other Works* 977, 982.

⁴² *ibid* 980-981.

address this oppression.⁴³ It is a normative project that involves understanding what justice requires of law and then participating in its reconstruction to achieve that goal.⁴⁴ Given feminist legal theorists' belief that the legal system does not adequately reflect women's experiences, the legal system is described as a gendered system that needs to re-evaluate and reformulate its substantive and formal law to ensure it reflects the diverse experience of individuals.⁴⁵ Proponents argue that a critical examination of the very foundations of legal persuasions is essential.⁴⁶ These foundations include, but are not limited to, the language used, the seemingly indefensible hierarchy of legal materials, the failure to question current concepts, and the commitment to male hierarchical structures in all legal and political organizations.⁴⁷

As there are various strands of feminist legal theory with different orientations and political goals, the theory is difficult to define. What is certain, however, is that formal equality before the law has long been the dominant area, as there has been more agreement.⁴⁸ Even today, mainstream legal discourse often reduces feminist demands to formal equality. Advocates of substantive equality who called for concessions, particularly in the form of affirmative action requiring differential treatment to compensate for women's historical disadvantage and their continuing distinct social roles, found little support.⁴⁹

Feminist legal theory not only consists of an analysis and critique of the role of law in maintaining the subordinate position of women in patriarchal society, but furthermore has the potential to contribute to the elimination of patriarchy. Because feminist legal theory challenges traditionally dominant opinions and even sources of law it is a potentially transformative force.⁵⁰ Critiques of recent developments within feminist legal theory question this transformative potential because of how feminist legal theory limits critical engagement with the concept of gender⁵¹ to a highly restrictive definition of sex that only recognizes women and

⁴³ Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *The American Journal of International Law* 613; West (n 41) 995.

⁴⁴ West (n 41) 997.

⁴⁵ Charlesworth, Chinkin and Wright (n 42) 615, 621, 634.

⁴⁶ *ibid* 634.

⁴⁷ *ibid* 634.

⁴⁸ Martha Albertson Fineman, 'Introduction: Feminist and Queer Legal Theory' (2 December 2009) 3 <<https://papers.ssrn.com/abstract=1516647>> accessed 9 July 2024.

⁴⁹ *ibid*.

⁵⁰ Charlesworth, Chinkin and Wright (n 42) 644.

⁵¹ Gender refers to a social construct of attributes which are associated with masculinities and femininities.

men, but not *inter alia* trans*, non-binary and intersex people.⁵² Further, critics argue that achievements of feminist legal theory have been closely tied to women's victimhood, a perspective that has led to the homogenization of women's priorities while overlooking multiple global structures that affect women's experiences differently.⁵³

Against this backdrop, this thesis takes an intersectional approach to authentically represent the lived experience of LGBT+ people. The term intersectionality was coined in 1989 by the American legal scholar and Black feminist Kimberlé Crenshaw in an academic paper in which she criticised the "single-axis framework" prevailing in antidiscrimination law, feminist and antiracist politics.⁵⁴ She described that sex and race discrimination doctrines are defined by the experiences of white women and Black men, respectively, so Black women are excluded from analysis by limiting the inquiry to the experiences of privileged members of the group.⁵⁵

Intersectionality is best defined as a theoretical framework that recognizes the complex and overlapping nature of social categories, such as race, gender, ethnicity, class, sexual orientation, and gender identity, and seeks to examine how these various categories interact on multiple levels and can create an intersection of oppression and privilege.⁵⁶ An intersectional approach emphasizes that a person's identity cannot be reduced to one social category and emphasizes that all categories of inequality are mutually reinforcing and must therefore be analysed and addressed simultaneously to prevent one form of inequality from reinforcing another.⁵⁷

For this reason, this thesis assumes that gender is a social construct that is temporary, fluid and changeable. Given that armed conflicts have a significant impact on gender roles and expectations within society, it is crucial to pay particular attention to this aspect in order to accurately portray the lived reality and specific difficulties faced by queer people in times of

⁵² Jayne C Huckerby, 'Feminist Theories of International Law' in Christina Binder and others (eds), *Elgar Encyclopedia of Human Rights* (Edward Elgar Publishing 2022) para 3 <<https://www.elgaronline.com/view/book/9781789903621/b-9781789903621.feminist.theories.int.law.xml>> accessed 20 July 2024.

⁵³ Vasuki Nesiah, 'Introduction' (2009) 103 *Proceedings of the Annual Meeting* (American Society of International Law) 67, 68.

⁵⁴ Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 *University of Chicago Legal Forum* 139, 139.

⁵⁵ *ibid* 140, 143.

⁵⁶ Monika Mayrhofer, 'Intersectionality' in Christina Binder and others (eds), *Elgar Encyclopedia of Human Rights* (Edward Elgar Publishing 2022) paras 7–8 <<https://www.elgaronline.com/view/book/9781789903621/b-9781789903621.intersectionality.xml>> accessed 20 July 2024.

⁵⁷ Crenshaw (n 54) para 7.

conflict. This critical legal analysis is approached from a feminist and intersectional perspective in order to address and transform the current legal framework to ensure protection and prevent discrimination and violence against LGBT+ people.

1.3.5 Queer Legal Theory

Queer Legal Theory is a distinct approach within the realm of CLS, applying methodological approaches inspired and developed by CLS, while being guided by the unique experiences of the queer community.⁵⁸ Like CLS, queer legal theory positions itself outside the traditional boundaries of legal positivism and aims to analyse and critique the complexity of law's interaction and intertwining with society.⁵⁹

At the heart of queer legal theory is the principle of non-essentialism: the rejection of essentialised sexual and gender identities.⁶⁰ Instead, it views sexuality and identity/identities as a fluid construct that is changeable and indeterminate.⁶¹ The assumption that gender is binary is challenged and a more multifaceted and diverse perspective is presented. While “sex” refers to the biological and physiological characteristics that distinguish female, male, and intersex individuals and includes factors such as chromosomes, hormones, and reproductive organs, gender identity reflects a deeply felt and experienced sense of one's own gender.⁶² This means that gender identity refers to a person's perception of their own gender, regardless of whether this gender corresponds to the sex they were assigned at birth.⁶³

Queer legal theory is a non-normative project that critically engages with laws and policies that attempt to enforce a heteronormative concept of sexuality and a binary concept of gender. Furthermore, it is a theory that criticizes laws that seek to exclude, subordinate, or stigmatize identities outside the heteronormative and binary gender system.⁶⁴ Another characteristic is the fact that queer theory not only scrutinizes but also challenges societal norms that fit neatly within the constraints imposed by society. Since the concept of queer rejects fixed definitions

⁵⁸ Damir Banović, 'Queer Legal Theory' (9 February 2022) 1 <<https://ssrn.com/abstract=4031017>> accessed 8 July 2024.

⁵⁹ *ibid* 2.

⁶⁰ *ibid*.

⁶¹ *ibid* 1–2.

⁶² 'Gender and Health' <<https://www.who.int/health-topics/gender>> accessed 18 April 2024; 'Definitions' (*gender-equality-law*) <<https://www.genderequalitylaw.org/lgbqdefinitions>> accessed 18 April 2024.

⁶³ 'Definitions' (n 62).

⁶⁴ Banović (n 58) 2–3.

and given the non-normative nature of critical queer studies, any attempt to define it would inherently constrain its broader objectives.⁶⁵

The deeply entrenched binary understanding of gender in feminist legal theory, coupled with the perception of gender queering theories as a threat to women's rights, has led to a difficult relationship between feminist and queer legal theories. Consequently, many queer theorists are highly sceptical of feminist legal theory due to its identity-based nature and its own anti-foundational approach.⁶⁶ Moreover, feminist legal theory has been criticized for having limited potential for transformative change resulting from its dependence on existing identities and social structures.⁶⁷

Despite their many differences, I believe that queer and feminist legal critiques benefit from each other by raising awareness of inequalities and advancing the interests of all people who are disadvantaged by the patriarchy. The author of the present thesis thus holds the understanding that gender and sexuality are social constructs, allowing these two theories to build on and enrich each other.

Queer legal theory provides a methodological framework that promotes the examination of legal provisions beyond the traditional binary understanding of SOGI and ensures a more comprehensive understanding of the diverse experiences and vulnerabilities of LGBT+ individuals in conflict zones. This approach not only critically analyses current IHL and its protections for LGBT+ persons but also aims to strengthen their rights within the framework of IHL, emphasizing the need for comprehensive legal discourse rooted in the perspectives of individuals with diverse SOGIESC. Furthermore, consideration will extend beyond the legal framework to further enhance the rights of LGBT+ individuals in conflict zones.

1.3.6 Conclusion

In this thesis, the doctrinal approach is primarily used. Building on the findings of the doctrinal approach, these findings are analysed and criticised using CLS. CLS, which is employed here, builds on the theoretical foundations of intersectional feminism and queer legal theory.

⁶⁵ Marcelo Maciel Ramos, 'Teorias Feministas e Teorias Queer Do Direito: Gênero e Sexualidade Como Categorias Úteis Para a Crítica Jurídica' (2021) 12 *Revista Direito e Práxis* 1679, 1691.

⁶⁶ Fineman (n 48) 6.

⁶⁷ *ibid* 6.

In employing all theories, I define and apply “queer” as an undefinable concept that questions and challenges what is seen as norm.

1.4 Definition

In the following chapter, the most important terms used in this thesis are defined. In doing so, an attempt is made to define the terms in such a way that they encompass as many realities and identities as possible. However, this is only possible to a limited extent, as the terms used are of Western origin and therefore many sexual and gender diverse people are not addressed by them.⁶⁸ The author of this thesis has chosen to use these terms because they are commonly used by international organisations such as the UN, or by legal scholars and human rights advocates, when engaging in a discourse of transformative change towards inclusive jurisprudence and when describing the human rights and protections of LGBT+ people. It is important to note that the author is aware that language evolves and needs to be used sensitively and adapted as necessary.

Within this thesis, the following definitions are adopted:

UN Free and Equal, a UN campaign to increase awareness of and support for LGBT+ people, defines “LGBTIQ+” as:

“An initialism for lesbian, gay, bisexual, transgender, intersex, queer and other people with sexual orientations, gender identities and expressions and sex characteristics that are perceived not to conform to social norms.”⁶⁹

UN Free and Equal further notes that although the term LGBT+ has global resonance, many cultures have culturally and geographically confined words, such as hijra, kuchu and Two-Spirit, to describe people with different SOGIESC.⁷⁰

⁶⁸ On the question of whether LGBTQ terminology can be translated from one cultural, historical and linguistic context to another, see ‘Queer Terminology: LGBTQ Histories and the Semantics of Sexuality’ (*NOTCHES*, 9 June 2016) <<https://notchesblog.com/2016/06/09/queer-terminology-lgbtq-histories-and-the-semantics-of-sexuality/>> accessed 31 March 2024.

⁶⁹ ‘UN Free & Equal | Definitions & Terminology on LGBTIQ+ People and Human Rights’ <<https://www.unfe.org/know-the-facts/definitions#>> accessed 31 March 2024.

⁷⁰ ‘Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law (2nd Edition)’ (*OHCHR*) <<https://www.ohchr.org/en/publications/special-issue-publications/born-free-and-equal-sexual-orientation-gender-identity-and>> accessed 31 March 2024.

In this thesis the term LGBT+ is used. The plus stands for an unrestricted extension to other terms that people use to describe their diverse SOGIESC and makes it apparent that all queer people are subsumed under this term. Therefore, the abbreviation LGBT+ and the term queer are used interchangeably.

“Queer” is an umbrella term for people whose sex, gender identity, self-image, appearance, behaviour, or expression is non-normative and thus does not fit society’s expectations.⁷¹ Hence, queer describes all sexual and gender identities other than straight and cisgender.⁷² But the term contains much more and is characterized by the fact that it cannot be defined. Queer involves, *inter alia*, a critical attitude towards existing norms, be they social, gender or sexual norms.

In the introduction to the Yogyakarta Principles (YP), the term "gender identity" is defined as follows:

*“Gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”*⁷³

As “gender” is a social construct and is learned through socialization processes, it is context and time specific and changeable.⁷⁴ Especially in times of armed conflict, the social attributes and opportunities associated with being male and female change, making the impact of armed conflict on gender significant.

Although the above definition of gender identity includes the term “gender expression”, it is important to emphasize that gender expression is the way in which people present their gender to the outside world through their actions and appearance, including clothing, language and

⁷¹ ‘Queer’ (17 July 2024) <<https://dictionary.cambridge.org/dictionary/english/queer>> accessed 20 July 2024; ‘What Does Queer Mean?’ <<https://www.plannedparenthood.org/learn/teens/sexual-orientation/what-does-queer-mean>> accessed 20 July 2024.

⁷² ‘Definitions’ (*gender-equality-law*) <<https://www.genderequalitylaw.org/lgbtqdefinitions>> accessed 20 July 2024.

⁷³ ‘Introduction to the Yogyakarta Principles’ <<https://yogyakartaprinciples.org/introduction/>> accessed 31 March 2024.

⁷⁴ ‘OSAGI Gender Mainstreaming - Concepts and Definitions’ <<https://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>> accessed 31 March 2024.

mannerisms.⁷⁵ In summary, gender identity refers to internal feelings, while gender expression pertains to external behaviour.

Finally, it should be noted that the definition of the 2007 YP is a quasi-essential one.⁷⁶ By describing gender identity as “deeply felt”, it is implied that gender identity is a unitary, non-fluid part of the individual’s personality, while excluding people whose identity is non-binary, gender fluid or agender.⁷⁷ However, this definition, which is also referred to in the additional 2017 YP, is still the generally accepted definition of gender identity in IHRL today.⁷⁸ This master's thesis has an understanding that builds on the definition of YP, but sees identity as something fluid and constantly changing. In particular, all gender-variant individuals are included.

“SOGIESC” is an acronym which stands for sexual orientation, gender identity and expression and sex characteristics and thus includes all sexual and gender diverse people.⁷⁹ The term SOGIESC has been increasingly adopted by human rights organizations and advocates because it shifts the focus away from specific population groups to deeper shared characteristics.⁸⁰ In the introduction to the YP, for example, it is emphasized that SOGI are an integral part of the dignity and humanity of every human being.⁸¹ These shared characteristics - all people have a sexual orientation, gender identity/expression and gender characteristics - make some people, namely those with diverse SOGIESC, the target of discrimination and stigmatization.⁸²

The term “intersex” refers to people who have sex characteristics that do not conform to the typical binary notions of male or female.⁸³ There is a broad and diverse spectrum of sex characteristics, such as sexual anatomy, reproductive organs, hormonal and/or chromosomal

⁷⁵ ‘Our Glossary | ILGA-Europe’ (4 February 2022) <<https://www.ilga-europe.org/about-us/who-we-are/glossary/>> accessed 1 April 2024.

⁷⁶ Sandra Duffy, ‘Contested Subjects of Human Rights: Trans- and Gender-Variant Subjects of International Human Rights Law’ (2021) 84 *The Modern Law Review* 1041, 1065.

⁷⁷ *ibid* 1045.

⁷⁸ *ibid* 1043.

⁷⁹ ‘UN Free & Equal | Definitions & Terminology on LGBTIQ+ People and Human Rights’ (n 69).

⁸⁰ ‘From LGBTQIA+ to SOGIESC: Reframing Sexuality, Gender, and Human Rights’ (*OpenGlobalRights*) <<https://www.openglobalrights.org/lgbtqia-to-sogiesc-reframing-sexuality-gender-human-rights/>> accessed 1 April 2024.

⁸¹ ‘Introduction to the Yogyakarta Principles’ (n 73).

⁸² ‘UN Free & Equal | Definitions & Terminology on LGBTIQ+ People and Human Rights’ (n 69).

⁸³ ‘Intersex | Intersex’ <<https://www.unfe.org/en/know-the-facts/challenges-solutions/intersex>> accessed 1 April 2024.

patterns, which may be internal or external, may be apparent at birth or emerge from puberty, or not be apparent at all.⁸⁴

Intersex people are not criminalized in any state, but lack legal recognition globally.⁸⁵ However, diverse biological sex characteristics may give rise to medical needs that require medical treatment. Furthermore, intersex individuals challenge the binary status quo and therefore may face stigma and discrimination

The term “non-binary” is still rarely found in reports, documents, and legal texts due to its indefinability and its rejection of the idea that gender is a fixed concept. With many celebrities coming out as non-binary in the recent past, the term has found its way into pop culture and is therefore well known to much of the public.⁸⁶ UN Free and Equal states that the term can encompass a variety of gender experiences, including people with a specific gender identity that is neither exclusively male nor female, people who identify as two or more genders (bigender, pangender or polygender) and people who do not identify with any gender (agender).⁸⁷ When using the term in a legal context, a possible conflict with the principle of clarity must be taken into account.

Being “trans*” mean that people have a gender identity which does not match the sex recorded on their birth certificate.⁸⁸ Trans* people may identify with gender identities such as man, woman, trans man or trans woman, transgender person, non-binary person or with a variety of other labels in different languages and in different places.⁸⁹ The author uses the term “trans*” in the present thesis because the term “trans gender” misleadingly suggests that being trans* merely has something to do with gender. However, being trans is in fact an identity and adding the asterisk shows that there are many different ways one can be trans*. It is important to recognise that a person is trans* regardless of whether they change their physical appearance

⁸⁴ ‘UN Free & Equal | Definitions & Terminology on LGBTIQ+ People and Human Rights’ (n 69).

⁸⁵ Yolanda Booyzen, ‘The Intersex Project’ (*Centre for Human Rights*) <<https://www.chr.up.ac.za/the-intersex-project>> accessed 1 April 2024.

⁸⁶ Callie Ahlgrim, ‘17 Celebrities Who Don’t Identify as Either Male or Female’ (*Business Insider*) <<https://www.businessinsider.com/9-celebrities-who-identify-as-gender-non-binary-2019-6>> accessed 1 April 2024.

⁸⁷ ‘UN Free & Equal | Definitions & Terminology on LGBTIQ+ People and Human Rights’ (n 69).

⁸⁸ ‘Transgender | Transgender’ <<https://www.unfe.org/en/know-the-facts/challenges-solutions/transgender>> accessed 1 April 2024.

⁸⁹ ‘UN Free & Equal | Definitions & Terminology on LGBTIQ+ People and Human Rights’ (n 69).

or undergo gender reassignment surgery and/or hormone therapy.⁹⁰ Self-recognition is what ultimately determines a person's identity.

While not all terms are defined in this chapter, a concise overview of the terms that need to be defined for a legal analysis of IHL has been provided.

1.5 Material

The primary material used in this thesis consists of the GC and their AP as well as Customary International Humanitarian Law (CIHL).

The in-depth examination of primary sources is supported by a comprehensive assessment and evaluation of scholarly work. In this analysis, the scholarly work – apart from few articles by authors about queering IHL – was mainly drawn from publications of the ICRC and the UN. This choice was made because these two organizations play a leading role in shaping the discourse on the current state and development of IHL as well as in implementing and advancing humanitarian efforts and legal frameworks.

⁹⁰ 'Transgender | Transgender' (n 88).

2 Developments in IHRL

2.1 Introduction

This chapter provides a brief overview of the historical development of LGBT+ rights in IHRL. The aim is to show that although there have been some developments in the inclusion of LGBT+ people in this area of law, the human rights plight of people with diverse SOGIESC remains precarious.

2.2 Historic Overview and Current Developments within IHRL

This following chapter gives a brief overview of the development of the regional human rights system in Europe, the UN, as well as selected other international organizations and courts.

The European Court of Human Rights (ECtHR) first dealt with an LGBT+ issue in 1981, namely the criminalization of private sexual acts between consenting males over the age of 21 years capable of valid consent in *Dudgeon v. The United Kingdom*.⁹¹ The court ruled in this ground-breaking case that the criminalization of male homosexuality violated the plaintiff's right to private life under Article 8 ECHR.⁹² The first landmark judgment on gender identity, *Goodwin v United Kingdom*, was rendered in 2002 and confirmed a minimum obligation for Council of Europe (CoE) member states to provide legal gender recognitions (LGR).⁹³ In addition to these two landmark cases, there are a variety of ECtHR cases dealing with SOGIESC issues, such as access to social rights⁹⁴, the right to adoption⁹⁵, access to the armed forces⁹⁶, condemning sterilization and surgical requirements for LGR⁹⁷, and affirming the member states' obligation to provide quick, transparent and accessible LGR procedures, which ensure a clear and foreseeable legal process for amending legal gender/sex based on self-determination.⁹⁸

The institutions of the CoE, such as the European Commission against Racism and Intolerance (ECRI) or the Committee of Ministers, have continued their further development of LGBT+ human rights in recent years and have published judgements, resolutions and reports on the

⁹¹ *Dudgeon v The United Kingdom* [1981] ECtHR 7525/76.

⁹² *ibid* 60.

⁹³ *Goodwin v The United Kingdom* [2002] ECtHR 28957/95.

⁹⁴ *P.b and J.s v Austria* [2010] ECtHR 18984/02.

⁹⁵ *X and Others v Austria* [2013] ECtHR 19010/07.

⁹⁶ *Smith and Grady v the United Kingdom* [1999] ECtHR 58408/10.

⁹⁷ *S.v v Italy* [2018] ECtHR 55216/08.

⁹⁸ *A.p, Garçon and Nicot v France* [2017] ECtHR 79885/12, 52471/13, 52596/13.

issues.⁹⁹ Particularly noteworthy in this context is the 2024 issue paper by the CoE Commissioner for Human Rights on human rights and gender identity and expression.¹⁰⁰ In this paper, the Commissioner complements the first issue paper and discusses the changes that have occurred since 2009. The issue paper addresses the issue of legal status for non-binary people and highlights the need to recognise gender identity and expression as prohibited grounds of discrimination.¹⁰¹ With regard to trans* people deprived of liberty, the paper states that there should be a case-by-case assessment to determine the appropriate detention facility, adding that due consideration should be given to alternatives to detention.¹⁰² Furthermore, the issue paper emphasizes the importance of self-determined LGR processes and the use of chosen names and pronouns, marking a shift towards trans* self-determination.¹⁰³

However, Europe is currently experiencing a backlash regarding the further development and inclusion of human rights for queer people. Increasingly, anti-LGBT laws¹⁰⁴ are being passed, LGBT-free zones¹⁰⁵ are being proclaimed and ECtHR rulings¹⁰⁶ are not being implemented.

In addition to the CoE, the European Union (EU) is also an important player in the European human rights system. The Court of Justice of the European Union (CJEU) has rendered judgements on queer issues, such as *P v. S & Cornwall Council*, which extended the principle of equal treatment to cover discrimination on the grounds of gender reassignment, where individuals undergoing or intending to undergo such reassignment are treated less favourably than they would have been treated had they been of their perceived sex prior to reassignment.¹⁰⁷

⁹⁹ ‘SOGI: Adopted Texts - Sexual Orientation and Gender Identity’ <<https://www.coe.int/en/web/sogi/adopted-texts>> accessed 7 April 2024.

¹⁰⁰ Council of Europe Commissioner for Human Rights, ‘Human Rights and Gender Identity and Expression’ (2024) <<https://rm.coe.int/issue-paper-on-human-rights-and-gender-identity-and-expression-by-dunj/1680aed541>>.

¹⁰¹ *ibid* 14–15.

¹⁰² *ibid* 10.

¹⁰³ *ibid* 9; this is of particular interest as the ECtHR has recognised in judgments that a person's trans* and gender identity falls within the scope of the convention's non-discrimination article, even though Article 14 of the ECHR, the article on non-discrimination, does not explicitly mention SOGIE-discrimination as a prohibited ground.

¹⁰⁴ ‘#OUTLAWED: “The Love That Dare Not Speak Its Name”’ <https://features.hrw.org/features/features/lgbt_laws> accessed 7 April 2024.

¹⁰⁵ Roch Dunin-Wąsowicz, ‘In Poland, the Home of “LGBT-Free Zones”, There Is Hope at Last for the Queer Community’ *The Guardian* (1 November 2023) <<https://www.theguardian.com/commentisfree/2023/nov/01/poland-lgbtq-new-government-law-and-justice-equality>> accessed 7 April 2024.

¹⁰⁶ EIN, ‘EU Commission Rule of Law Report 2023 & Non-Implementation of ECtHR Judgments’ (*European Implementation Network*, 12 July 2023) <<https://www.einnetwork.org/blog-five/2023/7/12/eu-commission-rule-of-law-report-2023-amp-non-implementation-of-ecthr-amp-cjeu-judgments>> accessed 7 April 2024.

¹⁰⁷ *P v S & Cornwall City Council* [1996] European Court of Justice Case C-13/94 [20–21].

While the CJEU's reasoning was quite brief, it pointed out that discrimination against a person because of their gender reassignment is discrimination on grounds of sex *per se*.¹⁰⁸

Another important CJEU case is *A., B., C. v Staatssecretaris van Veiligheid en Justitie*, in which the court ruled on the credibility assessment of sexual orientation in asylum applications.¹⁰⁹ It ruled that while self-identification is important, the individual situation and personal circumstances of asylum seekers must also be taken into account in the assessment process.¹¹⁰

At the international level, the UN plays a crucial role in advancing the human rights of people with diverse SOGIESC. The landmark case *Toonen v Australia* in 1994 was the first instance in which LGBT+ issues were addressed in the UN context.¹¹¹ The Human Rights Committee (HRCtee) ruled that the criminalisation of consensual homosexual acts violated the right to privacy under Article 17 of the ICCPR.¹¹² In addition, the HRCtee found that "sex" in Articles 2(1) and 26 includes sexual orientation.¹¹³ Since *Toonen*, the HRCtee has continued to expand protections related to SOGIESC beyond privacy to broader human rights concerns.¹¹⁴

Until recently, there have been no gender identity complaints brought to the HRCtee by trans* people. The first one where a violation was disclosed, was the landmark decision of *G. v. Australia*, adopted by the HRCtee in 2017.¹¹⁵ It concerned a trans* woman who had undergone hormone treatment and gender reassignment surgery and received a new passport, but was denied a birth certificate reflecting her gender because legal recognition was only allowed if the person was unmarried.¹¹⁶ The HRCtee determined that gender identity falls under Article 17 of the ICCPR, and Australia's refusal interfered with her privacy and family.¹¹⁷ Under Article 26, the Committee noted that both marital status and gender identity are protected from discrimination.¹¹⁸ Hence, Australia's denial of a birth certificate to married trans* persons

¹⁰⁸ *ibid* 20.

¹⁰⁹ *A, B, C v Staatssecretaris van Veiligheid en Justitie* [2021] Court of Justice of the European Union C-148/13 to C-150/13.

¹¹⁰ *ibid* 52, 57.

¹¹¹ *Toonen v Australia* [1994] Human Rights Committee CCPR/C/50/D/488/1992.

¹¹² *ibid* 8.2.

¹¹³ *ibid* 8.7.

¹¹⁴ 'SOGI... So What? Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations – Canadian Journal of Human Rights' 12 <<https://cjhr.ca/articles/vol-3-no-1-2014/sogi-so-what-sexual-orientation-gender-identity-and-human-rights-discourse-at-the-united-nations/>> accessed 7 April 2024.

¹¹⁵ *G v Australia* [2017] Human Rights Committee CCPR/C/119/D/2172/2012.

¹¹⁶ *ibid* 2.1, 2.6.

¹¹⁷ *ibid* 7.10.

¹¹⁸ *ibid* 7.15.

violated the right to equal protection under the law.¹¹⁹ Although this case represents a specific situation and only involved one aspect of the LGR process, namely the requirement to be unmarried, this case is important because it has been the basis for many changes in the legal recognition of gender identity at the national level.

In addition to the views of the HRCtee, there are many other milestones regarding the rights of persons with diverse SOGIESC within the UN system. In 2011, the Human Rights Council (HRC) passed the first-ever UN resolution on SOGI rights in which the United Nations High Commissioner for Human Rights (OHCHR) was asked to conduct a study documenting discriminatory laws and violence on the basis of a person's sexual orientation and gender identity.¹²⁰ The report of the OHCHR emphasizes the principle of universality and non-discrimination in the application of human rights to all human beings, recognizing that violence against LGBT+ people is particularly vicious compared to other bias-motivated crimes.¹²¹ In addition, the report recognizes that states have an obligation to prevent violence and discrimination on the basis of sexual orientation.¹²² Furthermore, it stipulates that states must enact comprehensive anti-discrimination laws that include discrimination on the grounds of SOGI among the prohibited grounds and recognize intersecting forms of discrimination.¹²³ Notably, the report finds that general wording on non-discrimination is interpreted as equivalent protection and therefore does not require explicit mention with regard to SOGI.¹²⁴

The UN's stance on states' legal obligations to protect the rights of queer individuals was confirmed in the 2012 OHCHR publication, "Born Free and Equal: Sexual Orientation, Gender Identity, and International Human Rights Law (Free and Equal)".¹²⁵ The subsequent campaign "Free and Equal" in 2013 highlighted the promotion of human rights for queer people as a priority for the OHCHR and UN agenda.¹²⁶ In 2016, the HRC passed a resolution establishing an Independent Expert on protection against violence and discrimination based on sexual

¹¹⁹ *ibid* 7.15.

¹²⁰ Human Rights Council, 'Human Rights, Sexual Orientation and Gender Identity' (United Nations) A/HRC/RES/17/19.

¹²¹ United Nations High Commissioner for Human Rights, 'Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity' (2011) A/HRC/19/41 paras 1, 22.

¹²² *ibid* 8.

¹²³ *ibid* 84.

¹²⁴ *ibid* 49.

¹²⁵ 'Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law' (*Refworld*) <<https://www.refworld.org/reference/themreport/ohchr/2012/en/88826>> accessed 8 October 2024.

¹²⁶ 'UN Free & Equal | UN Free & Equal Campaign for the Rights of LGBTIQ+ People' <<https://www.unfe.org/>> accessed 7 April 2024.

orientation and gender identity (IE SOGI).¹²⁷ The mandate holder assesses the implementation of international human rights instruments to combat violence and discrimination against individuals based on their SOGI, raises awareness, engages in dialogue with states and stakeholders, addresses intersecting forms of violence, and supports national efforts through advice and technical assistance.¹²⁸

Of the numerous publications of the IE SOGI, one report is of particular relevance to the present thesis, as it deals with the situation of queer people during armed conflict.¹²⁹ The 2022 Report on protection from violence and discrimination on the grounds of SOGI in armed conflict and in peacebuilding and peacekeeping identified the current legal framework and outlined the steps necessary to create a queer-inclusive framework. The report emphasises the need for all parties to armed conflicts, both international and non-international, to comply with IHL and the principle of non-discrimination.¹³⁰ It also stresses the importance of collecting data on SOGI in order to accurately assess the varied experiences of queer individuals during armed conflict.¹³¹ Furthermore, combating impunity is identified as a critical step in building safer and more inclusive societies for queer people in conflict-affected areas. To achieve this, states are urged to ensure access to effective remedies for human rights violations.¹³²

By now, the UN treaty bodies, and special procedures have repeatedly stated in their jurisprudence and reports that SOGIESC are prohibited grounds of discrimination under IHRL.¹³³ Thus, although no UN treaty directly prohibits discrimination on the basis of SOGIESC, all treaties implicitly prohibit discrimination on the basis of actual or perceived SOGIESC. The UN treaties list “sex” as a prohibited ground of discrimination, which has been interpreted to include sexual orientation.¹³⁴ UN treaties also include references to “other status”, which has been interpreted to include gender identity.¹³⁵ According to the understanding of the UN institutions and publications, gender expression falls under the term gender identity. This means that expression, namely how one shows one’s gender to the outside world, is also

¹²⁷ Human Rights Council, ‘Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity’ (2016) A/HRC/Res/32/2.

¹²⁸ *ibid* 3.

¹²⁹ IE SOGI (n 8).

¹³⁰ *ibid* para 69.

¹³¹ *ibid* para 74.

¹³² *ibid* para 76.

¹³³ ‘Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law (2nd Edition)’ (n 70) 54–55.

¹³⁴ *ibid* 55.

¹³⁵ *ibid*.

protected by the UN treaties under “other status”. Even though no intersex cases have been reviewed by treaty bodies so far, and the first ever resolution on sex characteristics was only recently adopted in April 2024, it is important to recognize that the IHRL’s non-discrimination guarantee applies to all people regardless of their sex characteristics.¹³⁶

Another important instrument for the inclusion and advancing of LGBT+ rights in IHRL are the 2006 Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles) and the 2017 Yogyakarta Principles (YPs) plus 10.¹³⁷ The YPs are not a new set of standards but a compilation and clarification of existing legal obligations. They identify how existing IHRL can be applied to strengthen rights for queer people and address human rights violations. The principles were developed by a group of human rights experts and list 39¹³⁸ human rights principles which aim to affirm binding international legal standards to which all states must comply.¹³⁹ The principles are a non-binding but authoritative interpretation of states’ human rights obligations concerning SOGI and apply generic treaty provisions to issues concerning SOGI.¹⁴⁰ Following the adoption of the YP in 2006, UN treaty bodies have published a number of comments and reports recognizing that states do have an obligation to respect SOGISC rights.¹⁴¹ Additionally, several national courts and regional human rights courts have referred to the YP when advancing the rights of queer people.¹⁴² These developments show the huge impact soft law principles can have, even though they are not legally binding.

The introduction to the YPs states that SOGI are integral to the dignity and humanity of every person and must not be the basis for discrimination or human rights violations.¹⁴³ Hence, adverse distinction based on SOGI constitutes unlawful discrimination.¹⁴⁴ However, it is

¹³⁶ Human Rights Council, ‘Combating Discrimination, Violence and Harmful Practices against Intersex Persons’ (2024) A/HRC/55/L.9; ‘A “Big Victory” for Intersex People and Their Rights’ (OHCHR) <<https://www.ohchr.org/en/stories/2024/04/big-victory-intersex-people-and-their-rights>> accessed 20 April 2024.

¹³⁷ ‘Yogyakarta Principles.Org – The Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity’ <<https://yogyakartaprinciples.org/>> accessed 21 July 2024.

¹³⁸ The 2006 YP contain 29 principles and the 2017 additional YP list 10 more.

¹³⁹ ‘Yogyakarta Principles.Org – The Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity’ (n 137).

¹⁴⁰ Association for the Prevention of Torture, ‘Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide’ (2018) 25.

¹⁴¹ Duffy (n 76) 1050–1051; ‘Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law (2nd Edition)’ (n 70) 11.

¹⁴² Council of Europe Commissioner for Human Rights (n 100) 21–26.

¹⁴³ ‘Introduction to the Yogyakarta Principles’ (n 73).

¹⁴⁴ This is of particular interest for the present thesis, because the all-encompassing and inherent principle of IHL is to protect human dignity and humanity.

undisputed that the YP do not bring a transformative justice character to IHRL as they are confined to the existing framework. The YP aim to integrate queer practices into mainstream understandings by trying to outline them in principles rather than challenging the mainstream understandings of SOGI.

In summary, although queer individuals are not explicitly referenced in written IHRL, it is now well established that human rights protection under IHRL extends to and safeguards queer people.

2.3 Excursus: International Criminal Law and the International Criminal Court

In the context of the protection and advancement of human rights for queer people, International Criminal Law (ICL) and the judgments of the International Criminal Court (ICC) are of great interest, as there are many considerations regarding the protection of queer people in times of armed conflict. Additionally, the further development of the protection of queer people can be seen as a process of dialogue between IHL, ICL and IHRL.¹⁴⁵ As far as the rights of queer people are concerned, it is up to evolutive interpretation whether they are protected by the Rome Statute, as SOGIESC is not explicitly mentioned.¹⁴⁶¹⁴⁷

Article 21 of the Rome Statute outlines the hierarchy of applicable law for the ICC.¹⁴⁸ It prioritizes the Statute, its elements of crimes, and rules of procedure in Article 21(1)(a). Article 21(1)(b) allows consideration of treaties and principles of IL, including IHL, and if needed, Article 21(1)(c) permits the application of general legal principles derived from the legal systems of the world. Article 21(3) mandates that the interpretation and application of law must align with internationally recognized human rights and prohibit discrimination based on various grounds like gender, race, or belief.¹⁴⁹ The fact that the Rome Statute stipulates that the interpretation and application of the law must comply with IHRL is particularly important, as it ensures that the ICC is prohibited from making adverse distinctions on the basis of diverse SOGIESC, as human rights law prohibits such discrimination.¹⁵⁰ Moreover, as IHRL evolves,

¹⁴⁵ IE SOGI (n 8) para 9.

¹⁴⁶ Rome Statute of the International Criminal Court 2002 (2187 UNTS 3).

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.*

¹⁴⁹ *ibid.* Article 21(3).

¹⁵⁰ For a detailed discussion, see the remarks made in chapter 2 about the developments made within the realm of IHL.

ICC jurisprudence may increasingly reflect the expanding scope of human rights, potentially paving the way for more comprehensive protections for queer people under its jurisdiction.

The Rome Statute includes its own definition of gender in Article 7(3), the result of long negotiations in the late 1990s.¹⁵¹ Initially, the term wasn't in the drafts for establishing the ICC, but lobbying from gender-supportive states and NGOs led to its inclusion from 1996 onwards.¹⁵² Opposing states put forward two main arguments against the use of the term gender. First, the opponents expressed fears that the term would grant rights based on sexual orientation, create recognition of more than two genders, or impose values from gender-inclusive states.¹⁵³ Secondly, they argued that the term was too ambiguous, making it difficult to translate and possibly in breach of the legal principles of clarity.¹⁵⁴ The dispute was resolved through “constructive ambiguity”, a tactic aimed at resolving seemingly divergent positions through vague formulations.¹⁵⁵ By referring to “the two sexes, male and female”, it appeased opposing states, while the inclusion of “within the context of society” satisfied supportive states.¹⁵⁶ Despite its tautological nature, both gender-inclusive and gender-exclusive states and factions found the definition to offer adequate flexibility and precision.¹⁵⁷

Furthermore, Article 54 of the Rome Statute is crucial as it mandates the Office of the Prosecutor (OTP) to prioritise sexual and gender-based violence (GBV).¹⁵⁸ This has led the OTP to repeatedly release policy papers on GBV. Through the 2023 paper, the OTP has taken another step towards closing the international criminal jurisprudence gap on the issue of GBV and the inclusion of people with diverse SOGIESC. It acknowledges that gender is a social construct and varies from society to society.¹⁵⁹ The paper further notes that gender changes over time or due to events such as armed conflict.¹⁶⁰ It is explicitly pointed out that this understanding of gender is consistent with the Rome Statute and emphasises that the statute requires alignment

¹⁵¹ Oosterveld (n 23) 564.

¹⁵² *ibid.*

¹⁵³ *ibid* 566.

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid* 563–564.

¹⁵⁶ *ibid* 567.

¹⁵⁷ *ibid.*

¹⁵⁸ Rome Statute of the International Criminal Court 54.

¹⁵⁹ The Office of the Prosecutor, ‘Policy on Gender-Based Crimes - Crimes Involving Sexual, Reproductive and Other Gender-Based Violence’ (n 24) para 17.

¹⁶⁰ *ibid.*

with the norms of IL.¹⁶¹ Furthermore, it illustrates that the phrase “within the context of society” refers to social constructs, which include SOGIE.¹⁶²

By recognising that gender is constructed, it becomes apparent that perpetrators often use violence against LGBT+ people as punishment for deviating from constructed gender norms. This affirmative inclusion of SOGIE in the OTP policy paper meets a very gender-inclusive definition, which, to a certain extent, seems contradictory with the phrase “the two sexes, male and female” in Article 7(3).

Many scholars, including *Peretko* and *Margalit*, have attempted to interpret the existing Rome Statute to include people with diverse SOGIESC as full right holders.¹⁶³ Ending impunity and holding perpetrators accountable for SOGIESC-related violence through ICC conviction contributes to the development of IHL towards a more queer-inclusive branch of law.

Margalit outlines two cumulative requirements for SOGIESC-related violence to be covered by the Rome Statute: first, there must be a causal link between the abuse or deprivation of rights and the person’s actual or perceived SOGIESC; second, there must be a sufficient nexus to an armed conflict.¹⁶⁴ To date, however, no ICC judgments have recognised SOGIESC-related incidents as war crimes or crimes against humanity.¹⁶⁵ Thus, any interpretation of queer individuals as full right-holders under the Rome Statute remains speculative. In the absence of case law, interpretations that read SOGIESC into the existing legal framework are primarily scholarly efforts to queer the law.

¹⁶¹ *ibid.*

¹⁶² *ibid.* 18.

¹⁶³ *Peretko* (n 23); *Margalit* (n 14).

¹⁶⁴ *Margalit* (n 12) 249; for example, Common Article 3 of the GCs can be considered violated if a person has been subjected to in humane treatment on the basis of their actual or perceived SOGIESC.

¹⁶⁵ Many observers hoped that the *Al Hassan* case would be the first to address gender-based persecution, but the final judgment omitted gender as a ground for persecution, which represents a missed opportunity for juridical advancement in this area; ‘*Al Hassan: The International Criminal Court’s First Judgment on Gender Persecution (Part 1)*’ (*Opinio Juris*, 2 August 2024) <<https://opiniojuris.org/2024/08/02/al-hassan-the-international-criminal-courts-first-judgment-on-gender-persecution-part-1/>> accessed 7 August 2024.

3 Overlap of IHRL and IHL

IHL and IHRL are two distinct yet overlapping branches of IL. Hence, it is important to provide a concise overview of their similarities and differences as they apply in parallel in times of armed conflict and are increasingly converging.¹⁶⁶ While IHL protects individuals from the abusive or arbitrary exercise of power by state authorities, IHL applies only in times of armed conflict and governs the conduct of hostilities.¹⁶⁷ IHRL is binding only on states, unlike IHL, which is binding on all parties to a conflict.¹⁶⁸ The scope of application is also different, as the applicability of human rights protection depends on whether the individual concerned is in the jurisdiction¹⁶⁹ of the state involved in the human rights violations, and IHL presupposes a nexus to an armed conflict.¹⁷⁰ The consequence is that IHRL applies at all times, with certain exceptions for public emergencies in which some non-peremptory right may be derogated from.¹⁷¹ However, peremptory rights, such as the right to life, the prohibition of torture and the prohibition of slavery remain non-derogable. Non-peremptory human rights, like the freedom of movement, can be restricted to protect the public safety and restore order.¹⁷² In states of emergency, there are strict conditions for imposing restrictions on other human rights.¹⁷³ These conditions include an absolute ban on discrimination, protecting people from being, *inter alia*, discriminated against on the basis of their actual or perceived SOGIESC.¹⁷⁴

Despite their differences, IHRL and IHL share a common core of inalienable rights and a common objective, namely the protection of human life and human dignity.¹⁷⁵ Although there are some rights that are explicitly guaranteed in both IHRL and IHL, such as the prohibition of torture and degrading treatment, there are also conflicts between those two branches of law.¹⁷⁶ For example, IHL does not protect combatants and civilians directly participating in hostilities from violence to life and person, whereas IHRL protects everyone from arbitrary deprivation

¹⁶⁶ Dana Schmalz, 'Normative Demarcations of the Right to Life in a Globalized World: Conflicts between Humanitarian Law and Human Rights Law as Markers' (2016) 99 KritV, CritQ, RCrit. Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft / Critical Quarterly for Legislation and Law / Revue critique trimestrielle de jurisprudence et de législation 234, 258; Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (International Committee of the Red Cross 2022) 30.

¹⁶⁷ Melzer (n 166) 27.

¹⁶⁸ *ibid* 28.

¹⁶⁹ Jurisdiction encompasses the territory that a state has under its control, including occupied territories.

¹⁷⁰ Melzer (n 166) 28.

¹⁷¹ *ibid* 28, 29.

¹⁷² *ibid*.

¹⁷³ IE SOGI (n 8) para 12.

¹⁷⁴ *ibid*.

¹⁷⁵ Schmalz (n 166) 234–253; Melzer (n 166) 29.

¹⁷⁶ Schmalz (n 166) 240; Melzer (n 166) 29.

of life.¹⁷⁷ The emergence of conflicts between two branches of law is inevitable¹⁷⁸ and is resolved by the principle of *lex specialis*, which resolves a conflict between norms by applying IHL as the specific law governing behaviour in hostilities.¹⁷⁹

Furthermore, the ICRC seeks to interpret the respective norms of IHL and IHRL with a view to harmonization.¹⁸⁰ This also strengthens protection for queer people as they have been established to be covered by the scope of various human rights.

Efforts to protect human rights during armed conflict have led UN bodies, agencies, special mechanisms, and international and regional courts to apply IHRL and IHL in a complementary and mutually reinforcing way.¹⁸¹ This approach avoids gaps in protection and facilitates dialogue with the parties to the conflict on the scope of their legal obligations.¹⁸² Therefore, future decisions of the ICJ, regional human rights courts and the work of UN treaty bodies should be seen as a collective effort to enhance the protection of individuals in armed conflict.¹⁸³

In conclusion, IHL and IHRL generally apply in parallel during armed conflicts, although some issues are governed exclusively by one or the other.¹⁸⁴

¹⁷⁷ Melzer (n 166) 29.

¹⁷⁸ Conflicts between two branches of law are unavoidable but they are the exception rather than the norm.

¹⁷⁹ United Nations (ed), *International Legal Protection of Human Rights in Armed Conflict* (United Nations 2011) 119; Melzer (n 166) 29.

¹⁸⁰ International Committee of the Red Cross (ICRC), *Gendered Impacts of Armed Conflict and Implications for the Application of International Humanitarian Law* (2022) 26.

¹⁸¹ United Nations (n 179) 118.

¹⁸² *ibid* 118.

¹⁸³ *ibid* 119.

¹⁸⁴ Melzer (n 166) 30.

4 Current Legal Protection of LGBT+ Individuals in IHL

The following chapter first introduces IHL as such and gives a general and concise outline of the current state of IHL. It provides is an overview of the main sources of IHL and how to interpret them as well as an overview of relevant IHL principles and provisions with regard to the protection of queer people. Next, these principles and provisions are interpreted in terms of the extent to which they protect queer people, and gaps or restrictions in the existing legal framework are analysed.

In the light of the above, is important to note that written IHL was drafted at a time of near-global criminalization of people with diverse SOGIE. Consequently, written IHL does not mention or make any implicit reference to individuals with diverse SOGIESC. Similarly, CIHL do not explicitly mention queer people. However, the ICRC's Commentaries on the GCs have recently begun to make statements about SOGIE. These statements are analysed below and examined for their potential to protect LGBT+ people. In doing this, core publications on the protection of queer people under IHL are used to discuss and critically assess the extent to which LGBT+ people are protected.

As described in chapter 1, queer legal theory is used to examine IHL. As a first step, queering IHL means analysing the existing legal framework and addressing queer experiences and identities. The scope of rights is extended to include queer people, e.g. by analysing the prohibition of discrimination on the basis of SOGIESC. Yet queering law is more than just the normative inclusion of queer people without altering IHL. Queering IHL means questioning the fundamental assumptions, structures and methods of IHL and represents a process of rethinking IHL. In this chapter, the search for comprehensive legal protection for LGBT+ people is primarily focused on the interpretation of existing IHL, before a critical examination of seemingly neutral norms, which have inherently binary and discriminatory effects and affect queer people differently from non-queer people, is carried out. Furthermore, the need for special protection will be examined.

4.1 Introduction to IHL

IHL is the branch of IL that restrict the means and methods of warfare in order to protect those affected by armed conflicts and prevent human suffering as well as preserve core values of human dignity in situations of armed conflict.¹⁸⁵ IHL sets out the minimum standard of humanity that has to be respected under all circumstances during armed conflicts and regulates the conduct of belligerents to limit the humanitarian consequences of war.¹⁸⁶ The four fundamental principles of IHL are the principles of humanity, distinction, proportionality and military necessity.¹⁸⁷

In order to achieve the objective of IHL of limiting the effects of armed conflict, rules are established which make it clear that those who are not or are no longer directly participating in the hostilities should be spared, and that violence should be limited to the extent necessary to achieve the objective of the conflict, which, regardless of the causes being fought for, can only be to weaken the military potential of the opponent.¹⁸⁸ The rules and principles of IHL are both designed to protect civilians not or no longer taking direct part in the hostilities and civilian objects, while taking into account the military necessities and the exigencies of the situation.¹⁸⁹ To put it in other word, IHL is all about balancing between the military necessity and the needs for humanitarian protection.¹⁹⁰ However, IHL does not cover all aspects and has inherent limitations. To illustrate, IHL does not prohibit the use of force itself, nor does it protect all persons affected by warfare, nor does it take into account the purpose of the conflict.¹⁹¹

IHL is also referred to, although less frequently, as the “law of war”, the “law of armed conflict” or “*jus in bello*”.¹⁹² It must be distinguished from *ius ad bellum*. The aim of *ius ad bellum* is to

¹⁸⁵ ‘Easy Guide to International Humanitarian Law’ (*Diakonia International Humanitarian Law Centre*) <<https://www.diakonia.se/ihl/news/easy-guide-to-international-humanitarian-law/>> accessed 15 June 2024; Melzer (n 166) 12, 17.

¹⁸⁶ Melzer (n 166) 17; ‘Fundamentals of IHL | How Does Law Protect in War? - Online Casebook’ <<https://casebook.icrc.org/law/fundamentals-ihl#toc-d-sources-of-contemporary-international-humanitarian-law>> accessed 3 October 2024

¹⁸⁷ ‘Basic principles of IHL’ (*Diakonia International Humanitarian Law Centre*) <<https://www.diakonia.se/ihl/resources/international-humanitarian-law/basic-principles-ihl/>> accessed 23 July 2024.

¹⁸⁸ ‘Fundamentals of IHL | How Does Law Protect in War? - Online Casebook’ (n 186).

¹⁸⁹ ‘Military Necessity | How Does Law Protect in War? - Online Casebook’ <https://casebook.icrc.org/a_to_z/glossary/military-necessity#> accessed 3 October 2024; ‘Easy Guide to International Humanitarian Law’ (n 185).

¹⁹⁰ ‘Basic principles of IHL’ (n 187).

¹⁹¹ ‘Fundamentals of IHL | How Does Law Protect in War? - Online Casebook’ (n 186).

¹⁹² Melzer (n 166) 17.

prohibit war as a means of settling disputes between states.¹⁹³ The main source in this regard is the UN Charter, which prohibits the threat or use of force except in clearly defined circumstances listed in chapter VII of the charter (e.g., individual or collective self-defence).¹⁹⁴ The main treaties of IHL, on the other hand, are the four 1949 GCs¹⁹⁵ and their three APs.¹⁹⁶

IHL applies once an armed conflict has broken out, regardless of whether the use of force was lawful or not and continues to apply beyond the cease of hostilities until a general conclusion of peace or a peaceful settlement is reached.¹⁹⁷ The concept and different forms of armed conflict are hence essential to understanding IHL. The definition that is now considered the classic formula of armed conflict was formulated by the International Criminal Tribunal for the former Yugoslavia (ICTY).¹⁹⁸ The definition is as follows: “[A]n armed conflict exists whenever there is a resort to armed forces between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.”¹⁹⁹ The definition distinguishes between non-international armed conflicts (NIACs) and international armed conflicts (IACs).²⁰⁰ It is important to precisely describe the differences between NIAC and IAC, as they entail distinct legal regimes with varying degrees of codification.²⁰¹ Nevertheless, due to recent developments, there is a convergence of both legal frameworks, yet there are significant legal and factual differences.²⁰²

¹⁹³ Hans-Peter Gasser, ‘Humanitarian Law, International’, *Max Planck Encyclopedias of International Law* (2015) para 1 <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e488>> accessed 30 July 2024.

¹⁹⁴ *ibid.*

¹⁹⁵ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) 1949 (75 UNTS 31); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Second Geneva Convention) 1949; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 1949.

¹⁹⁶ Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977 (1125 UNTS 3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1977 (1125 UNTS 609); as mentioned in the remarks on delimitation, this thesis refers exclusively to the first two protocols, for further explanation on the GCs and their APs see 5.2.

¹⁹⁷ ‘Refworld | Prosecutor v. Dusko Tadic Aka “Dule” (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)’ (*Refworld*) para 70 <<https://www.refworld.org/cases,ICTY,47fd520.html>> accessed 2 October 2024; Gasser (n 193) para 5.

¹⁹⁸ Gasser (n 193) para 5.

¹⁹⁹ ‘Refworld | Prosecutor v. Dusko Tadic Aka “Dule” (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)’ (n 197) para 70.

²⁰⁰ For a detailed overview of the different forms of armed conflict in IHL and the difficulties in classifying situations of violence, see Sylvain Vit , ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’ (2009) 91 *International Review of the Red Cross* 69; Opinion Paper International Committee of the Red Cross (ICRC) How is the Term “Armed Conflict” Defined in International Humanitarian Law?, March 2008.

²⁰¹ Gasser (n 193) para 4.

²⁰² Melzer (n 166) 13.

Common Article 2 of the 1949 Geneva Convention provides that the conventions apply in three distinct situations: declared war with or without hostilities, inter-state armed conflict and the occupation of a territory.²⁰³ An IAC starts at the point of a state's actual use of force against another, independent of a formal declaration of war, with the unwritten prerequisite that the belligerents must have an intention to start an armed conflict.²⁰⁴ Furthermore, the occupation of another state's territory without their consent, even in the absence of armed resistance, constitutes an IAC.²⁰⁵ Legally speaking, the categories of NIAC and IAC are complementary because they cover every possible situation triggering the applicability of IHL.²⁰⁶

The term NIAC is not only used in contrast to the category of IAC, but also for internal disturbances and tensions that are excluded from the definition of armed conflict.²⁰⁷ The threshold of intensity required in the event of a NIAC is higher than for an IAC.²⁰⁸ IHL distinguishes between NIACs within the meaning of Common Article 3 and NIACs falling within the definition of Article 1 of Additional Protocol II.²⁰⁹ Article 1 AP II has a more restrictive definition which is only relevant for the application of said protocol, as it develops and supplements Common Article 3 without modifying its existing conditions of application, by introducing a requirement of territorial control.²¹⁰

The simultaneous occurrence of non-international and national armed conflicts within a particular territory is possible, and their classification and the corresponding legal framework depend on the relationships between the belligerents.²¹¹ While the presence of an armed conflict is a crucial condition for the application of IHL, treaty IHL lacks a precise definition of what qualifies as an armed conflict. As a result, the task of clarification and interpretation is largely left to state practice and the interpretative efforts of courts and legal scholars.²¹²

²⁰³ Geneva Convention (I) for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 85 1949 art 2.

²⁰⁴ Melzer (n 166) paras 56–57.

²⁰⁵ *ibid* 57.

²⁰⁶ *ibid* 54.

²⁰⁷ 'Noninternational Armed Conflict (NIAC)' (*Doctors without borders | The Practical Guide to Humanitarian Law*) <<https://guide-humanitarian-law.org/content/article/3/non-international-armed-conflict-niac/>> accessed 30 July 2024.

²⁰⁸ Vité (n 200) 76.

²⁰⁹ 'International Humanitarian Law: Answers to Your Questions' (*International Committee of the Red Cross*, 1 December 2015) 19 <<https://www.icrc.org/en/publication/0703-international-humanitarian-law-answers-your-questions>> accessed 4 September 2024.

²¹⁰ *ibid*.

²¹¹ *ibid* 20.

²¹² Melzer (n 166) 52–53.

The 1949 GCs and the 1977 AP I to the GCs are applicable during an IAC.²¹³ The 1949 GCs have been adopted by all states that are members of the international community and are therefore universally applicable.²¹⁴ Thus, in times of an IAC, there is sufficient codified law. Written law for NIAC, on the other hand, is far less developed, as there are no provisions on the status of combatants or prisoners of war (POWs).²¹⁵ The main reason for this is that states have been reluctant to grant armed opposition groups an international legal status in order to be bound only by IHRL and not by IHL.²¹⁶ Although there is some codified treaty law with respect to NIAC, Common Article 3 and Additional Protocol II being the most crucial, the rules of Customary International Law (CIL) are of great importance.²¹⁷

4.2 Sources of IHL

The creation and development of IHL is a dynamic process involving many actors – states, non-state actors and state-empowered entities – and characterized by an interactive and fluid relationship between these actors.²¹⁸ The sources themselves interact with and influence each other - a treaty may become a custom, a custom may be codified in a treaty, and a judicial decision may identify a customary rule or interpret a treaty provision.²¹⁹ The ICRC is particularly important with regard to the sources of IHL, as it is mandated to “promote the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflict and to prepare for its further development”.²²⁰

This chapter introduces the various sources of IHL, while their potential for developing more inclusive protections for queer individuals is explored in chapter 5.

²¹³ Gasser (n 193) para 4.

²¹⁴ ‘Geneva Conventions and Their Additional Protocols’ (*LII / Legal Information Institute*) <https://www.law.cornell.edu/wex/geneva_conventions_and_their_additional_protocols> accessed 2 July 2024; Gasser (n 196) para 13.

²¹⁵ Gasser (n 193) para 4.

²¹⁶ Melzer (n 170) 54; ‘Non-International Armed Conflict | How Does Law Protect in War? - Online Casebook’ <https://casebook.icrc.org/a_to_z/glossary/non-international-armed-conflict> accessed 4 June 2024.

²¹⁷ *ibid*; see detailed explanation of Customary International Law in chapter 4.2.

²¹⁸ Sandesh Sivakumaran, ‘Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law’ *Columbia Journal of Transnational Law* 392, 394.

²¹⁹ *ibid*.

²²⁰ ‘Statutes of the International Red Cross and Red Crescent Movement’ art 5(2)(g).

4.2.1 Written Law

Article 38(1)(a) of the Statute of the International Court of Justice (ICJ) establishes that international conventions, also known as treaties, are a fundamental source of IL.²²¹ IHL is one of the most codified parts of IL and consists of a number of international treaties, most notably the four GCs and their 1977 APs.²²² Collectively, these treaties constitute the core of IHL, and they have, in whole or in part, acquired the status of CIHL.²²³ The 1949 Conventions, also called “Law of Geneva”, concern the protection of persons from the effect of armed conflicts.²²⁴ The 1977 APs, also referred to as “Law of the Hague”, deal primarily with inter-state rules governing the use of force.²²⁵ These treaties regulate the conduct in warfare in an unambiguous language.²²⁶ The GCs are considered “living instruments”, meaning that their interpretation adapts to current circumstances and developments, and their scope changes over time.²²⁷

IHL treaties are strongly shaped by the historical circumstances at the time of their conclusion and represent a compromise between military interests and a commitment to humanitarian considerations.²²⁸ A crucial factor that facilitated the successful negotiation of the GCs and their APs, and ultimately led to their acceptance as a set of norms, was the role of the ICRC.²²⁹ Hence, it is important to bear in mind that IHL is an evolving branch of law that is constantly changing and evolving.²³⁰

It is key to reiterate that the concept of humanity is an integral part of the GC system, as IHL is about balancing military necessity with the need for humanitarian protection.²³¹ Consequently, the principle of humanity must be thoroughly taken into account in the interpretation and application of the GC.²³²

²²¹ United Nations, ‘Statute of the International Court of Justice’ (*Refworld*, 18 April 1946) art 38(1)(a) <<https://www.refworld.org/legal/constinstr/un/1946/en/17385>> accessed 5 June 2024.

²²² Malcolm N Shaw, *International Law* (Ninth edition, Cambridge University Press 2021) 1031, for further information, see chapter 5.1.

²²³ *ibid*; ICRC, ‘Sources of IHL: Treaties and Customary Law’ <<https://blogs.icrc.org/ir/en/international-humanitarian-law/sources-ihl-treaties-customary-law/>>.

²²⁴ Shaw (n 222) 1033.

²²⁵ *ibid*.

²²⁶ Melzer (n 166) 21.

²²⁷ Heike Krieger and Jonas Püschmann (eds), *Law-Making and Legitimacy in International Humanitarian Law* (Edward Elgar Publishing 2021) 169.

²²⁸ Cordula Droege and Eirini Giorgou, ‘How International Humanitarian Law Develops’ (2022) 104 *International Review of the Red Cross* 1798, 1801, 1802; chapter 7 discusses treaties in the context of their potential for further development.

²²⁹ *ibid* 1807.

²³⁰ International Committee of the Red Cross (ICRC) (n 180) 33.

²³¹ Melzer (n 166) 24.

²³² Melzer (n 166); ‘Basic principles of IHL’ (n 187).

4.2.2 Customary International Law

Customary International Law is defined in Article 38(1)(b) of the Statute of the ICJ as “evidence of a general practice accepted as law”²³³ and reflects the practices that states follow in a consistent and persistent manner, while believing that these practices (*usus*) are obligatory (*opinio juris*).²³⁴ As CIL is unwritten, the ICJ has a leading role in identifying CIL and defining the scope of the standards it contains.²³⁵ In the North Sea Continental Shelf Case the ICJ established a definition that is still often referenced today. The court held that CIL requires a settled practice, accompanied by the legal conviction that the conduct in question is prompted by a legal sense of duty, as indicated by the *opinio juris sive necessitatis*.²³⁶ The court further specified that the subjective element necessitates that states adhere to the practice as a legal obligation, distinguishing it from mere habitual or customary acts driven by considerations of courtesy, convenience, or tradition.²³⁷ This definition emphasises the importance of *opinio iuris* and rejects the approach that the conduct must be consistent and repeated over a long period of time, which was previously the prevailing approach.²³⁸ Therefore, it is now recognized that even a single legal act can be used to justify both state practice and *opinio iuris*, as long-term maturation or repeated practice is not required.²³⁹ However, it must be borne in mind that the threshold that must be reached before a legally binding custom can be established depends on the nature of the alleged rule and the opposition it generates.²⁴⁰

Once certain behaviours or practices have gained the status of customary law, they have acquired legal authority and constitute obligations upon states that are not parties to treaties.²⁴¹ Hence, customary rules bind all parties involved in an armed conflict. The rules of the CIL exist over and above the traditional treaty rules.²⁴² As CIL is a dynamic body of law, that is constantly evolving in line with *usus* and *opinio iuris*, it can adapt to new challenges and developments

²³³ United Nations (n 221).

²³⁴ ‘Customary International Law’ (*Doctors without borders | The Practical Guide to Humanitarian Law*) <<https://guide-humanitarian-law.org/content/article/3/customary-international-law/>> accessed 31 July 2024.

²³⁵ Ahmed Yusuf Abdulqawi, ‘The International Court of Justice and Unwritten Sources of International Law’ (Sixth Committee of the General Assembly, New York, 1 November 2019) para 4 <<https://www.icj-cij.org/public/files/press-releases/0/000-20191101-STA-01-00-EN.pdf>> accessed 31 July 2024.

²³⁶ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Court of Justice).

²³⁷ *ibid* 77.

²³⁸ Abdulqawi (n 235) paras 15, 18, 21.

²³⁹ *ibid* 22.

²⁴⁰ Shaw (n 222) 65.

²⁴¹ ‘Customary International Law’ (n 234).

²⁴² Shaw (n 222) 1031.

much more quickly than written law, since any changes to the latter require international negotiations followed by a formal process of adoption and ratification.²⁴³

In the field of IHL, examples of a legally binding custom can be found primarily in official declarations and military manuals, but also in allegations of violations by one state against another state or in defences against violations.²⁴⁴ A particular challenge of IHL is that it is difficult to determine what constitutes battlefield practice and, moreover, to determine that the practice is accompanied by *opinio iuris*.²⁴⁵

4.2.3 General Principles of Law

The third source of IL, alongside treaties and customs, is the general principles of law recognized by „civilized nations“²⁴⁶, which, due to the lack of a definition, are difficult to determine.²⁴⁷ Once identified they impose international obligations.²⁴⁸ One of the most important general principles is the principle of *good faith*, which requires states to perform all their obligations under IL in *good faith*, including those embodied in treaties.²⁴⁹ Therefore, the rule of *good faith* is an indispensable part of the sources and rules of IL in general.²⁵⁰

With regard to IHL, it is important to note that international courts have on several occasions derived IHL obligations directly from a general principle of law, namely the “elementary considerations of humanity”.²⁵¹ These considerations should be taken into account comprehensively in the interpretation and application of IHL treaties.²⁵² The Martens Clause²⁵³ supports this approach by emphasizing that even in areas not covered by treaty law, populations and belligerents remain protected by principles derived from custom, humanity, and public

²⁴³ Melzer (n 166) 22.

²⁴⁴ ‘Customary International Humanitarian Law | How Does Law Protect in War? - Online Casebook’ <https://casebook.icrc.org/a_to_z/glossary/customary-international-humanitarian-law> accessed 31 July 2024.

²⁴⁵ *ibid.*

²⁴⁶ The author of this thesis is aware of the colonial origin of this term and refers to articles that critically examine the term and offer alternatives: Sué González Hauck, “‘All Nations Must Be Considered to Be Civilized’” [2020] Verfassungsblog <<https://verfassungsblog.de/all-nations-must-be-considered-to-be-civilized/>> accessed 15 June 2024.

²⁴⁷ Melzer (n 166) 24.

²⁴⁸ *ibid.*

²⁴⁹ Shaw (n 222) 87.

²⁵⁰ *ibid.*

²⁵¹ Melzer (n 166) 24.

²⁵² *ibid.*

²⁵³ The Martens Clause has acquired the status of a customary rule and has been incorporated into IHL treaties; the thesis does not go into the details of this rule, as explained in chapter 1.2.

conscience, thus countering the notion that anything not expressly prohibited by IHL is permissible.²⁵⁴

4.2.4 Subsidiary Means

Subsidiary means play a crucial role in determining the existing rules of IHL, as set out in Article 38(1)(d) of the Statute of the ICJ²⁵⁵, but do not constitute a source of law in themselves.²⁵⁶ Article 38(1)(d) states that judicial decisions as well as the writings of the most qualified publicists serve as a subsidiary means of interpreting and applying IL. With regard to the relationship between subsidiary means and the various sources of IL, judicial decisions can play different roles, sometimes clarifying general treaty rules or interpreting them specifically to apply to new situations that may not have been foreseen previously.²⁵⁷ Similarly, the writings of international legal scholars contribute to a comprehensive understanding of legal obligations, supporting the progressive and even evolutive development of IL.²⁵⁸ These analyses and interpretations complement the primary sources of IL, aiding in its development and application.

4.2.5 Fundamental Principles of IHL

The four fundamental principles of IHL are the principle of proportionality, military necessity, distinction, and humanity. These four principles are inextricably intertwined and cannot be considered in isolation; rather, they must be evaluated collectively.

The principle of distinction is considered to be one of the oldest principles in IHL and aims to protect civilians and civilian objects during armed conflict through prohibiting directing attacks against them.²⁵⁹ Parties to an armed conflict must at all times distinguish between civilians and combatants, as well as between civilian objects and military objectives, and accordingly direct their operations only against military objectives.²⁶⁰ This principle is customary law, applicable

²⁵⁴ ‘Martens Clause | How Does Law Protect in War? - Online Casebook’ <https://casebook.icrc.org/a_to_z/glossary/martens-clause> accessed 22 June 2024; Melzer (n 28) 24; However, the extent to which specific legal obligations can be directly derived from the Martens clause is disputed.

²⁵⁵ United Nations (n 221) art 38(1)(d).

²⁵⁶ Shaw (n 222) 92.

²⁵⁷ United Nations Department for General Assembly and Conference Management, *Report of the International Law Commission: Seventy-Second Session (26 April–4 June and 5 July–6 August 2021)* (United Nations 2021) para 15 <<https://www.un-ilibrary.org/content/books/9789210057325>> accessed 22 June 2024.

²⁵⁸ *ibid* 31.

²⁵⁹ ICRC, ‘The Principle of Distinction - Cyber Operations during Armed Conflict’ 1 <https://www.icrc.org/sites/default/files/wysiwyg/war-and-law/03_distinction-0.pdf>.

²⁶⁰ ‘Distinction | How Does Law Protect in War? - Online Casebook’ <https://casebook.icrc.org/a_to_z/glossary/distinction#> accessed 22 June 2024.

in both NIAC and in IAC.²⁶¹ Furthermore, it is codified in Articles 48 and 52 of AP I and Article 13(2) of AP II, to which no state has made a reservation.²⁶² A definition of what is considered to be a “military object” is set out in Article 52(2) of the AP II, whereby any item that does not fall under this definition is to be considered a civilian object as Article 52(1) states.²⁶³ Military objectives as defined in Article 52(2) are limited to those objects which, by their nature, location, purpose or use, make an effective contribution to military action and may be attacked only if their destruction, capture or neutralisation provides a clear military advantage.²⁶⁴

The principle of military necessity authorises measures that are necessary to achieve a legitimate military purpose and that are not otherwise prohibited by IHL.²⁶⁵ In the case of armed conflict, the only legitimate military purpose is to weaken the military capacity of the adversary.²⁶⁶ The legal concept of military necessity is the most detrimental to humanitarian protection because it allows combatants to engage in destructive and harmful acts by recognising that winning an armed conflict is a legitimate objective under IHL.²⁶⁷ To overcome the enemy, it may be militarily necessary to cause death, injury and destruction, but all military action must be balanced with humanitarian considerations.²⁶⁸

In balancing military necessity and humanity, it must be considered that a military operation aimed at weakening the adversary’s military capabilities must not cause excessive harm to civilians or civilian objectives compared to the expected concrete and direct military advantage.²⁶⁹ This principle is called the principle of proportionality and is regulated in the AP I

²⁶¹ ‘The Principle of Distinction between Civilian Objects and Military Objectives’ <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule7>> accessed 22 June 2024; ‘The Principle of Distinction between Civilians and Combatants’ <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule1>> accessed 22 June 2024.

²⁶² Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. 48,52; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 13; ‘The Principle of Distinction between Civilian Objects and Military Objectives’ (n 260); ‘The Principle of Distinction between Civilians and Combatants’ (n 260).

²⁶³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. 52.

²⁶⁴ *ibid* 52(2).

²⁶⁵ ‘Military Necessity | How Does Law Protect in War? - Online Casebook’ (n 189).

²⁶⁶ *ibid*.

²⁶⁷ ‘Basic principles of IHL’ (n 187).

²⁶⁸ Melzer (n 166) 17–18.

²⁶⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. 51(5)(b), 57(2)(a)(iii), 57(2)(b); ‘Crimes of War – Military Necessity’ (9 August 2013) <<https://web.archive.org/web/20130809183729/http://www.crimesofwar.org/a-z-guide/military-necessity/>> accessed 22 June 2024.

and has acquired the status of customary law.²⁷⁰ The greater the expected military advantage, the greater the collateral damage, often including civilian casualties, that is “justified” or “necessary”.²⁷¹ It is widely recognised that the assessment of military necessity often requires subjective evaluation, as information on the battlefield is incomplete and it is not known exactly where inaction might lead.²⁷² This gives military personnel a large margin of appreciation, especially when these decisions are made under combat conditions.²⁷³

The fourth principle is the principle of humanity which sets certain limits on the means and methods of warfare also requires that those who fall into the hands of the enemy should always be treated humanely.²⁷⁴ As discussed in chapter 4.2.3, this principle is not only a fundamental principle of IHL, but also a general principle of law.²⁷⁵ It is indisputably the most important principle of all, since all other principles are derived from it.²⁷⁶ However, as there is no agreed definition, it is not clear what humanity is in a legal sense.²⁷⁷ There are alternative definitions of what humanity is or encompasses. Humanity can be defined on the one hand as “the human race” or “humankind”, and on the other hand as behaviour, i.e. behaviour towards others that is appropriate for a human being.²⁷⁸ The current ambiguity of the concept of humanity has meant that humanity is no longer perceived as a source²⁷⁹ of IL.²⁸⁰ As a result, the concept of humanity is often denied a place in the legal dialogue, with the result that it no longer has much influence and is seen more as a principle that is more concretely embodied in other principles of IHL.²⁸¹

²⁷⁰ Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art 51(5)(b), 57(2)(a)(iii), 57(2)(b); ‘Proportionality in Attack’ <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14#>> accessed 23 June 2024; ‘Assessment of the Effects of Attacks’ <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule18>> accessed 23 June 2024; ‘Control during the Execution of Attacks’ <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule19>> accessed 23 June 2024.

²⁷¹ ‘Humanitarian Principles’ (*Doctors without borders | The Practical Guide to Humanitarian Law*) <<https://guide-humanitarian-law.org/content/article/3/humanitarian-principles/#>> accessed 2 September 2024; ‘Crimes of War – Military Necessity’ (n 269).

²⁷² ‘Crimes of War – Military Necessity’ (n 269).

²⁷³ *ibid.*

²⁷⁴ Melzer (n 166) 17,18.

²⁷⁵ *ibid.* 24.

²⁷⁶ Jean Pictet, ‘The Fundamental Principles of the Red Cross’ (1979) 19 *International Review of the Red Cross* 130, 133, 135.

²⁷⁷ Robin Coupland, ‘Humanity: What Is It and How Does It Influence International Law?’ (2001) 83 *International Review of the Red Cross* 969, 972.

²⁷⁸ *ibid.*

²⁷⁹ Source in the sense of a general principle of law.

²⁸⁰ Coupland (n 277) 988.

²⁸¹ *ibid.*

4.3 Interpretative and Analytical Resources of IHL

In addition to the legally binding sources of IHL, there are numerous interpretive and analytical resources that play a crucial role in understanding the law of armed conflict and its potential to effectively protect queer people. This section will examine the ICRC Commentaries, which, while not legally binding, are often considered authoritative, and the ICRC's Customary IHL Study, which, while also non-binding, is widely cited by key actors, including international tribunals.²⁸² Finally, the chapter looks at the process of interpreting IHL. These analytical tools and interpretive processes will be examined not only for their general relevance to IHL, but also for their potential to enhance the protection of queer people in times of armed conflict.

4.3.1 Commentaries on the Geneva Conventions

As the ICRC's mandated mission is to protect the lives and dignity of victims of armed conflict, the clarification, development and dissemination of IHL is an integral part of the realisation of this mission.²⁸³ For this reason, the ICRC updated the "Pictet Commentaries"²⁸⁴ on GC I-III between 2016 and 2020.²⁸⁵ Since their publication in the 1950s, the Pictet Commentaries on the four GC had become a source of interpretation that was widely regarded as authoritative.²⁸⁶ They have been cited by military lawyers, international and national judges, and scholars around the world.²⁸⁷ Since the GC commentaries were published in the 1950s and the AP commentaries in the 1970s, the authors were unable to anticipate the legal and operational developments of the following decades, necessitating new commentaries to provide up-to-date legal guidance that addresses current armed conflict challenges and advancements in

²⁸² Charlotte Mohr, 'From the Gilded Age to the Digital Age: The Evolution of ICRC Legal Commentaries' (*Cross-Files | ICRC Archives, audiovisual and library*, 8 June 2022) <<https://blogs.icrc.org/cross-files/the-evolution-of-icrc-legal-commentaries/>> accessed 15 August 2024.

²⁸³ Heike Krieger and Jonas Püschmann (eds), *Law-Making and Legitimacy in International Humanitarian Law* (Edward Elgar Publishing 2021) 150.

²⁸⁴ These commentaries were named after the ICRC lawyer, Jean Pictet, who was the general editor of the original commentaries to the four GVs.

²⁸⁵ Krieger and Püschmann (n 227) 150; '2016 Commentary of Article 3 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.' <<https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016>> accessed 2 June 2024; 'Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949.' <<https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949>> accessed 8 June 2024; 'Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.' <<https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949>> accessed 2 June 2024; 'Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.' <<https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949>> accessed 8 June 2024.

²⁸⁶ Krieger and Püschmann (n 227) 250.

²⁸⁷ *ibid.*

technology and law.²⁸⁸ Furthermore, one of the key reasons for issuing new commentaries was a shift in expectations of compliance with the Conventions due to evolving practices.²⁸⁹

Pictet's Commentaries took a state-centred, gap-conscious approach, whereby in many cases Pictet was prepared to accept the ambiguities of the Convention as evidence of the limits of state consensus, rather than seeing them as gaps to be filled by interpretation.²⁹⁰ The updated Commentaries go well beyond the approach of their predecessor, drawing on a variety of interpretive approaches and supplementary sources to provide a thorough, if interpretively challenging, humanitarian reassessment of much of the Conventions.²⁹¹ An example of this approach is footnote 49 of Article 14 of the 2020 Commentary on GC III.²⁹² It refers to the 1960 Pictet commentaries as "a product of the social and historical context of the time" and that "the statement that "due regard to women" primarily requires a Detaining Power to bear in mind the points of "weakness, honour and modesty and pregnancy and childbirth" is no longer appropriate."²⁹³ The observation that Pictet's commentaries are a product of their time and that social and international legal developments related to gender equality have been taken into account in the drafting of the new Commentaries has also been confirmed in other ICRC publications.²⁹⁴

These developments illustrate the ICRC's recognition that the scope of IHL and permissible conduct in armed conflict evolve over time in response to societal changes, as illustrated here by the changing position of women in society. It can thus be concluded that the scope of existing IHL must be extended to encompass queer individuals. As societal attitudes and legal protection for queer persons progress, their rights and status must be reflected in the interpretation and application of IHL. Therefore, updated Commentaries should be continuously adapted to ensure full protection and inclusion of queer persons.

²⁸⁸ *ibid* 150–151.

²⁸⁹ *ibid* 101.

²⁹⁰ Sean Watts, 'Interpretation in the Updated GCIII Commentary' (*Lieber Institute West Point*, 15 December 2020) <<https://lieber.westpoint.edu/interpretation-updated-gcii-commentary/>> accessed 8 June 2024.

²⁹¹ *ibid*.

²⁹² 'Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.' (n 285) para 1682.

²⁹³ *ibid* footnote 49.

²⁹⁴ Lindsey Cameron and others, 'The Updated Commentary on the First Geneva Convention – a New Tool for Generating Respect for International Humanitarian Law' (2015) 97 *International Review of the Red Cross* 1209, 1221; 'Updated Commentaries Bring Fresh Insights on Continued Relevance of Geneva Conventions' <<https://www.icrc.org/en/document/updated-commentaries-first-geneva-convention>> accessed 8 June 2024.

In summary, the Commentaries are a valuable subsidiary means to the sources available for defining the rules of IHL.²⁹⁵ As the ICRC plays a central role in assisting states in shaping IHL, the ICRC's commentaries have a unique position in the interpretation process and are arguably authoritative.²⁹⁶

4.3.2 ICRC's Customary IHL Study

The study on customary IHL, initiated in 1996 by the ICRC with expert collaboration, aimed to identify and clarify CIHL to enhance legal protection for victims of war.²⁹⁷ The study identified 161 rules of CIHL, forming a common core binding on all parties in armed conflict, thus strengthening global legal protection.²⁹⁸ The 2005 study consists of two volumes: the first volume analyses customary IHL rules on NIAC and IAC, and the second volume analyses relevant state practice and the practice of international organisations.²⁹⁹ Most of the rules which were identified are equally applicable in both NIAC and IAC.³⁰⁰

Furthermore, the study is a widely recognized source of reference for examining and identifying state practice and customs.³⁰¹ While CIHL is a source of IHL that is binding on states, the ICRC study is not.³⁰² Although non-binding, the study carries the authority of an organisation specifically mandated by the international community to promote the understanding and dissemination of knowledge of IHL.³⁰³

4.3.3 The Interpretation of IHL Treaties

Treaty interpretation is the process by which practitioners and academics attempt to clarify and explain the meaning of treaty provisions by providing a picture of how the law should be understood at the moment of interpretation.³⁰⁴ The Vienna Convention on the Law of Treaties (VCLT)³⁰⁵ establishes a general rule of interpretation in Article 31 and a supplementary means of interpretation in Article 32. As the VCLT interpretation system is not a strictly formulated

²⁹⁵ Watts (n 290); 'Non-State Commentaries: Law-Making or Law-Suggesting?' - Lieber Institute West Point' <<https://lieber.westpoint.edu/non-state-commentaries-law-making-law-suggesting/>> accessed 8 June 2024.

²⁹⁶ Melzer (n 166) 25–26; 'Non-State Commentaries: Law-Making or Law-Suggesting?' - Lieber Institute West Point' (n 295).

²⁹⁷ 'Customary International Humanitarian Law' <<https://www.icrc.org/en/document/customary-international-humanitarian-law-0>> accessed 23 June 2024.

²⁹⁸ *ibid.*

²⁹⁹ *ibid.*

³⁰⁰ Melzer (n 166) 23.

³⁰¹ *ibid.* 22.

³⁰² *ibid.* 23.

³⁰³ *ibid.*

³⁰⁴ Krieger and Püschmann (n 227) 152.

³⁰⁵ Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331 1980.

system of rules, it offers a certain flexibility in the application of the rules and the sources used for the interpretive process.³⁰⁶ The VCLT articles on the interpretation of treaties have attained the status of customary IL.³⁰⁷

For the interpretation of any treaty, the starting point is Article 31(1) VCLT, which states:

*“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”*³⁰⁸

All the elements listed in Article 31(1) of the VCLT must be taken into account when interpreting the VCLT.³⁰⁹

With regard to the ordinary meaning it can be assumed that the ordinary meaning of the terms of the GCs and APs do not cause any significant difficulties, as the treaties refer to relevant standard English dictionaries and are worded precisely.³¹⁰ To determine the ordinary meaning of terms, it is further necessary to consider them within their context, as the context helps to explicate their ordinary meaning.³¹¹ Article 31(2) of the VCLT sets out the elements constituting the context of the treaty within the meaning of paragraph 1 and states that the context consists of the entire text of the treaty, including the title of the treaty, its structure and chapter headings, its annexes and preambles.³¹² Furthermore, agreements³¹³ or instruments³¹⁴ made in connection with the conclusion of the GCs and their APs are also identified as context, but these do not exist in connection with the GCs and APs.³¹⁵

The meaning of treaty provisions must also be determined with regard to the object and purpose of the treaty, which pertains to the fundamental core of a treaty.³¹⁶ The overall object and purpose of the first GC is to ensure respect for and protection of the wounded, sick and dead in

³⁰⁶ Krieger and Püschmann (n 227) 155.

³⁰⁷ *ibid* 153.

³⁰⁸ Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331 1980 art 31(1).

³⁰⁹ Krieger and Püschmann (n 227) 156.

³¹⁰ *ibid*.

³¹¹ *ibid*.

³¹² VCLT art 31(2); Krieger and Püschmann (n 226) 157.

³¹³ VCLT art 31(3)(a).

³¹⁴ *ibid* 31(3)(b).

³¹⁵ Krieger and Püschmann (n 227) 157.

³¹⁶ *ibid* 156–157.

IAC.³¹⁷ The second GC seeks to protect the wounded, sick, shipwrecked and dead in naval warfare.³¹⁸ The third GC aims to ensure that POWs are treated humanely at all times, while allowing belligerents to intern captured enemy combatants to prevent their return to the battlefield.³¹⁹ The Fourth Convention is centred on the protection of civilians from arbitrary acts of the enemy during war.³²⁰

The objective of the GCs appears to be the protection of all individuals affected by armed conflict, through establishing different rules for specific groups of people such as combatants, POWs and civilians. Therefore, it is accurate to conclude that the object and purpose of the GC is to protect individuals regardless of their respective SOGIESC. This is consistent with the evolutive interpretation, which takes into account not only the intention of the parties at the time of the adoption of the treaty, but also its purpose and object.³²¹

The next aspect to be included in the interpretation process is the principle of *good faith*. The principle of *good faith* provides a link between the means of interpretation set out in Articles 31 to 33 of the VCLT and the overarching purpose of those provisions.³²² Furthermore, the principle can be seen as a recognition of the need to assume the rationality of the parties when interpreting treaties.³²³ Thus, in the process of interpretation, it must be assumed that the state parties have drafted the text in such a way as to meet certain rational and communicative standards.³²⁴

In interpreting IHL treaties concerning the protection of queer individuals, a *good faith* interpretation reveals that both general and specific protections are afforded to them.³²⁵

³¹⁷ *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd edition, International Committee of the Red Cross 2016) para 30 <<https://ihl-databases.icrc.org/ihl/full/GCI-commentary>>.

³¹⁸ ‘Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949.’ (n 285) para 30.

³¹⁹ ‘Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.’ (n 285) para 89.

³²⁰ Introduction to the ‘Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.’ (n 285).

³²¹ Lamessa Gudeta Guder, ‘The Nature of Evolutive Treaty Interpretation: Does Evolutive Treaty Interpretation Operating under VCLT?’ (2022) 8 *Journal of Asian and African Social Science and Humanities* 83, 88.

³²² Ulf Linderfalk, ‘What Are the Functions of the General Principles? Good Faith and International Legal Pragmatics’ (20 April 2017) 7 <<https://papers.ssrn.com/abstract=2955648>> accessed 22 June 2024.

³²³ *ibid* 8.

³²⁴ *ibid*.

³²⁵ Margalit (n 14); Nivedita Raju and Laura Bruun, ‘Integrating Gender Perspectives into International Humanitarian Law’ (Stockholm International Peace Research Institute 2023) <<https://www.sipri.org/publications/2023/sipri-insights-peace-and-security/integrating-gender-perspectives-international-humanitarian-law>> accessed 12 May 2024; Nieratzky (n 19).

However, since queer people are not explicitly mentioned in the GCs or their APs, their protection depends on this *good faith* interpretation of the existing rules.³²⁶ This reflects a petitioner's stance, which, in my view, remains insufficient.

Furthermore, subsequent developments must be taken into account when interpreting treaty provisions, as the VCLT acknowledges the necessity to consider the passage of time through subsequent agreements, subsequent practice and other rules of IL.³²⁷ With regard to the GCs and their APs, subsequent practice and other rules of IL prove to be relevant.³²⁸ The threshold for subsequent practice to qualify as an authentic means of interpretation is quite high, as it must establish the agreement of all parties.³²⁹ In addition, the absence of objection or inaction may also be a factor in establishing agreement.³³⁰ Again, however, the threshold is high.³³¹ State practice is a manifestation of the joint understanding of the parties, which has its own value and which may differ from the intentions at the time of the conclusion of the treaty.³³²

However, subsequent practice with regard to the protection of queer people under the GC regime is still almost non-existent, as mainstream IHL discourse does not address queer people and does not monitor their well-being and potential violations.³³³

As mentioned above, all relevant provisions of IL pursuant to Article 31(3)(c) VCLT must be taken into account.³³⁴ Article 31(3)(c) VCLT aims to achieve concordance between different parts of IL and is proving useful in the interpretation of IHL, as many branches of IL, such as ICL and IHRL, were still in their early stages when the Pictet Commentaries were published.³³⁵ Interpretive efforts by international criminal tribunals and human rights bodies are particularly important in confirming or determining the meaning of the GCs.³³⁶ An illustrative example is

³²⁶ Raju and Bruun (n 325) 6, 7.

³²⁷ VCLT art 31(3); Krieger and Püschmann (n 226) 157, 158.

³²⁸ Krieger and Püschmann (n 226) 158; subsequent agreements with regard to the GCs and their APs does not exist, which is why it cannot be considered relevant.

³²⁹ *ibid* 158, 159.

³³⁰ *ibid* 159, 160.

³³¹ *ibid* 160.

³³² Stefan Kadelbach, 'International Law Commission and Role of Subsequent Practice as a Means of Interpretation under Articles 31 and 32 VCLT' (*QIL QDI*, 31 January 2018) <<https://www.qil-qdi.org/international-law-commission-and-role-of-subsequent-practice-as-a-means-of-interpretation-under-articles-31-and-32-vclt/>> accessed 30 June 2024.

³³³ For detailed explanations on monitoring see chapter 4.4.2.

³³⁴ VCLT art 31(3)(c).

³³⁵ Krieger and Püschmann (n 227) 160, 161.

³³⁶ *ibid* 167.

the definition of torture in the GCs, which were developed primarily by IHRL bodies.³³⁷ It should be noted that an important caveat is that only other treaty provisions applicable in the relationship between the parties can affect the interpretation of a particular treaty, but given the universal ratification of the GCs, reliance on them is a given in all circumstances.³³⁸

The fact that developments in IHRL can be taken into account in the interpretation of the GCs is particularly important because people with diverse SOGIESC fall within the scope of protection of various human rights.³³⁹

If the interpretation under Article 31 requires confirmation or clarification because the meaning is ambiguous or unclear or leads to a manifestly absurd or unreasonable result, recourse may be had to the supplementary means of interpretation under Article 32. In addition, the complementary means of Article 32 can provide crucial insights and are essential to understanding the evolving application of the GCs. Although Article 32 suggests that these supplementary means are optional and of secondary importance, they are of great practical importance in the interpretation process.³⁴⁰

State practice which does not fulfil the requirement of subsequent practice within the meaning of Article 31 may be considered as a complementary means.³⁴¹ State practice includes all acts of competent state authorities. In the case of conflicting positions between different state authorities or instances of state practice, this practice is considered internally inconsistent and may be given less weight.³⁴² Conduct that violates treaty provisions cannot be regarded as a practice influencing the interpretation of the rule.³⁴³ In addition, any conduct that meets the VCLT's definition of a subsequent practice must be carried out in application of the treaty.³⁴⁴ Furthermore, the conduct of non-state actors can also be accepted as a complementary practice in the interpretation process.³⁴⁵ The ICRC is of particular relevance in this context, as it has

³³⁷ *ibid.*

³³⁸ Heike Krieger and Jonas Püschmann (eds), *Law-Making and Legitimacy in International Humanitarian Law* (Edward Elgar Publishing 2021) 160; the situation is distinct with regard to the APs, which have not been universally ratified.

³³⁹ For a detailed discussion on developments within IHRL, see the chapter 2.2.

³⁴⁰ Krieger and Püschmann (n 227) 162, 163.

³⁴¹ *ibid.* 164.

³⁴² *ibid.*

³⁴³ *ibid.* 165.

³⁴⁴ *ibid.*

³⁴⁵ *ibid.* 166, 167.

been entrusted by state parties to the GCs with the role of guardian of IHL.³⁴⁶ The practice of the ICRC has significantly influenced the practice of states and should therefore be taken into account in the interpretation of the GCs.³⁴⁷ Moreover, it is not only the practice of the ICRC but also its interpretative efforts that can play a decisive role in the interpretation of the GCs.³⁴⁸

As previously stated, there are numerous arguments in favor of including queer individuals in the GCs regime. In addition to the object and purpose of the treaties, *good faith* interpretation and developments within IHRL also support the inclusion of queer individuals. However, the absence of subsequent practice is a factor that weighs against the inclusion of queer people.

In conclusion, queering interpretation while acknowledging the evolutive nature of IHL is one of the most effective ways to further develop IHL towards a queer-inclusive branch of law.

4.4 Current IHL's Protection of Queer People

4.4.1 Introduction

In the following chapter, different articles, principles and developments of IHL are analysed in order to queer IHL. Initially, it is important to note that the GCs do not mention queer people and are based on a gender binary, which means that they do not address the specific needs and vulnerabilities of individuals with diverse SOGIESC.³⁴⁹ The inherent gender bias on which the GC regime is built reflects gendered assumptions and perpetuates stereotypes based on binary classifications of men and women in specific gendered roles.³⁵⁰ For example, the GCs do not distinguish between sex and gender and characterize individuals based on stereotypes associated with their sex.³⁵¹ The assumption that experiences in conflict situations are mainly made by men becomes evident from the carveout of specific provisions for women.³⁵² In these specific provisions, women are often portrayed as pregnant or nursing mothers or as victims, while men are portrayed as combatants.³⁵³ These binary rules result in excluding the experiences of queer individuals in armed conflict.³⁵⁴ IHL is therefore inherently anti-queer, as

³⁴⁶ Yves Sandoz, 'The International Committee of the Red Cross as Guardian of International Humanitarian Law - ICRC' (17:27:18.0) <<https://www.icrc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm>> accessed 30 June 2024.

³⁴⁷ Krieger and Püschmann (n 226) 168.

³⁴⁸ *ibid.*

³⁴⁹ Nieratzky (n 19).

³⁵⁰ Raju and Bruun (n 325) 3.

³⁵¹ *ibid* 3–4.

³⁵² *ibid* 4.

³⁵³ *ibid.*

³⁵⁴ *ibid* 3.

it operates on the assumption that people involved in armed conflict conform to the binary understanding of gender.

Even though IHL does not explicitly mention SOGIESC, the rights enshrined pertain to all persons affected by armed conflict, regardless of their SOGIESC.³⁵⁵ *Margalit* highlights that protection of queer individuals can be derived from the fundamental principle of humane treatment and the prohibition of adverse distinction.³⁵⁶ Additionally, certain articles within the GCs regime and rules of CIHL provide protection against discrimination on the basis of SOGIESC and allow for differential measures.³⁵⁷

Moreover, there is a growing recognition within the IHL discourse that armed conflict affects women, men, girls and boys differently. For example, the ICRC Commentary on the GV I states:

*“In addition, there is a growing acknowledgement that women, men, girls and boys are affected by armed conflict in different ways. Sensitivity to the individual’s inherent status, capacities and needs, including how these differ among men and women due to social, economic, cultural and political structures in society, contributes to the understanding of humane treatment under common Article 3.”*³⁵⁸

Another aspect which is addressed in an ICRC Commentary is the recognition that women, men, girls and boys may have specific needs, capacities and perspectives due to the different impacts of armed conflict and detention.³⁵⁹ In particular, the fact that women have special needs and may be exposed to particular physical and psychological risks is recognized.³⁶⁰ Furthermore, sexual and gender minorities are mentioned by the 2020 Commentary of GC II. It is stated here that persons deprived of their liberty are vulnerable to ill-treatment, including sexual violence, with women sexual and gender minorities being at particularly high risks.³⁶¹

³⁵⁵ *Margalit* (n 14) 247, 249.

³⁵⁶ *ibid* 247.

³⁵⁷ *ibid* 250, chapters 4.4.2 to 4.4.4 provide a detailed analysis of Articles 1 and 3 and the fundamental principle of IHL.

³⁵⁸ *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (n 317) para 553.

³⁵⁹ ‘Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.’ (n 285) para 1682.

³⁶⁰ *ibid*.

³⁶¹ ‘2020 Commentary of Article 14 of Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.’ para 1664 <<https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-14/commentary/2020>> accessed 30 July 2024.

As explained in chapter 4.3.1, the Commentaries on the Geneva Conventions are “a product of the social and historical context of the time”³⁶², which is why the statements in the ICRC Commentaries vary according to the date of their publication.

While there have been limited attempts to highlight the specific living conditions and circumstances of queer individuals during armed conflict within mainstream legal discourse, a crucial first step involves collecting and analysing comprehensive data on the diverse experiences of queer people.³⁶³ The knowledge that can be gained from the information collected must impact the planning, conduct and evaluation of military operations in accordance with the obligations under the applicable IHL.³⁶⁴

The collection and analysis of data on the situation of queer people can be achieved by monitoring queer civilians and POWs, as civilians and POWs are already monitored in various reports by different international organisations.³⁶⁵ However, the terms “queer”, “LGBT”, “gender”, “identity”, “trans”, or any variation thereof do not appear in the reports of the most influential organizations, the United Nations and the Organization for Security and Co-operation in Europe (OSCE).³⁶⁶ This implies a protection gap that extends to monitoring.³⁶⁷ It is evident that monitoring the situation of queer POWs and civilians is only a preliminary step in addressing the needs of queer individuals, as it does not eradicate the root cause of discrimination and marginalisation, but merely illuminates it. Nevertheless, by monitoring the situation of queer individuals during conflict, visibility is created, which in turn facilitates the pursuit of the goal of ending impunity and the lack of legal protection.

³⁶² ‘Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.’ (n 287) footnote 49.

³⁶³ *IHL and Gender - Swedish Experiences* (Swedish Red Cross 2015) 42.

³⁶⁴ *ibid.*

³⁶⁵ Organization for Security and Co-operation in Europe, ‘Fourth Interim Report on Reported Violations of International Humanitarian Law and International Human Rights Law in Ukraine’ <<https://www.osce.org/odihr/560325>> accessed 2 June 2024; United Nations in Ukraine, ‘OHCHR Report on the Treatment of Prisoners of War and Persons Hors de Combat in the Context of the Armed Attack by the Russian Federation against Ukraine: 24 February 2022 – 23 February 2023’ <<https://ukraine.un.org/en/224749-ohchr-report-treatment-prisoners-war-and-persons-hors-de-combat-context-armed-attack-russian>> accessed 2 June 2024; United Nations in Ukraine, ‘Protection of Civilians in Armed Conflict — April 2024’ <<https://ukraine.un.org/en/268279-protection-civilians-armed-conflict-%E2%80%94-april-2024>> accessed 2 June 2024.

³⁶⁶ *ibid.*

³⁶⁷ Nieratzky (n 19).

It is uncertain whether IHL provides a legal basis from which a duty to monitor the situation of queer civilians and POWs can be derived. Chapter 4.4.2 examines what Common Article 1 encompasses and whether it provides a legal basis for monitoring and further specific measures.

Common Article 3, which stipulates that individuals who are not or no longer participating in hostilities must be treated humanely in all circumstances, is then analysed. The requirement of humane treatment as set out in Article 3 must be applied without adverse distinction on the basis of certain non-exhaustive criteria. In particular, the question of whether the phrase “or any similar criteria” in Common Article 3 also includes people who identify as queer is analysed.

Next, the fundamental principles of IHL are analysed. Chapter 4.4.4 examines the gendered and anti-queer assumptions that underpin these principles and whether they can be interpreted to ensure the safety and protection of people with diverse SOGIESC.

Despite the growing body of evidence indicating the human rights plight of queer individuals, no special protections are afforded to them. This thesis argues that such an omission contradicts the core objectives of IHL.³⁶⁸ Given the well-documented disproportionate suffering of queer people during armed conflict, there is an urgent need to develop IHL to effectively safeguard them. Due to limitations, this thesis briefly discusses the existing special protection for certain groups of people and then argues why special protection for queer people is consistent with the principle of impartiality. This principle, which is rooted in IHL, will be examined to determine whether IHL and humanitarian assistance can provide special protection to queer individuals while upholding the principle of impartiality.³⁶⁹

Before analysing the current legal framework of IHL, it is important to note that IHL is deliberately limited in scope.³⁷⁰ IHL applies only to acts that have a nexus to the armed conflict, i.e. it does not regulate all acts that occur during the temporal scope of a conflict, but only those that meet the legal criteria.³⁷¹ For example, IHL does not prohibit acts such as common theft or intimate partner violence, even though these may be exacerbated by the conflict environment.³⁷²

³⁶⁸ The purpose is to limit and prevent human suffering in times of armed conflict.

³⁶⁹ ‘Humanitarian Principles’ (UNHCR, 30 January 2024) <<https://emergency.unhcr.org/protection/protection-principles/humanitarian-principles>> accessed 5 August 2024.

³⁷⁰ International Committee of the Red Cross (ICRC) (n 180) 34.

³⁷¹ *ibid.*

³⁷² *ibid.*

4.4.2 Common Article 1: to Respect and Ensure Respect for the Conventions

4.4.2.1 Introduction to Common Article 1

The duty to respect and to ensure respect, as set out in Common Article 1 of the GCs and Article 1 of AP I³⁷³, is customary IHL and obliges states to respect and to ensure respect for IHL in all circumstances.³⁷⁴ This obligation applies during IAC and NIAC.³⁷⁵ Beyond the legal maxim “pacta sunt servanda”, which mandates that states parties fulfil all their treaty obligations, Article 1 also entails the principle of non-reciprocity.³⁷⁶ This principle, implied by the phrase “in all circumstances”, dictates that combatants must comply with their humanitarian obligations even if the adversary violates them.³⁷⁷ Consequently, states must use their influence to prevent and end violations of IHL and refrain from encouraging violations by other parties.³⁷⁸ Furthermore, states parties to the Conventions, whether or not they are themselves parties to an armed conflict, undertake to ensure respect for the Conventions by other states and non-state parties to an armed conflict.³⁷⁹

The ICJ has held that the duty to respect and ensure respect constitutes a general principle of IHL, which means that it is applicable in all armed conflicts irrespective of treaty obligation.³⁸⁰ The principle applies first and foremost to state parties, to the state itself, to its armed forces, to other persons and groups acting on its behalf, and to its population as a whole.³⁸¹ Common Article 1 establishes not only a right but also an international legal obligation to act.³⁸² It imposes a “duty of diligence” rather than an obligation to achieve a particular result.³⁸³ The obligation of due diligence, also called the obligation of means, requires

³⁷³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art 1(1).

³⁷⁴ ‘Respect for International Humanitarian Law’ r 139 <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule139>> accessed 2 June 2024.

³⁷⁵ *ibid.*

³⁷⁶ Melzer (n 166) 268.

³⁷⁷ ‘Principle of Reciprocity’ <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule140#>> accessed 27 July 2024; Melzer (n 166) 268.

³⁷⁸ ‘Ensuring Respect for International Humanitarian Law Erga Omnes’ <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule144#>> accessed 27 July 2024; ‘Contemporary Challenges to IHL – Respect for IHL: Overview | International Committee of the Red Cross’ (23 May 2016) <<https://www.icrc.org/en/document/respect-international-humanitarian-law>> accessed 27 July 2024.

³⁷⁹ ‘2016 Commentary of Article 1 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.’ para 119 <<https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-1/commentary/2016>> accessed 27 July 2024.

³⁸⁰ Melzer (n 166) 268.

³⁸¹ ‘2016 Commentary Article 1 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.’ para 118 <<https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-1/commentary/2016>> accessed 27 July 2024.

³⁸² Knut Dörmann and Jose Serralvo, ‘Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations’ (2014) 96 *International Review of the Red Cross* 707, 723.

³⁸³ *ibid* 723, 724.

third states only to choose with due diligence appropriate measures to induce the parties to the conflict to comply with the law.³⁸⁴ Whether or not it achieves the desired result, states are obliged to adopt a particular course of action.³⁸⁵ The relationship between states is important in determining the scope of due diligence.³⁸⁶ A State with close political and military ties with one of the parties to a conflict has a greater obligation to ensure that the state complies with IHL.³⁸⁷ Possible measures to ensure compliance with IHL by states not party to an armed conflict include diplomatic pressure, such as protests, public condemnation and referral to international bodies such as the International Fact-Finding Commission or the International Criminal Court.³⁸⁸ Coercive measures, such as the expulsion of diplomats and cooperation with international organizations, can also be used, provided these actions adhere to international law.³⁸⁹

Article 1 includes both negative and positive obligations.³⁹⁰ The negative obligation requires states to refrain from certain behaviours, such as not encouraging other states or groups in a conflict to violate treaty provisions.³⁹¹ To illustrate the negative obligation, states must refrain from transferring weapons if it is likely that these weapons will be used to violate IHL.³⁹²

The positive obligation requires states to take proactive steps to end violations and to restore a belligerent party's compliance with the Conventions, primarily by using their influence on that party.³⁹³ This positive obligation includes both internal and external dimensions. The internal positive obligation entails ensuring the domestic implementation and application of IHL, while the external positive obligation involves taking measures to ensure that others comply with the GCs and, arguably, the entire body of IHL.³⁹⁴ States, whether engaged in armed conflict or not, have a positive obligation to intervene with states over which they have some influence to stop their violations of IHL.³⁹⁵

³⁸⁴ *ibid.*

³⁸⁵ *ibid* 724.

³⁸⁶ *ibid.*

³⁸⁷ *ibid.*

³⁸⁸ *ibid* 725, 726.

³⁸⁹ *ibid* 726.

³⁹⁰ '2016 Commentary of Article 1 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.' (n 379) para 157.

³⁹¹ *ibid* 158.

³⁹² *ibid* 162.

³⁹³ *ibid* 164.

³⁹⁴ Dörmann and Serralvo (n 382) 709; Melzer (n 166) 268.

³⁹⁵ Dörmann and Serralvo (n 382) 728.

This positive external obligation is evidenced specifically in Article 89 of AP I, which provides “[i]n situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter”³⁹⁶. The positive external obligation is now considered customary law, but the extent of the external dimension remains disputed.³⁹⁷

In addition to the obligation to end violations of IHL, there could arguably be an obligation to prevent violations of IHL from occurring. Particularly in the light of the atrocities committed during the Second World War and in the light of the object and purpose of Article 1, there are many arguments in favor of an obligation to prevent.³⁹⁸ Furthermore, numerous legal scholars have argued in favor of such an obligation.³⁹⁹ However, it is almost impossible to clarify in the abstract the criteria according to which states and non-state parties to a conflict can be held responsible under IL for failing to prevent violations of IHL.⁴⁰⁰ Notably, the primary objective of the GCs is to prevent violations of established rules, which makes Common Article 1 of paramount importance.⁴⁰¹ Since Article 1 obliges states to repress violations of IHL in order to ensure that they are not repeated in the future, the prevention aspect is inextricably linked to the duty to respect.⁴⁰²

In conclusion, the author of the thesis is of the opinion that Common Article 1 encompasses an external positive obligation to not only cease but also prevent violations from happening.

4.4.2.2 Queering the Duty to Respect and Ensure Respect

This chapter “queers” Common Article 1 by exploring how it can be interpreted and applied to address the specific vulnerabilities and needs of persons with diverse SOGIESC in armed conflict. As previously identified IHL protects both queer civilians and queer POWs, as the rights enshrined in the GC pertain to all people. Therefore, due to the particular vulnerability of queer people, states must take measures to protect queer civilians and POW in order to better

³⁹⁶ Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art 89.

³⁹⁷ ‘Ensuring Respect for International Humanitarian Law Erga Omnes’ (n 378); ‘2016 Commentary of Article 1 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.’ (n 379) paras 153, 156.

³⁹⁸ Dörmann and Serralvo (n 382) 728.

³⁹⁹ *ibid* 729.

⁴⁰⁰ *ibid*.

⁴⁰¹ *ibid* 735, 736.

⁴⁰² *ibid* 729, 730.

fulfil their obligations under IHL. Drawing on the insights of legal scholars *Nieratzky* and *Margalit*, it examines what states can do to safeguard queer people.

First, the negative obligation of Article 1 requires states not to encourage or support the armed forces of a party to a conflict - whether by financing, training or providing operational or material support - if they know that such support might be used to target persons on the basis of their actual or perceived SOGIESC.⁴⁰³

Second, the positive internal obligation includes monitoring compliance and taking action to address violations against queer people by their own military personnel, such as implementing specific measures to protect them from discrimination, attacks and violence.⁴⁰⁴ Such measures include training military leaders and personnel, fostering a queer-inclusive culture within the armed forces, and conducting military operations with a queer perspective.⁴⁰⁵ To achieve this, states must issue clear orders, enforce internal disciplinary measures that influence the external behavior of armed forces and establish accountability mechanisms.⁴⁰⁶ Additionally, proper orders have to be issued, and the armed forces should be trained and sensitized through awareness-raising activities for commanders, security forces and the public.⁴⁰⁷

Third, the positive external obligation requires states and state-empowered entities to take proactive steps to end and prevent violations of IHL. Hence, specific measures must be taken to end violence and discrimination against queer people and restore compliance with the Convention by the belligerent party. Taking proactive steps to ensure that the needs of queer people are met and to protect and safeguard them is covered by Article 1.

Additionally, monitoring the situation of queer civilians and POWs is important to determine whether violations are taking place or are about to take place, as well as to ensure that ongoing violations are promptly identified and addressed. *Nieratzky* argues that states have a duty to monitor and implement specific measures similar to those for female POWs, such as separate

⁴⁰³ Margalit (n 14) 252.

⁴⁰⁴ '2016 Commentary of Article 1 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.' (n 379) para 152.

⁴⁰⁵ 'International Humanitarian Law and a Gender Perspective in the Planning and Conduct of Military Operations | International Committee of the Red Cross' (22 March 2024) 20, 21 <<https://www.icrc.org/en/publication/4741-international-humanitarian-law-and-gender-perspective-planning-and-conduct-military>> accessed 28 July 2024.

⁴⁰⁶ *ibid* 21.

⁴⁰⁷ Margalit (n 14) 252.

dormitories and needs-based screening procedures, to protect the rights of queer POWs.⁴⁰⁸ Hence, monitoring queer POWs is part of the obligation to ensure respect as set out in Article 1, as it requires the use of appropriate available means to prevent and repress violations of IHL.⁴⁰⁹

In conclusion, queering of Common Article 1 underscores the need to interpret and apply IHL to address the specific vulnerabilities and rights of persons with different SOGIESC. By recognizing these needs and implementing targeted protective measures, states can better fulfil their IHL obligations and ensure the humane treatment and protection of all persons affected by armed conflict. Article 1 not only covers queer people, but also opens up the possibility of specific monitoring and the implementation of tailored measures to adequately protect them.

4.4.3 Common Article 3: the Principle of Humane Treatment and the Prohibition of Adverse Distinction

4.4.3.1 Introduction

The four GCs share a Common⁴¹⁰ Article 3 which is seen as a “convention in miniature” and is often held to be the single most important contemporary treaty provisions of IHL.⁴¹¹ Its fundamental aim is to ensure the physical integrity of those who have fallen into the hands of the enemy, prohibiting torture and inhuman treatment.⁴¹² It is historically significant as it is the first agreement between states on the regulation of NIAC.⁴¹³ It has been recognised as a “minimum yardstick”.⁴¹⁴ The principle of humane treatment and the prohibition of adverse distinction, as set out in Article 3, have both acquired the status of CIHL.⁴¹⁵ Consequently, these

⁴⁰⁸ Nieratzky (n 19) 2.

⁴⁰⁹ Margalit (n 14) 252.

⁴¹⁰ The Article is common to the four Geneva Conventions. The text is identical in these Conventions, with the exception of the Second Convention, which refers to “wounded, sick and shipwrecked”, whereas the other three Conventions refer only to “wounded and sick”.

⁴¹¹ Melzer (n 10) 256; the principle of humane treatment without adverse discrimination is also included in AP II.

⁴¹² ‘Humane Treatment | How Does Law Protect in War? - Online Casebook’ <https://casebook.icrc.org/a_to_z/glossary/humane-treatment> accessed 29 July 2024.

⁴¹³ ‘2016 Commentary of Article 3 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.’ (n 285) para 351.

⁴¹⁴ ‘Introduction’ <<https://ihl-databases.icrc.org/en/customary-ihl/v1/in#>> accessed 29 July 2024.

⁴¹⁵ ‘Humane Treatment’ <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule87>> accessed 8 August 2024; ‘Non-Discrimination’ <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule88>> accessed 8 August 2024; the principle of humane treatment is also defined in various other Articles of the GCs and their APs such as Art. 12(1) GC I, Art. 12(1) GC II, Art. 13 GC III, Art. 5, 27(1), Art. 75(1) AP I and Art. 4(1) AP II; in addition, the prohibition of adverse distinction can also be found in various other Articles of the GCs and their APs such as Art. 16 GC III, Art. 13 GC IV, the preamble to AP I and Art. 75(1) AP I, Art. 4(1) APII.

principles apply in all conflicts, whether international or non-international, and bind all parties, including states and non-state actors.⁴¹⁶

The principle of humane treatment is central to IHL and ensures that all persons not actively participating in a conflict are treated humanely.⁴¹⁷ It applies in all circumstances and guarantees humane treatment, regardless of status or previous activity.⁴¹⁸ This absolute obligation explicitly prohibits acts that the GCs deem inhumane.⁴¹⁹ Civilians and detained combatants are entitled to respect for their physical and mental integrity, their honour, family rights, religious convictions and practices, and their manners and custom.⁴²⁰ Hence, Article 3 ensures humane treatment for all civilians, medical and religious personnel and persons no longer engaged in the conflict – regardless of their SOGIESC.⁴²¹

The prohibition of adverse distinction, on the other hand, is not absolute, as it permits non-adverse distinctions. While discrimination is prohibited, distinctions may be made to give priority to those in most urgent need of care.⁴²² This approach allows for the differentiation in treatment that is necessary to ensure humane treatment, as treatment must be tailored to the individual's specific needs.⁴²³ Adverse distinction, however, is prohibited on the grounds enumerated on the non-exhaustive list set forth in Common Article 3.⁴²⁴ Article 3(1) states that adverse distinction is prohibited on the following grounds:

“Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without

⁴¹⁶ ‘2020 Commentary of Article 3 of Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.’ para 539 <<https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-3/commentary/2020>> accessed 30 July 2024.

⁴¹⁷ Melzer (n 10) 20.

⁴¹⁸ Shaw (n 222) 1032.

⁴¹⁹ Margalit (n 14) 250.

⁴²⁰ ‘Humane Treatment | How Does Law Protect in War? - Online Casebook’ (n 412).

⁴²¹ ‘2016 Commentary Article 3 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.’ paras 521, 522, 535 <<https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016>> accessed 2 June 2024; Alon Margalit, ‘Still a Blind Spot: The Protection of LGBT Persons during Armed Conflict and Other Situations of Violence’ (2018) 100 International Review of the Red Cross 237, 250; queer combatants do not fall within the scope of Article 3 because of their status as combatants; identifying or being perceived as queer has no bearing on the question of whether someone is a civilian or a combatant.

⁴²² ‘Non-Discrimination’ (n 415).

⁴²³ ‘2020 Commentary of Article 3 of Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.’ (n 416) 612.

⁴²⁴ Margalit (n 14) 251.

any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”

It is evident that LGBT+ individuals are not explicitly mentioned in Article 3, and there is no overt recognition afforded to SOGIESC as a ground upon which adverse distinction is prohibited.⁴²⁵ In order to assess whether adverse distinction on SOGIESC is prohibited, the ground “sex” or phrase “any other similar criteria” needs to be examined.

4.4.3.2 Queering the Principle of Humane Treatment and the Prohibition of Adverse Distinction

The question as to whether SOGIESC can be regarded as a ground on which an adverse distinction is prohibited is a multi-faceted one, since SOGIESC is not mentioned. In order to qualify SOGIESC as a ground, either “sex” or “and any other similar criteria” must be affirmatively interpreted with the means of interpretation and therefore the protection of queer people is dependent on the positive result of an interpretation based on *good faith*.

Since this principle of humane treatment protects all persons who are not or are no longer actively participating in hostilities, there is no question that all protected persons, including queer persons, must be treated humanely.⁴²⁶ However, in relation to the prohibition of adverse distinction, issues arise when queer people are arbitrarily detained on the basis of their real or perceived SOGIESC, or when lawfully interned civilians or combatants placed *hors de combat* are subjected to discrimination or violence during detention.⁴²⁷

The ground “sex” has been interpreted in the context of IHRL to include SO.⁴²⁸ However, this approach is not a transformative approach which “queers” the law, but only mimics what is

⁴²⁵ Vaughn Rossouw, “‘Or Any Other Similar Criteria’: Towards Advancing the Protection of LGBTQI Detainees against Discrimination and Sexual and Gender-Based Violence during Non-International Armed Conflict’ (2020) 102 International Review of the Red Cross 765.

⁴²⁶ ‘2016 Commentary of Article 3 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.’ (n 285) paras 518–539.

⁴²⁷ Vaughn Rossouw, “‘Or Any Other Similar Criteria’: Towards Advancing the Protection of LGBTQI Detainees against Discrimination and Sexual and Gender-Based Violence during Non-International Armed Conflict’ (2020) 102 International Review of the Red Cross 765, 770, 771.

⁴²⁸ ‘Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law (2nd Edition)’ (n 70) 54–55.

considered the norm.⁴²⁹ The thesis therefore assumes that the ground "sex" does not include all queer people, but could merely be considered as covering SO.⁴³⁰

With regard to the phrase "any other similar criteria", the following arguments should be considered: The ICRC Commentaries on Common Article 3 lists a number of grounds not mentioned in the text of the Convention that would also be prohibited grounds for adverse distinction.⁴³¹ These include age, state of health, level of education and family connection.⁴³² Furthermore, the prohibited grounds for adverse distinction added in Article 2(1) of AP II would also qualify as "other similar criteria" prohibited under Common Article 3.⁴³³ Article 2(1) AP II lists language, political or other opinion and national or social origin.⁴³⁴ However, the ICRC Commentaries on Common Article 3 does not use the word SOGIESC⁴³⁵ at any point. Only in a single footnote, referring to the 1997 Humanitarian Charter in relation to the principle of impartiality, "sexual orientation" is mentioned as a reason why no one should be discriminated against.⁴³⁶ For *Rossouw*, it is a missed opportunity that the ICRC does not explicitly mention SOGI in their Commentaries, as violence and discrimination against queer people is not only well documented historically, but is also one of the most pressing humanitarian challenges today.⁴³⁷

Rossouw has affirmatively interpreted the phrase "any other similar criteria" in order to qualify SOGI as falling within the scope of the phrase. He defines the concept of "criteria" as differential characteristic traits present in all human beings, all of which set individuals apart from one another in societal standing.⁴³⁸ He suggests that the phrase "any other similar criteria"

⁴²⁹ Matteo Winkler, 'Queering the Law of Armed Conflict' (13 December 2022) 6, 8 <<https://papers.ssrn.com/abstract=4301218>> accessed 4 July 2024.

⁴³⁰ IHRL treaties that contain references to "other status" have been interpreted to include GIs, which should also be seen as an attempt at interpretation outside the realm of queering the law.

⁴³¹ Vaughn Rossouw, "'Or Any Other Similar Criteria': Towards Advancing the Protection of LGBTQI Detainees against Discrimination and Sexual and Gender-Based Violence during Non-International Armed Conflict' (2020) 102 *International Review of the Red Cross* 765, 771; for example '2016 Commentary of Article 3 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.' para 569 <<https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016>> accessed 2 June 2024.

⁴³² '2016 Commentary of Article 3 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.' (n 285) 569.

⁴³³ *ibid* 570.

⁴³⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art 2(1).

⁴³⁵ Or any variation of SOGIESC, like queer or LGBT.

⁴³⁶ '2020 Commentary Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.' footnote 778 <<https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-3/commentary/2020>> accessed 30 July 2024; in chapter 4.4.5 the principle of impartiality will be discussed.

⁴³⁷ *Rossouw* (n 16) 766. 771.

⁴³⁸ *ibid* 772.

is “an all-encompassing and flexible blanket of protection” that will be applicable to all spheres of differential criteria, which include SOGI.⁴³⁹ He further emphasizes that detaining powers are not allowed to take advantage of the fact that criteria are not listed to avoid providing humane treatment on the basis of the omitted criteria.⁴⁴⁰ In addition, he argues that “humane treatment” is not explicitly defined in IHL, but is understood as context-specific and influenced by societal changes, resulting in a changing scope of Article 3.⁴⁴¹ Recognizing the differential impact of armed conflict on different groups and communities, including LGBT+ people, also contributes to the understanding of humane treatment.⁴⁴² He argues that a detaining power - regardless of a person’s knowledge of SOGI - is obliged to provide equal and non-discriminatory protection under Article 3 as the core of “humane treatment”.⁴⁴³

Margalit argues that the inclusion of queer people is consistent with Common Article 3’s status as a “minimum yardstick”.⁴⁴⁴ Violating a person’s human dignity and denying them equal protection of the law on the basis of SOGIESC undermines the *raison d’être* of minimum humanitarian protection, which applies to all persons not taking part in hostilities.⁴⁴⁵ The fundamental protections of Common Article 3 are granted to everyone in a universal manner, and they cannot be restricted on the basis of religious or public morals which means that LGBT+ people cannot be legally discriminated against.⁴⁴⁶ The affirmative interpretation of Common Article 3 is supported by the YP. The YP state that SOGI is integral to every person’s dignity and humanity.⁴⁴⁷ In addition, the 2022 report of the IE on protection against violence and discrimination based on SOGI supports the affirmative interpretation. The 2022 report states that if a party to an armed conflict resorts to discriminatory or violent acts against an individual solely based on their actual or perceived SOGI, such an act should be viewed as adverse distinction.⁴⁴⁸ The reports also argues that these acts constitute a breach of IHL and, depending on their nature, motivation and nexus to the conflict, may amount to war crimes as set out in the Rome Statute.⁴⁴⁹

⁴³⁹ *ibid* 773.

⁴⁴⁰ *ibid* 772–773.

⁴⁴¹ *ibid* 774–775.

⁴⁴² *ibid* 774.

⁴⁴³ *ibid* 777.

⁴⁴⁴ *Margalit* (n 14) 251.

⁴⁴⁵ *ibid*.

⁴⁴⁶ *ibid*.

⁴⁴⁷ ‘Introduction to the Yogyakarta Principles’ (n 73).

⁴⁴⁸ IE SOGI (n 8) para 11.

⁴⁴⁹ *ibid* para 11.

As IHRL remains applicable during armed conflict, it must be recognised that IHL has an equivalent to the prohibition of adverse distinction, namely the principle of non-discrimination.⁴⁵⁰ The prohibition of discrimination under the IHRL, as well as the prohibition of discrimination in the imposition of restrictions on non-derogable human rights in times of emergency, is absolute.⁴⁵¹ Hence, parties to an armed conflict have the obligation to treat all people with diverse SOGIESC humanely and to prevent any discrimination and abuse.⁴⁵²

Article 3 has, in addition to the non-discrimination aspect, an aspect that allows for differential treatment of vulnerable persons.⁴⁵³ Feminist efforts have established that non-adverse distinction on the basis of sex requires substantive and not merely formal equality, allowing measures to achieve substantive equality.⁴⁵⁴ Furthermore, the 2020 ICRC Commentary states that a person's state of health, age or sex has traditionally been recognised as both justifying and requiring differential treatment.⁴⁵⁵ In light of the growing knowledge that queer people are exposed to severe violence, and discrimination in times of armed conflict and are therefore a particularly vulnerable group, Article 3 should be interpreted to mean that a diverse SOGIESC justifies and requires differential treatment in the sense of favorable treatment.

4.4.4 Queering the Fundamental Principles of IHL

This chapter queers the fundamental principles of IHL presented in chapter 4.2.5.

The principle of distinction requires actors to armed conflicts to distinguish between civilians and combatants and direct their operations only against military objectives.⁴⁵⁶ The act of distinguishing relies on gendered assumption, as it based on social indicators such as age and gender.⁴⁵⁷ This means that when there is uncertainty surrounding a targeting decision, women are more likely to be incorrectly identified as civilians, whereas men are more likely to be assessed as combatants.⁴⁵⁸ This leads to an overt targeting of men, which are seen to be in a military-fighting age.⁴⁵⁹

⁴⁵⁰ 'Non-Discrimination' (n 415).

⁴⁵¹ IE SOGI (n 8) para 12.

⁴⁵² Margalit (n 14) 256.

⁴⁵³ '2020 Commentary of Article 3 of Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.' (n 416) para 615.

⁴⁵⁴ Droege and Giorgou (n 238) 1819; this applies to queer people *mutatis mutandis*.

⁴⁵⁵ '2020 Commentary of Article 3 of Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.' (n 416) 615.

⁴⁵⁶ 'Distinction | How Does Law Protect in War? - Online Casebook' (n 260).

⁴⁵⁷ Raju and Bruun (n 325) 11, 12; International Committee of the Red Cross (ICRC) (n 180) 13.

⁴⁵⁸ International Committee of the Red Cross (ICRC) (n 180) 13; Raju and Bruun (n 325) 11.

⁴⁵⁹ International Committee of the Red Cross (ICRC) (n 180) 13.

Furthermore, the diverse and complex roles that women and queer people play in armed conflict have been undervalued both historically and in the present, with women and queer people still being caricatured as innocent and passive.⁴⁶⁰ This is also due to the fact that a person can only be considered a target if they are directly involved in hostilities, which is limited to a certain type of activity usually carried out by men.⁴⁶¹ IHL's categorization of many queer people and women's roles as non-targetable contributes to the maintenance of their invisibility in some contexts and perpetuates discriminatory assumptions about gendered roles in society.⁴⁶² These gender and anti-queer biases lead to misidentification of targets and constitute a violation of the principle of distinction. Identifying a lawful military target in accordance with the principle therefore requires military training that focuses on the selection and verification aspect and raises awareness of gender and racial bias.⁴⁶³ Decision-makers need to be aware of potential biases against males of certain ages and races, depending on the context, in the process of determining with reasonable certainty that a person identified for attack is a lawful military target.⁴⁶⁴

The principle of military necessity authorizes harmful acts contrary to humanitarian protection because it recognizes that winning an armed conflict is a legitimate objective under IHL.⁴⁶⁵ This doctrine assumes that the primary objective in armed conflicts is the state's military victory, with humanitarian considerations taking a secondary role.⁴⁶⁶ Consequently, the law of armed conflict primarily focuses on protecting combatants – those who fight on behalf of the state. According to *Gardam*, IHL therefore primarily protects men and the roles that men occupy during armed conflict, while women continue to operate in the private sphere.⁴⁶⁷ *Gardam* further argues that the apparent neutrality of IHL masks the injustice of the dominant role of the doctrine of military necessity.⁴⁶⁸ By mirroring gender roles and inequalities, it reinforces gender inequalities rather than challenging or correcting them.

⁴⁶⁰ Raju and Bruun (n 325) 12; International Committee of the Red Cross (ICRC) (n 180) 14.

⁴⁶¹ International Committee of the Red Cross (ICRC) (n 180) 14.

⁴⁶² *ibid.*

⁴⁶³ *ibid* 13, 14.

⁴⁶⁴ *ibid* 14.

⁴⁶⁵ 'Basic principles of IHL' (n 187).

⁴⁶⁶ Judith Gardam, 'A Feminist Analysis of Certain Aspects of International Humanitarian Law' (1988) 12 *Australian Year Book of International Law* 265, 276.

⁴⁶⁷ *ibid* 276.

⁴⁶⁸ *ibid* 278.

In addition, it is important to note that women and queer people are excluded from decision-making and power positions in the state. In the public sphere, marginalized people are still underrepresented. Consequently, decisions regarding foreign policy and the use of force in international relations are typically made and executed by cis men.⁴⁶⁹

The principle of proportionality requires that, prior to the initiation of a military attack, an assessment be conducted to ascertain whether the anticipated civilian casualties will exceed the expected military objective.⁴⁷⁰ In the absence of a specification regarding the types of harm to be considered, there is a risk of overlooking certain gender-related issues.⁴⁷¹ This is particularly so as the application of the principle of proportionality involves value judgements.⁴⁷² Sexist value judgments may determine what civil harm is foreseeable for a particular decision-maker and what should be considered excessive.⁴⁷³ Even if a particular civilian harm is foreseeable to a particular decision-maker, they may assess it differently because of gender bias.⁴⁷⁴

In this sense, the concept of “foreseeability” and the principle of proportionality need to be further developed through more research and publications on the gendered impacts of attacks, including on how systemic inequality influences the harm that hostilities cause to women and girls.⁴⁷⁵

The principle of humanity sets certain limits on the means and methods of warfare.⁴⁷⁶ *Fal-Dutra Santos* notes that the concept of humanity can be defined as the pursuit of respect for human beings, including their right to life, liberty and happiness.⁴⁷⁷ He asserts that gender inequalities are intrinsic to the prevailing patriarchal system, which poses a constant challenge to ensuring respect for those whom the system seeks to marginalize.⁴⁷⁸ *Fal-Dutra Santos* concludes that the

⁴⁶⁹ *ibid* 277.

⁴⁷⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. 51(5)(b), 57(2)(a)(iii), 57(2)(b); ‘Crimes of War – Military Necessity’ (9 August 2013) <<https://web.archive.org/web/20130809183729/http://www.crimesofwar.org/a-z-guide/military-necessity/>> accessed 22 June 2024.

⁴⁷¹ Cameron and others (n 294) 12.

⁴⁷² International Committee of the Red Cross (ICRC) (n 180) 15.

⁴⁷³ *ibid*.

⁴⁷⁴ *ibid* 17.

⁴⁷⁵ *ibid*.

⁴⁷⁶ Melzer (n 166) 17,18.

⁴⁷⁷ Ricardo Fal-Dutra Santos, ‘Challenging Patriarchy: Gender Equality and Humanitarian Principles’ (*Humanitarian Law & Policy Blog*, 18 July 2019) <<https://blogs.icrc.org/law-and-policy/2019/07/18/gender-equality-humanitarian-principles/>> accessed 13 August 2024.

⁴⁷⁸ *ibid*.

full application of the principle of humanity not only permits but requires the promotion of gender equality, which is essential for the full respect of all human beings.⁴⁷⁹

This chapter has demonstrated that the fundamental principles of IHL are not neutral; they are shaped by deeply rooted gender and anti-queer biases. A *good faith* interpretation of these principles demands a critical re-examination of those biases in their application. This is necessary to ensure that women and queer people are not invisible or further marginalized in the context of armed conflict. To truly uphold the humanitarian spirit of IHL, it is essential to challenge these assumptions and ensure that the protection provided by IHL applies equally to all, regardless of their SOGIESC.

4.4.5 Special Protection for Queer People

4.4.5.1 Introduction

As the central purpose of IHL is to prevent and limit human suffering, it recognises special protections for certain groups of persons. These protections are enshrined in both IHL treaties and CIHL.⁴⁸⁰ Some groups, such as women, children, the elderly, disabled and infirm are afforded special protection because of their specific vulnerability in times of armed conflict.⁴⁸¹ Queer persons may receive special protection under IHL if they belong to a group that is explicitly granted such protection, but not specifically because of their SOGIESC.⁴⁸² As a result, queer people receive less protection than other vulnerable groups under the current legal IHL framework. Given the identified vulnerabilities of queer people in armed conflict, the lack of specific protection for them undermines the core purpose of IHL and highlights the urgent need for legal developments to effectively safeguard their dignity and safety.⁴⁸³

It must be recognized that the scope of special protection for a group can change over time. An evolving understanding often results from the efforts of various actors without the text of the

⁴⁷⁹ *ibid.*

⁴⁸⁰ Articles granting special protection to women, for example: Art. 12(4) GC I, Art. 12(4) GC II, Art. 14(2) GC III, Art. 27(2) GC IV, Art. 76(1) AP I; Articles granting special protection to the elderly: Art. 16, 44-45, 49 GC III, Art. 17, 27, 85, 119 GC IV; Rules which have been identified by the ICRC as CIHL: Rules 25-34, 134-138 'Rules - Customary IHL - ICRC' <<https://ihl-databases.icrc.org/en/customary-ihl/v1>> accessed 7 August 2024.

⁴⁸¹ *ibid* 134-138.

⁴⁸² Margalit (n 14) 247, 250.

⁴⁸³ Chapter 5 discusses what the development of IHL towards a queer-inclusive framework looks like and how special protections for queer people can be implemented; for reasons of space, this thesis does not propose a wording for possible articles granting special protection to queer people; instead, it is suggested that a collaborative process involving states, the ICRC and LGBT+ NGOs is needed to identify appropriate special protection. If LGBT+ NGOs are not included in this process, there is a great risk that queer people will be portrayed as one-dimensional victims of armed conflict or that the special protection afforded to queer people will simply be a replication of the special protection afforded to women.

treaties having to be changed.⁴⁸⁴ One example is the rules concerning women. IHL prohibits discrimination against women by requiring due regard to their sex and honour.⁴⁸⁵ Through the efforts of feminist legal scholars, these rules, which reduce women to sexual and reproductive roles and portray them as victims, have evolved significantly.⁴⁸⁶ Advocacy and scholarship have documented gendered experiences, leading to gender-inclusive updates of the ICRC Commentaries and clarifications of gendered crimes by international courts.⁴⁸⁷ As a result, it is now established, *inter alia*, that the requirement of non-discriminatory distinction based on sex in IHL treaties requires substantive, not merely formal, equality.⁴⁸⁸ Furthermore, given the evolving understanding of special protection for women, certain developments are now helping queer people. An illustrative example is that it is now established that GBV is prohibited regardless of gender.⁴⁸⁹ In conclusion, the special protection of a group of persons evolves over time through the interpretive efforts of scholars, the ICRC and international tribunals.

It is crucial to establish special protection for queer people, whether by adopting or amending treaties, adding protocols, or creating CIHL. To achieve this, the principle of impartiality is being scrutinized. The principle of impartiality is often cited as a reason why special protection should not be afforded to queer people. However, in the following, it will be demonstrated that queer people can be granted special protection while upholding the principle of impartiality.

4.4.4.2 Queering the Principle of Impartiality

The principle of impartiality requires that decisions are made solely based on need, without being influenced by personal considerations.⁴⁹⁰ However, because the boundary between legal and political spheres is often blurred, some argue that addressing the specific vulnerabilities and needs of queer people is a political decision rather than one grounded in IHL obligations.⁴⁹¹

⁴⁸⁴ Droege and Giorgou (n 228) 1818, 1819.

⁴⁸⁵ 'Women' <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule134>> accessed 8 August 2024.

⁴⁸⁶ International Committee of the Red Cross (ICRC) (n 180) 33; Droege and Giorgou (n 228) 1818, 1819.

⁴⁸⁷ Droege and Giorgou (n 228) 1819.

⁴⁸⁸ *ibid*; this opens up the possibility of favourable treatment in order to achieve substantive equality.

⁴⁸⁹ 'Rape and Other Forms of Sexual Violence' <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule93>> accessed 8 August 2024; the prohibition of sexual violence in GC IV is interpreted as an attack on a woman's honour, rather than as violence against an individual's physical and psychological integrity.

⁴⁹⁰ 'The Fundamental Principles of the International Red Cross and Red Crescent Movement' 4 <https://www.icrc.org/sites/default/files/topic/file_plus_list/4046-the_fundamental_principles_of_the_international_red_cross_and_red_crescent_movement.pdf>.

⁴⁹¹ Hugo Slim, 'Impartiality and Intersectionality - Humanitarian Law & Policy Blog' <https://blogs.icrc.org/law-and-policy/2018/01/16/impartiality-and-intersectionality/?_hsenc=p2ANqtz-81IYbQsESuwlW5u00WCC3WeL9nEtrNotaQjJTfr_61-jDdcNVv0u9tk0zeo7HooWWCgEs_GYJC5JL03SIKbv8gRMSNQ&_hsmi=299229664> accessed 7 August 2024; Anna Chernova, 'Queering the Humanitarian Principles of Neutrality and Impartiality: Implications for Humanitarian Action, IHL Effectiveness and Gender Justice' [2024] *International Review of the Red Cross* 1, 1.

Given the tension between legal obligations and perceived political decisions, the challenge of developing IHL, which is currently based on a gender binary, into a queer-inclusive framework becomes even more pronounced. Simply including queer individuals in an anti-queer framework does not make it queer-inclusive. Using a transformative approach like intersectionality or queer legal theory is the only way to effectively address the human rights plight of queer people.

The marginalization and exclusion of queer people is compounded by the fact that states are not only the key actors in the development of IHL, but are also known to exclude queer people from power and decision-making within a state, suggesting that state practice will not be queer-inclusive in the future.⁴⁹² However, in relation to the object and purpose of IHL, ideological and political beliefs, such as those about the right of queer people to exist or the extent to which they are rights holders within the GC regime, must be excluded, with the focus instead on humanitarian considerations.⁴⁹³

In light of above, *Slim*'s critique of IHL's unilateral definitions and categories, such as "civilians" or "women and children", becomes particularly relevant.⁴⁹⁴ *Slim* argues that these definitions can dangerously entrench existing power relations and limit understanding of circumstances.⁴⁹⁵ However, *Slim* suggests that effective humanitarian practice already incorporates intersectional analysis by focusing on the needs of individuals and considering the various intersecting factors that shape their experiences. Intersectionality highlights how different aspects of identity - such as race, gender and socio-economic status - intersect to create complex patterns of power and vulnerability, and that these patterns are situational, fluid, change over time and depend on circumstances.⁴⁹⁶ Similar to intersectionality, queer legal theory provides a framework that acknowledges various and intersecting aspects of people's identity and ensures a more comprehensive understanding of queer people's needs and experiences.⁴⁹⁷ Thus, both intersectionality and queer legal theory recognize differences in need by acknowledging that people are complex subjects, thus avoiding adverse distinctions that prioritize the protection based only on one aspect of identity.

⁴⁹² Chernova (n 491) 15.

⁴⁹³ *ibid.*

⁴⁹⁴ *Slim* (n 491).

⁴⁹⁵ *ibid.*

⁴⁹⁶ *ibid.*

⁴⁹⁷ For a detailed discussion on queer legal theory see chapter 1.

Moreover, the principle of humane treatment supports the argument that there is no contradiction between impartiality and taking specific action to alleviate the suffering of queer people. *Slim* points out that the principle of humane treatment is context-specific and must be considered in the specific circumstances of each case, taking into account the growing recognition of the gendered impact of conflict.⁴⁹⁸ Hence, the principle of humane treatment ensures a nuanced and comprehensive understanding of the specific needs of individuals.

In addition to intersectionality and queer legal theory, the Humanitarian Charter supports addressing the distinct needs and vulnerabilities of queer people and sees no contradiction to the principle of impartiality.⁴⁹⁹ The Humanitarian Charter, an internationally recognized framework for humanitarian action, upholds the principle of impartiality as a reflection of the broader principle of non-discrimination.⁵⁰⁰ The Charter emphasizes that no one should be discriminated against on the basis of, *inter alia*, sexual orientation.⁵⁰¹

Furthermore, ICRC publications also support this finding. For example, a publication on gendered impacts of armed conflict states:

*“Understanding gender dynamics is a necessary element of impartial humanitarian response, because such an analysis enables humanitarian actors to understand where the most urgent needs are and to prevent unintended exclusion from the response.”*⁵⁰²

The report goes on to say that applying the diversity lens allows for a better understanding of who the most vulnerable and worst affected individuals and groups are, thereby allowing for the operationalization the fundamental principle of impartiality.⁵⁰³

⁴⁹⁸ Hugo Slim, ‘Impartiality and Intersectionality - Humanitarian Law & Policy Blog’ <https://blogs.icrc.org/law-and-policy/2018/01/16/impartiality-and-intersectionality/?_hsenc=p2ANqtz-81IYbQsESuwlW5u00WCC3WeL9nEtrNotaQjJTfr_61-jDdcNVv0u9tk0zeo7HooWWCgEs_GYJC5JL03SIKbv8gRMSNQ&_hsmi=299229664> accessed 7 August 2024; Slim is referencing para 553 of ‘2016 Commentary of Article 1 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.’ <<https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-1/commentary/2016>> accessed 27 July 2024.

⁴⁹⁹ ‘Humanitarian Charter | Sphere Standards’ (*Sphere*) <<https://www.spherestandards.org/humanitarian-standards/humanitarian-charter/>> accessed 9 August 2024.

⁵⁰⁰ *ibid.*

⁵⁰¹ The Humanitarian Charter para 6 retrieved from sphere Standards Interactive Handbook, ‘Sphere Standards Interactive Handbook - Companion Standards (MERS,MISMA,CPMS,CAMP,HIS,LEGS,INEE)’ <<https://handbook.spherestandards.org/>> accessed 18 July 2024; the Humanitarian Charter explicitly prohibits sexual orientation as a ground of discrimination. Furthermore, this very paragraph is cited by the ICRC Commentary on Common Article 3.

⁵⁰² International Committee of the Red Cross (ICRC) (n 180) 37.

⁵⁰³ *ibid.*

While recognizing that single categories are important in certain circumstances, such as mass emergencies, the principle of impartiality ensures fairness and objectivity based on need, rather than simplistic categories that do not do justice to the complexity of a human being.⁵⁰⁴ Intersectional analysis must therefore be applied to the interpretation and application of IHL, as it helps identify needs accurately and promotes a nuanced understanding of the specific needs of individuals, while remaining consistent with the principle of impartiality and humane treatment.⁵⁰⁵

In summary, addressing the specific needs and vulnerabilities of queer people is in line with the principle of impartiality, as supported by intersectionality, queer legal theory and the principle of humane treatment, as well as ICRC publications.

5 Development of IHL towards a Queer-Inclusive Framework

In order to achieve its object and purpose⁵⁰⁶, IHL has to constantly adapt to the changing realities of warfare.⁵⁰⁷ These include the ongoing development of military technologies and tactics, environmental changes such as increasing global urbanization, and advances in other areas of law such as IHRL.⁵⁰⁸ In addition, evolving fundamental principles and cross-cutting concepts, such as gendered social constructs, influence IHL development.⁵⁰⁹

In recent years, the political environment and international atmosphere have hindered states from reaching a consensus on many issues, making the creation of new IHL rules or treaties appear unlikely.⁵¹⁰ Nevertheless, the first aspect of the discussion on the development of IHL should be the treaties, as these are the written rules on which the states parties were able to reach an agreement. The creation of treaties is always closely linked to the military interests of states and *realpolitik* on the one hand, and human considerations on the other.⁵¹¹ Most treaties are reactions to past suffering in wars involving new technologies and unprecedented hardship for combatants or civilians, and they are typically created to fill gaps in the existing legal

⁵⁰⁴ Slim (n 491).

⁵⁰⁵ *ibid.*

⁵⁰⁶ The object and purpose of IHL is to limit and prevent human suffering in times of armed conflicts.

⁵⁰⁷ Droege and Giorgou (n 228) 1800.

⁵⁰⁸ *ibid* 1800.

⁵⁰⁹ *ibid.*

⁵¹⁰ Marco Sassòli, 'How Will International Humanitarian Law Develop in the Future?' (2022) 104 *International Review of the Red Cross* 2052, 2054.

⁵¹¹ Droege and Giorgou (n 228) 1802.

framework.⁵¹² The adoption of IHL treaties is driven by social pressure, stemming from the moral imperative to protect the victims of war and the opprobrium associated with opposing such measures.⁵¹³ For *Droege* and *Giorgou*, the development of IHL also requires a belief in a “common good” that benefits all negotiation states, as IHL enforcement relies largely on the goodwill of the parties involved.⁵¹⁴ However, initiating new process to establish IHL rules risks allowing ill-intentioned states to weaken the existing legal framework.⁵¹⁵

As the adoption of a new treaty or the amendment of an existing treaty in the area of IHL is unlikely in itself, and particularly in relation to LGBT+, this thesis does not address the likelihood or the possible outcomes of a process.⁵¹⁶ The present thesis therefore confines itself to arguing that the need for a new or amended treaty exists simply because of the specific vulnerabilities and needs of queer people. However, one aspect of great importance in this context is the following: even if an unlikely adoption or amendment were to occur, it remains questionable whether states and other actors involved in armed conflicts would adhere to it.

As it is unlikely that new rights will be created for queer people, there is a widespread perception that there is no need to do so. It is argued that an evolutive interpretation and adherence to the existing framework of IHL is sufficient. For example, in the context of IHRL, the UN has stated in regard to the human rights situation of queer people:

*“The protection of people on the basis of sexual orientation and gender identity does not require the creation of new rights or special rights for LGBT people. Rather, it requires enforcement of the universally applicable guarantee of nondiscrimination in the enjoyment of all rights.”*⁵¹⁷

However, this approach is not transformative. Rather than fully embracing the sexual diversity that exists outside the cis and heterosexual spheres, it forcibly pushes diverse SOGIESC into an existing framework in order to pursue a normality that has no place for diverse SOGIESC.⁵¹⁸ In order to queer IHL, the existing legal framework needs to be changed and expanded. In

⁵¹² *ibid* 1803,1810; an example of the opposite is CCW Protocol IV, which banned the use of blinding laser weapons before they were ever used in armed conflict.

⁵¹³ *ibid* 1805.

⁵¹⁴ *ibid* 1807.

⁵¹⁵ Sassòli (n 510) 2053.

⁵¹⁶ As stated in the introductory chapter on delimitations.

⁵¹⁷ ‘Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law’ (n 138) 10.

⁵¹⁸ Winkler (n 429) 6, 8.

ensuring adequate protection for queer people, a collaborative process involving states, the ICRC and queer NGOs is needed to correctly identify appropriate protection.⁵¹⁹

Besides the adoption or amendment of treaties, adding protocols to existing treaties provides an opportunity for development, as it gives states bound by the original treaty flexibility in considering whether to accede to the protocol.⁵²⁰ The advantage of additional protocols is the reduced risk of undermining treaty's existing provisions during negotiations. However, significant differences in membership between a treaty and its protocols, or between different protocols, can create imbalances within the treaty regime.⁵²¹ Introducing an additional protocol to the GC presents a viable path for advancing a queer-inclusive IHL framework. The establishment of an AP IV, which explicitly provides special protection for vulnerable groups, offers an opportunity to create a legal framework that better protects marginalized groups, such as queer people, in armed conflict. However, it is challenging to establish an AP that genuinely addresses the vulnerabilities and needs of queer people due to the inherent limitations of IHL, which is state-centric and hence not focused on individual rights.⁵²² Recent developments, including the creation of Common Article 3 and AP II, and the growing awareness of the importance of human rights in armed conflict, may encourage greater protection of certain human rights under IHL.⁵²³ This, in turn, implies a shift towards individual and needs-based human rights and may encompass the inclusion of rights for queer people.

Establishing an institutional framework where states parties to a treaty regularly meet to discuss treaty-related issues, review its implementation, identify potential gaps, and decide on developing its provisions offers another way to advance IHL without adopting new treaties.⁵²⁴ Unfortunately, no such permanent forum exists for the GC regime.⁵²⁵ Such an institutional framework could effectively address the rights needed by the queer community, even though states that criminalize being queer at the domestic level are unlikely to recognize queer rights

⁵¹⁹ If LGBT+ NGOs are not included in this process, there is a great risk that queer people will be portrayed as one-dimensional victims of armed conflict or that the special protection afforded to queer people will simply be a replication of the special protection afforded to women.

⁵²⁰ Droege and Giorgou (n 228) 1809.

⁵²¹ *ibid.*

⁵²² Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 *International Review of the Red Cross* 501, 548.

⁵²³ *ibid.* 548.

⁵²⁴ Droege and Giorgou (n 239) 1807–1808; it is important to distinguish between an institutional framework for discussing a treaty and its implementation and inquiry procedures. The latter are set out in the GC regime for any alleged violation of the convention in Articles 52 GC I, 53 GC II, 132 GC III and 149 GC IV.

⁵²⁵ *ibid.* 1807.

at the IHL level. However, this challenge is inherent to any potential development of IHL to protect queer people.

Beyond states, the ICRC and National Red Cross and Red Crescent Societies have played a pivotal role in the development of IHL.⁵²⁶ In addition, the resolutions of the International Conference of the Red Cross and Red Crescent have been a catalyst for the development of IHL.⁵²⁷ The ICRC's activities cannot be analyzed as a whole, as this would go beyond the scope of this thesis. However, it is important to stress that the ICRC has undertaken a number of publications⁵²⁸ and events⁵²⁹ to identify, discuss and strengthen the current protection of queer people under IHL.⁵³⁰

In addition, customary law is of central importance for the development of IHL. It is mostly identified through judicial decisions and legal writings and is characterized by the interplay between treaties and customs.⁵³¹ AP I is a good example in this regard, as both the codification of customary law and the creation of new law have taken place simultaneously.⁵³² Another example is the law regulating NIAC. The gaps left by the codification of IHL treaties have been substantially filled by other treaties and by case law, much of which is now regarded customary law.⁵³³

Furthermore, IHL development also occurs within existing IHL through interpretation, largely influenced by international and national courts.⁵³⁴ Courts play a crucial role in taking account of external developments, such as social change, and integrating them into the interpretation

⁵²⁶ *ibid* 1807.

⁵²⁷ *ibid* 1808; said resolutions will not be discussed in the present thesis as stated in the chapter on delimitations.

⁵²⁸ for example: Chris Dolan, 'Letting Go of the Gender Binary: Charting New Pathways for Humanitarian Interventions on Gender-Based Violence' (2014) 96 *International Review of the Red Cross* 485; Alon Margalit, 'Still a Blind Spot: The Protection of LGBT Persons during Armed Conflict and Other Situations of Violence' (2018) 100 *International Review of the Red Cross* 237; "'That Never Happens Here': Sexual and Gender-Based Violence against Men, Boys, LGBTIQ+ People' <<https://www.icrc.org/en/document/sexual-gender-violence-against-men-boys-lgbtq>> accessed 23 March 2024; International Committee of the Red Cross (ICRC), *Gendered Impacts of Armed Conflict and Implications for the Application of International Humanitarian Law* (2022); Helen Durham and Katie O'Byrne, 'The Dialogue of Difference: Gender Perspectives on International Humanitarian Law' (2010) 92 *International Review of the Red Cross* 31.

⁵²⁹ "'That Never Happens Here': Sexual and Gender-Based Violence against Men, Boys, LGBTIQ+ People' (n 22).

⁵³⁰ These activities are an effective part of custom and need to be intensified in the future.

⁵³¹ Sivakumaran (n 218) 358; Droege and Giorgou (n 228) 1811.

⁵³² Droege and Giorgou (n 228) 1811.

⁵³³ Sassòli (n 510) 2062; Droege and Giorgou (n 228) 1812.

⁵³⁴ Droege and Giorgou (n 239) 1815; Krieger and Püschmann (n 237) 139; the process of interpretation is discussed in detail in chapter 4.3.3.

process.⁵³⁵ Although primarily tasked with applying the law, their interpretation often leads to the normative development of IHL while acting as part of state practice.⁵³⁶ In the IL system, which lacks a centralized legislator, the distinction between legislation and interpretation is much more fluid than in domestic legal systems.⁵³⁷ Moreover, judicial decisions, even when representing radical or far-reaching changes to existing IHL, are more readily accepted by states than developments proposed by the ICRC.⁵³⁸

An important example of evolutive interpretation is the changing understanding of IHL provisions relating to women, even though the text of the relevant IHL treaties has not changed.⁵³⁹ Courts have helped to clarify gendered crimes, advocacy and scholarship have documented gendered experiences of armed conflict, and the ICRC is working to change sexist interpretations.⁵⁴⁰ In conclusion, with regard to CIHL and the interpretation of IHL, courts as interpreters and scholarship focusing on the interpretation of judicial decisions are at the heart of the development of IHL.

However, in the context of queer people and the plight of queer people during times of armed conflict, there are no judicial decisions that contribute to a queer-inclusive development of IHL. This absence highlights the need to analyze cases that affect women through a queer lens or to interpret them *mutatis mutandis* to queer individuals.⁵⁴¹

As custom within IHL is primarily derived from official declarations and military manuals, they must implement a queer perspective.⁵⁴² But as there is currently no evidence of a positive development towards a queer-inclusive custom, as declarations and manuals do not reference a queer approach to military operations.

Recently, new sources have become increasingly important, especially soft law instruments like the YP.⁵⁴³ While not legally binding, they play a crucial normative role in developing IHL by

⁵³⁵ Droege and Giorgou (n 228) 1800.

⁵³⁶ *ibid* 1816.

⁵³⁷ Sassòli (n 510) 2058.

⁵³⁸ Marco Sassòli, 'How Will International Humanitarian Law Develop in the Future?' (2022) 104 *International Review of the Red Cross* 2052, 2062; Sassòli is referring to the Tadić case, an early ICTY case (n 199).

⁵³⁹ Droege and Giorgou (n 238) 1818; see chapter 4.4.5 for more details.

⁵⁴⁰ *ibid* 1819.

⁵⁴¹ Discussion of judicial decisions regarding women will not be made in this thesis as stated in the delimitations.

⁵⁴² 'Customary International Humanitarian Law | How Does Law Protect in War? - Online Casebook' <https://casebook.icrc.org/a_to_z/glossary/customary-international-humanitarian-law> accessed 31 July 2024.

⁵⁴³ Droege and Giorgou (n 11) 1800–1801; see chapter 2.2 for a detailed discussion on the YP.

filling legal gaps, providing solutions in the absence of clear law, interpreting existing norms and developing practical measures to ensure compliance with existing obligations.⁵⁴⁴ Given the current political atmosphere and the reluctance of states to make formal changes to IHL, soft law instruments are a pragmatic alternative.⁵⁴⁵ The YP and YP+10 could be extended to encompass IHL, or specific principles for IHL could be developed to further strengthen the development of IHL into a queer-inclusive branch of law.

In addition, other branches of IL, in particular IHRL, which remains applicable during armed conflicts, must be taken into account, as they influence the development of IHL.⁵⁴⁶ In this regard, the evolution of social norms, contemporary values and understandings over time is also an important driver of the development of IHL.⁵⁴⁷

In summary, while the development of IHL is difficult to predict, it is even more challenging in relation to queer people, given the involvement of actors who are hostile to them, criminalize them and even deny their right to exist. However, actors such as the ICRC and academic scholars advocate for a queer-inclusive development of IHL, even if they represent a small minority.

⁵⁴⁴ *ibid* 1820.

⁵⁴⁵ Sassòli (n 510) 2054; Droege and Giorgou (n 228) 1836.

⁵⁴⁶ For more details see chapter 4; the continuous application of IHRL during armed conflicts has been recognised in IHL, although the nature of the interaction remains a matter of debate; for further details see Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 *International Review of the Red Cross* 501.

⁵⁴⁷ Droege and Giorgou (n 228) 1818.

6 Conclusion

The present work aimed to answer the following research questions:

1. What is the current state of protection of LGBT+ individuals under IHL?
2. Are changes and/or extensions of protection necessary to protect queer individuals adequately?

Firstly, the thesis argued that the current legal framework, which does not mention queer people and is based on a gender binary, fails to address the specific needs and vulnerabilities of people with diverse SOGIESC.⁵⁴⁸ Moreover, the inherent gender bias perpetuates stereotypes based on binary classifications of men and women in specific gendered roles, which is inherently anti-queer.⁵⁴⁹

Nevertheless, IHL offers protection to queer persons, as the rights enshrined therein apply to all persons who fulfil the relevant criteria of a respective article, regardless of their SOGIESC.⁵⁵⁰ It is of utmost importance to know that IHL was established during a time when queer people were nearly globally criminalized. Since the adoption of the treaties, both the scope of IHL and the surrounding discourse have evolved considerably.⁵⁵¹ Developments such as publications by key players in the international legal system, such as the ICRC and the UN, and interpretative efforts by various legal scholars, such as *Margalit*, to include queer people within the existing legal framework, demonstrate progress. Moreover, the creation of soft law instruments such as the YP and YP+10, the publication of updated commentaries on the GCs and their APs, and the appointment of the UN IE on SOGI further highlight an expanding discourse and recognition of the protection gap of queer people.

⁵⁴⁸ Raju and Bruun (n 325) 3.

⁵⁴⁹ *ibid.*

⁵⁵⁰ Margalit (n 14) 247, 249.

⁵⁵¹ See Chapter 4 for an analysis of the current legal protection afforded to queer individuals and the ways in which the scope of IHL has evolved to date, with particular attention to the interpretive efforts of legal scholars and the publications of key organizations such as the UN and ICRC, which have expanded the scope of the fundamental principles and various articles of the GC; see Chapter 5 for an analysis of the necessary developments required for IHL to become a queer-inclusive branch of law.

Those developments have been analysed in the present thesis and suggest that tailored measures for queer people are covered by IHL.⁵⁵² Hence, specific measures to address the vulnerabilities and needs of queer individuals can be inferred from the current IHL framework.⁵⁵³

Building on these developments, the thesis analyzed Common Article 1 in chapter 4.2.2, concluding that its obligations extend protection to queer civilians and POWs. Consequently, to fulfil their negative and positive obligations under Common Article 1, states must bring their actions into conformity with the obligations set forth in Article 1.⁵⁵⁴ This entails not only refraining from encouraging parties to a conflict that violate the rights of queer individuals, but also taking proactive steps to end and prevent violations of IHL.⁵⁵⁵ Furthermore, Article 1 obliges states to actively monitor compliance and address violence and discrimination against queer civilians and POWs.⁵⁵⁶ Lastly, taking specific measures to ensure that the needs of queer people are met and that they are protected and safeguarded, is covered by the obligations enshrined in Article 1.

Following the analysis of Common Article 1, Article 3 was analysed in chapter 4.4.3. Article 3 enshrines the principle of humane treatment and the prohibition of adverse distinction. While the obligation to treat all civilians, medical and religious personnel and persons no longer engaged in the conflict humanely is absolute, the prohibition of adverse distinction is not.⁵⁵⁷ Differentiation in treatment is permitted when necessary to ensure the humane treatment of an individual, making treatment tailored to the specific needs of the individual covered by Article 3.⁵⁵⁸ However, the grounds enumerated in Article 3, which include the phrase “any other similar criteria”, prohibit adverse distinction. Even though SOGIESC is not mentioned as a ground on which adverse distinction is prohibited, SOGIESC falls within the phrase “any other similar criteria”. This affirmatively interpretation is based on the fact that the list of grounds on which

⁵⁵² Measures tailored to the specific needs of queer people are covered by Common Articles 1 and 3, as explained in chapter 4.

⁵⁵³ The lack of explicit reference to queer individuals creates significant gaps in protection. As the current protection relies on interpretative efforts, its application is inconsistent and leaves queer individuals vulnerable to misinterpretation and exclusion from protection and specific measures. Codifying special protection or explicitly mentioning queer people in existing articles such as Article 3 would provide legal certainty, ensuring consistent protection, fostering accountability, enabling remedies and creating visibility for the needs and vulnerabilities of queer people.

⁵⁵⁴ Margalit (n 14) 252.

⁵⁵⁵ Margalit (n 14); Nieratzky (n 19) 3.

⁵⁵⁶ Nieratzky (n 19) 3, 4.

⁵⁵⁷ Shaw (n 222) 1032.

⁵⁵⁸ ‘2020 Commentary of Article 3 of Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.’ (n 416) para 612.

distinction is prohibited is non-exhaustive.⁵⁵⁹ Furthermore, the word “criteria” encompasses characteristics that lead to discrimination and marginalisation, including SOGIESC.⁵⁶⁰ Additionally, the ICRC Commentaries provide a comprehensive overview of various grounds not explicitly mentioned in the text of the Convention that prohibit adverse distinction, suggesting that “criteria” must be understood broadly.⁵⁶¹ Other instruments such as the YP and YP+10, UN publications, and the interpretative efforts of various legal scholars support the affirmative interpretation of the phrase to include SOGIESC.⁵⁶²

Moreover, the thesis established that Article 3 mandates and justifies differential treatment for queer individuals, as it is now widely recognized that queer people are a particularly vulnerable group during armed conflict.⁵⁶³ The differential treatment permitted by Article 3 is only implicitly afforded to queer individuals, resulting in a significant gap in protection and leaving them vulnerable to misinterpretation and exclusion from protection and specific measures.

Additionally, the thesis examined the four fundamental principles of IHL – the principle of distinction, the principle of military necessity, the principle of proportionality, and the principle of humanity – in chapter 4.4.4. The analysis revealed that these principles are not neutral but are influenced by gender and anti-queer biases. Consequently, it was argued that they need to be re-examined to prevent the further marginalization of queer individuals. To ensure that the protections afforded by IHL are applicable to all human beings, these principles must be continuously analyzed and interpreted through a queer lens.⁵⁶⁴

In order to answer the first research question, the present thesis argued that the current legal framework does offer protection to queer people, even though only implicitly. Moreover, existing IHL can be interpreted to allow for treatment tailored to the specific vulnerabilities and needs of queer people. However, specific treatment for queer people currently depends on a “*good faith*” interpretation of dedicated and queer-friendly legal scholars, organizations and parties to an armed conflict. This dependency makes queer people petitioners as opposed to rights holders, relying on the “*good faith*” of the various actors involved in an armed conflict.

⁵⁵⁹ Margalit (n 14) 251.

⁵⁶⁰ Rossouw (n 16) 772.

⁵⁶¹ *ibid* 773.

⁵⁶² For further arguments in favour of the inclusion of queer individuals, please see the discussion in Chapter 4.4.3.

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⁵⁶⁴ See chapters 4.2 and 4.3 for the specific process of interpreting IHL and its fundamental principles.

Therefore, further development of IHL is necessary to consider the lived experiences and realities of queer people in conflict.

The hypothesis of this master's thesis is that, as outlined in the introductory chapter, LGBT+ persons are not sufficiently protected by IHL during armed conflicts. By establishing that not only Common Article 1 but also Common Article 3 affords special measures for queer people, it could be argued that sufficient protection is provided. This, however, is not the case, because the gap in the protection cannot be closed by an implicit protection based on a “*good faith*” interpretation. In order to create legal certainty, to ensure coherent protection, to promote accountability, to enable legal recourse and to make the needs and vulnerabilities of queer people visible, it is necessary to codify a special protection or to explicitly mention queer people in existing articles, such as Common Article 3.

When answering the second research question, it must be kept in mind that IHL is deliberately limited in scope.⁵⁶⁵ IHL applies only to acts that have a nexus to an armed conflict and does not regulate all incidents which occur during an armed conflict, even though these incidents might be exacerbated by the conflict environment.⁵⁶⁶ Moreover, IHL is a state-centred branch of law that does not focus on the rights of individuals.⁵⁶⁷

However, IHL already recognises special protection for certain vulnerable groups.⁵⁶⁸ It is now evident that queer people constitute a vulnerable group. Hence, not affording special protection to people with diverse SOGIESC runs counter *raison d'être* of IHL.⁵⁶⁹ In chapter 4.4.4., the thesis analysed the principle of impartiality, which is often used as an argument that addressing the needs and vulnerabilities of queer people and affording them special protection is a political decision rather than one based on IHL obligations.⁵⁷⁰ The analyses showed that special protection is consistent with the principle of impartiality, which requires that decisions be based on needs rather than personal or political considerations.⁵⁷¹ In addition, the principle encompasses an understanding of intersectionality and identity dimensions, thus promoting a

⁵⁶⁵ ‘2020 Commentary of Article 3 of Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.’ (n 417) para 615.

⁵⁶⁶ *ibid.*

⁵⁶⁷ Droege (n 522) 548.

⁵⁶⁸ For general explanations of special protection and specific explanations of special protection for queer people, see Chapter 4.4.5.

⁵⁶⁹ Margalit (n 14) 250.

⁵⁷⁰ Slim (n 491).

⁵⁷¹ ‘The Fundamental Principles of the International Red Cross and Red Crescent Movement’ (n 490) 4.

more nuanced approach to humanitarian assistance.⁵⁷² This is supported by the principle of humane treatment, which requires that the specific circumstances of each individual be taken into account, and by various publications of humanitarian organizations and legal scholars.⁵⁷³

Building on this foundation, chapter 6 analyzed the development of IHL and what a development towards a queer-inclusive framework could look like.⁵⁷⁴ A queer-inclusive development was identified to be essential to ensure all queer people receive adequate protection during armed conflict. This development requires a collaborative effort among states, humanitarian organizations and queer NGOs to identify the special protection queer people need and incorporate queer interpretation and analyses into existing legal structures.⁵⁷⁵ While the adoption of new treaties or additional protocols may be unlikely, advocating for an additional protocol and an institutional mechanism for regular dialogue can facilitate queer-inclusive progress.⁵⁷⁶ Furthermore, the thesis argued that the use and application of soft law instruments such as the YP and YP+10, the promotion of evolutive legal and judicial interpretations, and the recognition of developments in IHRL and ICL will improve the protection of queer persons under IHL.⁵⁷⁷

Ultimately, the further development of IHL must prioritize the protection of all queer people in conflict situations and ensure that queer perspectives are actively integrated into the discourse on and development of IHL.

⁵⁷² International Committee of the Red Cross (ICRC) (n 180) 37.

⁵⁷³ Chernova (n 491); Handbook (n 501); International Committee of the Red Cross (ICRC) (n 180).

⁵⁷⁴ As stated in the introductory chapter, the likelihood or possible outcomes of a process to adopt or amend an IHL treaty have not been examined.

⁵⁷⁵ Due to space limitations, no suggestions are made as to how the collaborative process could or should be completed.

⁵⁷⁶ Sassòli (n 510) 2054.

⁵⁷⁷ 'Yogyakarta principles.Org – The Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (n 137); Droege and Giorgou (n 228); 'Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law (2nd Edition)' (n 70); Sassòli (n 510).

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