

Criminalising Homosexuality and LGBT Rights in Times of Conflict, Violence and Natural Disasters

There is a need to devote specific attention to the LGBT population, particularly in post-disaster and post-conflict situations. Stigmatization and discrimination on the basis of sexual orientation increase gender-based violence in post-conflict and post-disaster situations, negatively affecting LGBT persons in the provision of food assistance, shelters & humanitarian aid.

UN Human Rights Council Advisory Committee, 2014¹

This is one in a series of notes produced for the Human Dignity Trust on the criminalisation of homosexuality and good governance. Each note in the series discusses a different aspect of policy that is engaged by the continued criminalisation of homosexuality across the globe.

The Human Dignity Trust is an organisation made up of international lawyers supporting local partners to uphold human rights and constitutional law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. We are a registered charity no.1158093 in England & Wales. All our work, whatever country it is in, is strictly not-for-profit.

Contents

Overview	4
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Violations against LGBT people in the context of conflict, post-conflict and post-disaster situations	5
---	---

Perceived gaps in international humanitarian law	12
--	----

General vulnerability to violence	17
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Including LGBT people in responses to conflict and disaster	21
---	----

State-building as a means to remove structural homophobia	22
---	----

Providing asylum to LGBT people	22
---------------------------------	----

Conclusions	25
-------------	----

¹ UN Human Rights Council, *Progress report on the research-based report of the Human Rights Council Advisory Committee on best practices and main challenges in the promotion and protection of human rights in post-disaster and post-conflict situations*, A/HRC/27/57, 11 August 2014, para. 57.

Overview

01. Lesbian, gay, bisexual and transgender (LGBT) people are a vulnerable group at the best of times. During times of turmoil (conflict, natural disasters or widespread violence) this vulnerability is exacerbated, often leaving LGBT people to experience a level of violence and exclusion beyond that borne by others.
02. This heightened vulnerability arises for two main reasons. First, in times of increased lawlessness and pressure on scarcer resources, homophobia rises to the surface and can be acted upon with impunity. Pre-existing stigma becomes amplified. Secondly, international humanitarian law (IHL) pays little regard to the vulnerability and needs of LGBT people. Both of these factors ultimately arise due to the past and present criminalisation of homosexuality. Even where same-sex intimacy is no longer a crime, homophobia can persist and surface in an extreme way in times of conflict or disaster. Further, IHL was codified after World War II when laws that criminalise homosexuality were the norm. Today, it must be recognised that IHL prohibits targeting people based on their sexual orientation or gender identity, as is the case with other branches of international law.
03. As the UN High Commissioner for Refugees (UNHCR) has stated:

[A] large majority of the challenges surrounding protection work focused on LGBTI persons of concern stem from the criminalisation of LGBTI identity, expression, and association in many countries of operation.²

04. Compounding these vulnerabilities is the scant regard to LGBT people in aid and reconstruction programmes provided by the international community. This lack of coverage allows LGBT people to be targeted by others, excluded from the allocation of resources, and leaves them lacking support after violations are committed against them. Aid and reconstruction programmes can be improved by including these vulnerabilities and associated needs, as is done already for other vulnerable groups such as women and children. UNHCR has made progress in this regard on the issue of refugees, but the same must be done in other areas, such as IHL and the international community's responses to conflicts and disasters.
05. It is also important to consider the opportunities that arise post-conflict or post-disaster. State-building programmes funded or informed by foreign governments or international agencies can address structural issues that allow homophobia and persecution to persist. Laws that criminalise homosexuality are often part of out-dated, British-colonial criminal codes. Channelling the influence provided by reconstruction efforts to update a country's sexual offences law could have multiple benefits. It could not only bring about the decriminalisation of homosexuality, but it could also help other groups by providing a more victim-centred law, and have the indirect effect of improving public health and productivity.³

06. National government and international organisations can play a crucial role in protecting LGBT people in times of conflict and disaster, both by acting in advance by improving the frameworks that apply, and by reacting to conflict and disaster in a manner that includes LGBT people. For example:
 - a) Continue with and enhance efforts to improve LGBT rights across the globe in order to reduce the homophobia that is amplified in times of trouble. Advocating for decriminalisation is a part of this.
 - b) Publicly state that under international humanitarian rights law (IHL) it is unlawful to target people based on their sexual orientation or gender identity; include this in national military's manuals; and work with organisations who interpret IHL, such as the International Committee of the Red Cross, to include this expressly in their work.
 - c) When violations are known to have been committed against LGBT people in times of conflict or disaster, raise these as a part of the diplomatic dialogue on the underlying conflict or disaster, for example at the United Nations.
 - d) Include LGBT people in the aid programmes in response to overseas conflicts and disasters, and encourage aid agencies and non-governmental organisations to do the same.
 - e) Where a national government or international organisation is involved in state building, take the opportunity to address laws that criminalise and persecute LGBT people.

- f) When the consequences of the conflict or disaster are felt at home by way of asylum applications, national governments should provide asylum to those who are persecuted on the basis of their sexual orientation or gender identity, and do so as rapidly and as humanely as possible.

Violations against LGBT people in the context of conflict, post-conflict and post-disaster situations

07. LGBT people are prone to violence and discrimination on the basis of their sexual orientation or gender identity in times of peace. The additional pressures felt by society in times of conflict and natural disasters act to amplify homophobia, which can lead to serious and acute instances of violence against LGBT people and their being denied assistance. This vulnerability has been recognised by various United Nations (UN) entities that deal with conflict and human rights. In August 2014, the Human Rights Council observed:

[S]igmatization and discrimination on the basis of sexual orientation increase gender-based violence in post-conflict and post-disaster situations, negatively affecting LGBT persons in the provision of food assistance, shelters and humanitarian aid.⁴

² UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015, Executive Summary. Available at: <http://www.refworld.org/docid/566140454.html>

³ These latter two issues are discussed in other briefing notes in this series, *Criminalising Homosexuality and International Business: the Economic and Business Cases for Decriminalisation, and Criminalising Homosexuality and Public Health: Adverse Impacts on the Prevention and Treatment of HIV and AIDS*.

⁴ UN Human Rights Council, at n. 1 above.

08. Similarly, in May 2015 the Office of the High Commissioner for Human Rights (OHCHR) recognised that:

“ **Discrimination against LGBT individuals is often exacerbated by... socioeconomic factors, such as poverty and armed conflict.**⁵

09. In September 2015, 12 UN entities released an unprecedented joint statement urging states to act urgently to end violence and discrimination against LGBT people. The statement noted the impacts of ‘widespread physical and psychological violence against LGBTI persons’ and continued:

*Failure to uphold the human rights of LGBTI people and protect them against abuses such as violence and discriminatory laws and practices... [contributes] to increased vulnerability to ill health including HIV infection, social and economic exclusion, putting strain on families and communities, and impacting negatively on economic growth, decent work and progress towards achievement of the future Sustainable Development Goals.*⁶

10. In December 2015, the UN High Commissioner for Refugees (UNHCR) stated that:

*[A] large majority of the challenges surrounding protection work focused on LGBTI persons of concern stem from the criminalisation of LGBTI identity, expression, and association in many countries of operation.*⁷

11. This UNHCR report highlighted the particular vulnerability of LGBT people in the context of asylum, which is indicative of the situation faced by LGBT people generally in times of civil strife, the break down of law and order and scarce resources:

*Offices expressed that LGBTI asylum-seekers and refugees are subject to severe social exclusion and violence in countries of asylum by both the host community and the broader asylum-seeker and refugee community. While the degree of acceptance of LGBTI persons was reported as very low in all accommodation settings, the lowest degrees of acceptance, across all respondents, were noted in camp settings. Similarly, of the 39 offices that indicated efforts to specifically track the situation of LGBTI persons of concern in immigration detention facilities, most indicated that LGBTI persons are frequently subject to abuse and/or exploitation by both detention authorities and other inmates.*⁸

12. The UN Special Rapporteur on Torture has recommended that states must decriminalise same-sex relationships between consenting adults and repeal all laws that criminalise persons on the basis of their actual or perceived sexual orientation or gender identity or expression.⁹ In his 2016 report on the applicability of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law to the unique experiences of women, girls, and LGBT people, he also observed that:

“ **Torture and ill-treatment of persons on the basis of actual or perceived sexual orientation or gender identity is rampant in armed conflict and perpetrated by State and non-State actors alike, with rape and other forms of sexual violence sometimes being used as a form of “moral cleansing” of lesbian, gay, bisexual and transgender persons.**¹⁰

13. The sections below provide just a few examples to illustrate how LGBT people suffer in times of conflict, natural disasters and their aftermath.

Iraq after the 2003 intervention

14. The problems faced by LGBT people in post-Saddam Hussein Iraq pre-date the rise of the self-styled Islamic State of Iraq and Syria (ISIS). Iraq is illustrative of latent homophobia within a society being acted upon after the collapse of state apparatus, thus allowing groups with anti-LGBT sentiments or ideology to act with impunity.

15. In 2009, Human Rights Watch reported that violence against LGBT people in Iraq was on the rise amidst the country’s conflict:

“ **While the country remains a dangerous place for many if not most of its citizens, death squads started specifically singling out men whom they considered not ‘manly’ enough, or whom they suspected of homosexual conduct. The most trivial details of appearance – the length of a man’s hair, the fit of his clothes – could determine whether he lived or died.**¹¹

16. In 2009, a number of men perceived to be gay were forced to go underground after posters appeared on walls in eastern Baghdad naming them and threatening to kill them. Amnesty International reported at the time that at least 25 men alleged to be gay had been killed in Baghdad in the space of a few weeks.¹²

5 UN Human Rights Council, *Discrimination and violence against individuals based on their sexual orientation and gender identity: Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/29/23, 4 May 2015, para. 42.

6 ILO, UNDP, UNESCO et al., *Ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, 29 September 2015. Available at: <http://www.ohchr.org/EN/Issues/Discrimination/Pages/JointLGBTIstatement.aspx>

7 UNHCR, at n. 2 above.

8 UNHCR, at n. 2 above.

9 See Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/31/57, 5 January 2016, para. 69.

10 *Ibid*, para. 51.

11 Human Rights Watch, *‘They Want Us Exterminated’: Murder, Torture, Sexual Orientation and Gender in Iraq*, 2009. Available at: <https://www.hrw.org/report/2009/08/17/they-want-us-exterminated/murder-torture-sexual-orientation-and-gender-iraq>

12 Muir, J., ‘Iraqi gay men face ‘lives of hell’’, BBC News, 18 April 2009. Available at: http://news.bbc.co.uk/1/hi/world/middle_east/8005420.stm

17. More recently, in November 2014, research and analysis jointly produced by OutRight (formerly the International Gay and Lesbian Human Rights Commission), MADRE and the Organization of Women's Freedom in Iraq found that:

*[W]hile the conflict in Iraq has placed hundreds of thousands of Iraqis at risk of serious human rights violations, LGBT Iraqis face unique threats to their safety.*¹³

18. This report explained that LGBT people in Iraq were found to be at greater vulnerability due to:

*[L]ittle communal safety or protection from family, tribal or community members... Once exposed, family and community members, along with the authorities, are often complicit in abuses against LGBT individuals.*¹⁴

Iraq and Syria today

19. The rise of ISIS has brought an even more deadly dynamic. Whereas vigilante groups operating prior to ISIS taking control could, in theory, face prosecution by the Iraqi or Syrian authorities for violence committed against LGBT people, ISIS now acts as a *de facto* state across swathes of Iraq and Syria. The report mentioned above stated:

“ [T]he Islamic State's imposition and enforcement of its interpretation of Islamic law compels the conclusion that LGBT individuals are highly likely to be at imminent risk of death.¹⁵

20. However, it is not only ISIS's operatives and ideology that perpetrate violence against the LGBT community. In Iraq in May 2014, the League of the Righteous (a militia assembled by former Iraqi Prime Minister Nuri al-Maliki to fight ISIS) published on signs around Baghdad the names and neighbourhoods of 23 people accused of the 'crime' of homosexual acts. The following month, the League of the Righteous killed and beheaded two adolescent boys who were thought to be gay. Another two men were injured in the same attack.¹⁶

21. The heightened risk to LGBT people in Iraq and Syria was discussed during a closed session of the UN Security Council in August 2015, co-sponsored by the United States and Chile. Jessica Stern of OutRight told the Security Council that the presence of ISIS had:

“ [I]ncreased the vulnerability of millions... and further entrenched structural and cultural violence against women and [lesbian, gay, bisexual, transgender] persons.¹⁷

22. A gay Syrian refugee, Subhi Nahas, provided direct testimony to the UN Security Council, in which he described how attacks on LGBT people in Syria increased after 2011, with rebel militias and armed groups as well as Syrian government troops explicitly targeting gay men.¹⁸ He elaborated on his experience to Newsweek, stating that in 2012 the militant group Jabhat al-Nusra took control of his hometown of Idlib and vowed to cleanse the city 'of everyone who was involved in sodomy'. Mr Nahas escaped from Syria to Lebanon and Turkey, then to the USA where he was granted asylum. He stated in the interview:

“ I was terrified that would be my fate... I knew I would face death if I didn't do anything, so I contacted my friend in Lebanon and I arranged my escape there.¹⁹

23. Similarly, a Syrian trans woman spoke about her experience to CBC News in Canada, where she has been granted asylum, which reported:

In Syria, both the rebels and the government security forces also targeted lesbian, gay and transgender civilians...

*She began receiving death threats as the civil war went on. A transgender friend was jailed in Damascus after having had sexual reassignment surgery.*²⁰

24. The trans woman, who is not named in the report, then fled Syria to Jordan, where she says she was raped, assaulted and robbed by Jordanian police officers, who threatened to return her and fellow trans refugees to Syria. She added:

“ Each of us went with a police person in a private car. We choose to have sex instead of going to Syria. It was like there was nothing in our hands, nothing we can do.

The conflict in Ukraine

25. Following the outbreak of conflict in the east of Ukraine, LGBT groups have reportedly been alarmed by the way the situation appears to be worsening for LGBT people, both in terms of the de-prioritisation of LGBT issues and an increase in homophobic attacks.²¹ Elise Thomas of the Graduate Institute of International and Development Studies in Geneva wrote in April 2015 that:

“ [A]gainst the backdrop of conflict [in Ukraine], the rising tide of anti-LGBT aggression makes it both more difficult and more important than ever to hold the Ukrainian state to account for the safety of its LGBT citizens.²²

26. Even prior to the annexation of Crimea and the conflict in Eastern Ukraine, LGBT rights were being politicised with pro-Russian groups stirring up homophobia to alienate people against closer ties with the European Union (EU).²³ The scapegoating of LGBT people for political purposes is not uncommon and only serves to increase their vulnerability.

13 OutRight Action International, *Exposing persecution of LGBT individuals in Iraq*, 2014. Available at: <http://www.outrightinternational.org/content/exposing-persecution-lgbt-individuals-iraq>

14 *Ibid.*

15 *Ibid.*

16 OWFI, MADRE and IGLHRC, *When Coming Out is a Death Sentence: Persecution of LGBT Iraqis*, 2014. Available at: <http://www.refworld.org/docid/547437c44.html>

17 *Ibid.*

18 *Ibid.*

19 Westcott, L., 'Gay Refugees Addresses U.N. Security Council in Historic Meeting on LGBT Rights', *Newsweek*, 25 August 2015. Available at: <http://www.newsweek.com/gay-refugees-addresses-un-security-council-historic-meeting-lgbt-rights-365824>

20 Fraser, L., 'Transgender woman survives rape, assault while fleeing', *CBC News*, 30 November 2015. Available at: <http://www.cbc.ca/news/canada/toronto/trans-refugee-syria-1.3342724>

21 Thomas, E., 'Amid Conflict, Worsening Discrimination Makes It Harder to Organize for LGBT Rights in Ukraine', *Truthout*, 14 April 2015. Available at: <http://www.truth-out.org/news/item/30191-amid-conflict-worsening-discrimination-makes-it-harder-and-more-necessary-to-organize-for-lgbt-rights-in-ukraine>

22 *Ibid.*

23 Feder, J.L., 'The Russian Plot To Take Back Eastern Europe At The Expense Of Gay Rights', *Buzzfeed*, 10 November 2013. Available at: <http://www.buzzfeed.com/lesterfeder/russia-exports-homosexual-propaganda-law-in-effort-to-fight#.gnAAdnDdNv>

27. It has been reported that the situation for Ukraine's LGBT community is even more precarious in areas under Russian control.²⁴ Describing the situation in rebel-held Eastern Ukraine in June 2015, gay rights activist Oleksandr Zinchenkov said:

“The level of homophobia in the east is high. It is worse now than it was in the Soviet era. Many gays and lesbians have simply fled.”²⁵

28. In an indication of the pervasiveness of homophobia, it was reported that a former parliamentary candidate, Oleg Kytserib, and his son attacked two men outside their house and then bragged about the attack on Facebook, stating:

“Have you gone crazy, pidoras [a slur used against gay men in Ukraine], bitches, being cute here? There's a war going on, and you're here relaxing? This is not Gay-rope, especially beside my home... Two pidoras and the two sympathizers [sitting beside them] will be in the hospital for two weeks.”

29. A local activist told of the dangers associated with reporting such attacks, which contributes to impunity for the perpetrators:

“I'm going to write a police report, but I'm not sure whether the police will be careful with information about where I live... I don't know that these right-wing activists won't show up at my door. I will write the report, but I still feel in danger.”²⁶

30. The EU's response to growing homophobia and violence against LGBT people was to avoid the issue completely. The EU exempted the Ukraine from adopting anti-discrimination legislation that includes sexual orientation, which is a standard requirement in exchange for the EU liberalising visa requirements. Commenting on this, Olena Shevchenko, chairwoman of a Ukrainian LGBT advocacy and education group, said:

“The EU seems to have given Ukraine a pass on this issue because of the country's unique situation.”

Further examples during conflicts

31. Violence against LGBT people is reported in other conflict settings. The forty-year civil conflict in Columbia reportedly exacerbated the potential for abuse directed towards LGBT people as:

*[S]tate protections waver, individuals rely upon force to achieve their goals, and armed actors seek societal control through intimidation and violence.*²⁷

32. Likewise, during the conflict in Peru during the 1980s and 1990s, the Tupac Amaru Revolutionary Movement (MRTA) expressly targeted LGBT people and publicly announced their murders.²⁸

33. As discussed in other briefing notes in this series, the rights of LGBT people suffer as democracy and the rule of law retreat. This occurs with or without an accompanying ideology specifically directed against the LGBT community. In situations of conflict where democracy and the rule of law have all but evaporated many view LGBT people as legitimate targets for violence. LGBT people also make for an easy scapegoat for authoritarian regimes to vilify in order to garner support and to distract from other issues.

Sexual violence as a war crime: the conflict in the Democratic Republic of Congo

34. The issue of sexual violence committed against men in conflict situations is often overlooked. In a 2013 working paper, the Refugee Law Project at Makerere University School of Law in Uganda found that sexual victimisation is perpetrated on both men and women in conflict situations. The working paper observed that in both instances it is a 'crime of power, intended to degrade, humiliate, and subjugate victims'.²⁹ With reference to conflict-related sexual violence against men in the Democratic Republic of Congo (DRC), it stated:

*[P]erpetrators target men, in part, to attack males as leaders and protectors, diminish their masculinity, and unravel social hierarchies.*³⁰

35. As of April 2014, the Refugee Law Project was supporting 370 male survivors of sexual violence, 320 of whom were refugees from the neighbouring DRC.³¹ Despite the gravity and apparent prevalence of conflict-related sexual violence against men in an estimated 25 distinct armed conflicts in the past two decades alone,³² empirical data regarding the crime is limited. The Refugee Law Project suggests that:

*[T]he paucity of data may be explained, in part, by the result of lack of attention to male victims, lack of training of first responders to identify and treat male victims, fear by victims of stigma and potential criminal prosecution under anti-sodomy laws if they report their victimisation, and a lack of relief available to victims.*³³

Post-disaster situations

36. There is a significant body of research on the heightened vulnerability of LGBT people following natural disasters. In a 2011 briefing paper, OutRight and SEROVie considered several recent natural disasters, including the Haiti earthquake in 2010, the Indian Ocean Tsunami in 2004, Hurricane Katrina in 2005, and the earthquake in Chile in 2010. The paper concluded that:

“[T]he lack of response to the specific impact of disasters on LGBT communities and individuals is itself an emergency that has doubtless resulted in unnecessary suffering and an untold number of deaths.”³⁴

24 Rohrich, K., 'Human Rights Diplomacy Amidst "World War LGBT": Re-examining Western Promotion of LGBT Rights in Light of the "Traditional Values" Discourse', *Humanity In Action*, 2015. Available at: <http://www.humanityinaction.org/knowledgebase/588-human-rights-diplomacy-amidst-world-war-lgbt-re-examining-western-promotion-of-lgbt-rights-in-light-of-the-traditional-values-discourse>

25 Savoichenko, O., 'Hounded and out of work, gay Ukrainians flee rebel east', *Yahoo! News*, 28 June 2015. Available at: <http://news.yahoo.com/hounded-gay-ukrainians-flee-rebel-east-135403270.html?nf=1>

26 Lytvynenko, J., 'Intolerance and Violence Against LGBT People Is on the Rise in War-Torn Ukraine', *Vice News*, 9 September 2015. Available at: http://www.vice.com/en_uk/read/in-war-torn-ukraine-there-is-no-time-for-lgbtq-rights

27 US Office on Columbia, *The impact of conflict on lesbian, gay, bisexual, & transgender individuals*. Available at: http://www.usofficeoncolombia.org/understanding_colombia/pdf/lgbtt.pdf

28 Mora, R., 'Peru: LGBT Community Targeted During Armed Conflict', *TeleSUR TV*, 21 November 2014. Available at: <http://www.telesurtv.net/english/news/Peru-LGBT-Community-Targeted-During-Armed-Conflict-20141121-0038.html>

29 Refugee Law Project, Makerere University (RLP) and Berkeley Law International Human Rights Law Clinic, 'Promoting Accountability For Conflict-Related Sexual Violence Against Men: A Comparative Legal Analysis Of International And Domestic Laws Relating To IDP And Refugee Men In Uganda', *Refugee Law Project Working Paper*, July 2013, No. 24, p. 1. Available at: http://refugeelawproject.org/files/working_papers/RLP.WP24.pdf

30 *Ibid*, p. 1.

31 'Uganda's anti-gay law reinforces homophobia, xenophobia, says report', *IRIN*, 30 April 2014.

Available at: <http://www.irinnews.org/report/100018/uganda-s-anti-gay-law-reinforces-homophobia-xenophobia-says-report>

32 Refugee Law Project, at n. 29 above, p. 2.

33 *Ibid*, p. 1.

34 OutRight Action International and SEROVie, *The Impact of the Earthquake, and Relief and Recovery Programs on Haitian LGBT People*, 2011. Available at: <http://www.ighrc.org/sites/default/files/505-1.pdf>

37. With regard to the Haiti earthquake, the paper found that:

*[T]he emotional and physical suffering, political and social upheaval, and mass displacement resulting from the earthquake have heightened pre-existing inequalities and prejudices, including those against LGBT people.*³⁵

38. Other examples of heightened suffering include transgender people being denied entry to camps for internally displaced people after the 2010 floods in Pakistan because they did not possess government ID that matched their appearance; and Aravanis (feminine male-bodied people) being discriminated against in access to housing, medical care and toilets in the aftermath of the 2004 tsunami in Tamil Nadu, India.³⁶
39. In 2014, a paper in Home Cultures found that natural disasters ‘unmake’ the LGBT home, community and sense of belonging in three ways:

*[F]irst, destruction of individual residences, and problems with displacement and rebuilding; second, concerns about privacy and discrimination for individuals and families in temporary shelters; and third, loss and rebuilding of LGBT neighbourhoods and community infrastructure.*³⁷

Perceived gaps in international humanitarian law

40. An additional problem arises during times of conflict, which compounds the amplification of homophobia discussed above. International humanitarian law (IHL) is the specialist law designed to govern behaviour during international and non-international conflicts. An aim of IHL is to provide rules of war so as to allow conflicts to progress while still protecting civilians and combatants from the worst excesses of war. IHL does not replace human rights law during times of conflict, but provides certain derogations from it, and IHL is what combatants and their commanders turn to first when assessing how to act towards the civilian population and enemy combatants.
41. IHL prohibits the targeting of individuals on the basis of ‘race, colour, religion or faith, sex, birth or wealth, or any other similar criteria’, as per Common Article 3 of the Geneva Convention. Article 3 then goes on to state:

[T]he following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

42. Neither sexual orientation nor gender identity is included expressly in Common Article 3 of the Geneva Conventions. This may lead combatants to conclude that it is lawful to target individuals on the basis of sexual orientation and gender identity. This conclusion would be wrong for two reasons, but the international community is not articulating its falsity. First, international human rights law still applies in times of conflict, and this law protects LGBT people. Secondly, the phrasing of Common Article 3 is substantially the same as the non-discrimination clauses contained in other treaties of international law.³⁸ Like the Geneva Conventions, none of these treaties refers expressly to sexual orientation in its non-discrimination clause or elsewhere. However, the courts and bodies that interpret these treaties have each concluded that their non-discrimination clauses prohibit discrimination on the basis of sexual orientation.³⁹
43. This interpretative process came about as individual citizens can petition these courts and bodies to uphold their rights. With regards to IHL, individual citizens cannot petition a court or body. As such there is no decision applying the prevailing view in international law to IHL. The International Court of Justice (ICJ) could in theory make such a declaration, but this would require a state-to-state claim on this matter, which is unlikely in the foreseeable future.

44. However, given that all other areas of international law have been interpreted to include sexual orientation as a prohibited ground for discrimination, it would be absurd if IHL did not offer the same protection. In the absence of a judgment from the ICJ to the contrary, it must be assumed that IHL prohibits the targeting of people on the basis of sexual orientation and gender identity. It is entirely within the logic of IHL to interpret it in this manner.
45. Sexual orientation and gender identity are not expressly included in the Rome Statute either, the treaty that established the International Criminal Court (ICC). The Rome Statute allows for personal prosecution of state and non-state actors for certain breaches of IHL that occasion war crimes, genocide or crimes against humanity. For the same reason, the Rome Statute must be read to prohibit the targeting of individuals based on sexual orientation and gender identity.
46. Until the international community vocalises that sexual orientation and gender identity are prohibited grounds for targeting individuals during conflict, LGBT people face threats not faced by other vulnerable groups. The current situation risks leaving state and non-state actors with the belief that they can act with impunity when singling out LGBT people for adverse treatment. The perceived gap in IHL also risks giving the false impression that LGBT rights are a ‘luxury’, from which states can derogate as soon as a conflict arises.

³⁵ *Ibid.*

³⁶ Knight, K., Sollom, R., ‘Making disaster risk reduction and relief programmes LGBTI inclusive: examples from Nepal’, *Humanitarian Exchange Magazine*, September 2012. Available at: <http://www.odihpn.org/humanitarian-exchange-magazine/issue-55/making-disaster-risk-reduction-and-relief-programmes-lgbti-inclusive-examples-from-nepal>

³⁷ Dominey-Howes, D., Gorman-Murray, A., Mckinnon, S., ‘Queer Domicide’, *Home Cultures*, 2014, 11:2, pp. 237-261. Available at: http://www.researchgate.net/publication/262607121_Queue_Domicide_LGBT_Displacement_and_Home_Loss_in_Natural_Disaster_Impact_Response_and_Recovery

³⁸ For example the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the European Convention on Human Rights (ECHR); the American Convention on Human Rights (American Convention); the African Charter on Human and Peoples’ Rights (African Charter); and the Refugee Convention.

³⁹ ICCPR: *Toonen v. Australia* Communication No. 488/1992, U.N. Doc-CCPR/C/50/D/488/1992 (1994); ECHR: For example, *Dudgeon v. UK* (1981) 4 EHRR 149; American Convention: *Case of Atala Riffe and Daughters v. Chile*, IACHR, Report No. 139/09 (merits), Case 12.502; African Charter: *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02, May 2006. This topic is covered in detail in another note in this series, *Criminalising Homosexuality and International Human Rights Law*.

Steps that can be taken to make international humanitarian law more inclusive

47. As it is unlikely that the ICJ will hear a case on this issue any time soon, the onus falls on states to vocalise their views that sexual orientation and gender identity are protected. This vocalisation will serve two purposes. First, actors in the theatre of war will be put on notice that they cannot lawfully target LGBT people. If a broad section of the international community states their belief that sexual orientation and gender identity are included implicitly in Common Article 3 of the Geneva Conventions, this affirms that IHL is no different from other international law. Secondly, if and when these actors are prosecuted at the ICC or another court, such statements will help provide evidence that the targeting of LGBT people is illegal and attracts personal liability, thus avoiding the impunity gap.
48. Some small but significant steps have been taken to vocalise the view that LGBT people cannot be targeted in armed conflicts. In August 2015, the UN Security Council held its first meeting on an LGBT issue, when it discussed violence committed by ISIS against LGBT people. The meeting

was co-sponsored by the United States and Chile. Commenting on this private meeting, the US State Department published the following press release:

Today, members of the UN Security Council held their first Arria-formula meeting on Lesbian, Gay, Bisexual, and Transgender (LGBT) issues, particularly in the context of ISIL's crimes against LGBT individuals in Iraq and Syria. This historic event recognizes that the issue of LGBT rights has a place in the UN Security Council.

“ **Around the world, the UN has documented thousands of cases of individuals killed or injured in brutal attacks simply because they are LGBT or perceived to be LGBT. This abhorrent practice is particularly widespread in [ISIS]-seized territory in Iraq and Syria, where these violent extremists proudly target and kill LGBT individuals or those accused of being so. No one should be harmed or have their basic human rights denied because of who they are and who they love.**⁴⁰

49. National governments can say more on this issue, at the UN and elsewhere, to help build up a body of state practice and opinion on this matter.

50. Similarly, and perhaps most importantly, when national defence ministries and departments next update their military manuals, they can state that sexual orientation and gender identity are implicitly included in Common Article 3 of the Geneva Conventions, and that military personnel must be trained and act accordingly. If multiple countries make this addition to their military manuals, a body of state practice will grow that can form the basis for establishing a customary international norm. The work of the International Committee of the Red Cross (ICRC) is relevant here too. The ICRC expresses its view on the development of IHL and the customary international law therein. The views of national militaries on this matter will inform the ICRC.

International refugee law as an example to follow

51. Sexual orientation and gender identity have gradually been incorporated into the work of the UN High Commission for Refugees (UNHCR) via interpretation of the Refugee Convention. Importantly, refugee law was interpreted to include sexual orientation despite the absence of an international court that individuals may petition. It thus serves as an example of how IHL can come to recognise publicly that sexual orientation and gender identity are prohibited grounds for discrimination.
52. In October 2008, UNHRC identified the incorporation of sexual orientation and gender identity into its work as a key challenge, commenting:

*UNHCR's programmes usually tend to focus on sexual violence against women, while other forms of psychological, economic, or socio-cultural gender based violence are less commonly and comprehensively addressed. In particular, the absence of an appropriate guiding policy on how to address and respond to SGBV [sexual and gender-based violence] against lesbian, gay, bisexual and transgendered people of concern (LGBT) remains a serious problem. In addition, the sexual abuse of boys and men is often neglected, under-reported and hardly addressed by any of UNHCR's programmes.*⁴¹

53. In October 2010, UNHCR announced how sexual orientation and gender identity would be incorporated into its work:

*UNHCR guidelines and policies will be revised to ensure that the particular vulnerability of these groups is recognized at every stage in our interaction with refugees. The 1951 Refugee Convention spells out that a refugee is someone who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country. In 2008 we issued a guidance note recognizing that individuals being persecuted due to sexual orientation and gender identity should be considered within the 'fleeing due to membership of a particular social group' convention ground.*⁴²

⁴⁰ US State Department, *UN Security Council Holds Inaugural Meeting on LGBT Issues*, 24 August 2015. Available at: <http://www.state.gov/r/pa/prs/ps/2015/08/246296.htm>

⁴¹ UNHRC, *Evaluation of UNHCR's efforts to prevent and respond to sexual and gender-based violence in situations of forced displacement*, October 2008, p. 2. Available at: <http://www.unhcr.org/48ea31062.pdf>

⁴² UNHCR Press Briefing, spokesperson Melissa Fleming, 1 October 2010. Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4ca5da949&query=lgbt>

54. Two years later, in October 2012, UNHCR released specific guidelines on LGBT refugees, which included the following:

It is widely documented that LGBTI individuals are the targets of killings, sexual and gender-based violence, physical attacks, torture, arbitrary detention, accusations of immoral or deviant behaviour, denial of the rights to assembly, expression and information, and discrimination in employment, health and education in all regions around the world. Many countries maintain severe criminal laws for consensual same-sex relations, a number of which stipulate imprisonment, corporal punishment and/or the death penalty. In these and other countries, the authorities may not be willing or able to protect individuals from abuse and persecution by non-State actors, resulting in impunity for perpetrators and implicit, if not explicit, tolerance of such abuse and persecution. ... These Guidelines provide substantive and procedural guidance on the determination of refugee status of individuals on the basis of their sexual orientation and/or gender identity, with a view to ensuring a proper and harmonized interpretation of the refugee definition in the 1951 Convention.⁴³

55. Then in December 2015, UNHCR released a document entitled 'Protecting Persons with Diverse Sexual Orientation and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees'. This report gives examples on the particular vulnerabilities of LGBT people, concrete examples of how UNHCR's offices have specifically addressed the needs of LGBT people, and guidance on how LGBT refugees can be protected in the future. For example, the report states:

Almost two thirds of participating offices indicated having implemented reception or registration measures specifically targeting LGBTI persons of concern to UNHCR. Among these offices, the most common measures in place include (a) ensuring that registration forms are gender neutral and do not assume a particular sexual orientation and (b) creating 'safe spaces,' such as secure waiting areas and special times for LGBTI persons to register. Although only one third of participating offices reported formal partnerships to assist outreach to LGBTI persons of concern, two thirds indicated having established referral pathways to and from external organisations for SOGI-related issues. In countries with widespread hostility toward LGBTI persons, offices called for further support in developing culturally sensitive training materials and standard outreach materials that take into account challenging operational contexts.

⁴³ UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, paras. 2 and 4. Available at: <http://www.unhcr.org/50ae466f9.html>

... Roughly 60% of participating offices reported having either a formal or an informal focal point to provide support for the determination of asylum claims related to SOGI.

... Almost all participating offices repeatedly called for more extensive training led by UNHCR on SOGI issues. Many emphasised that such trainings should explicitly take into account the difficult cultural, religious, and legal contexts in which the offices operate. Some offices called for a 'training of trainers' model to allow SOGI-related information to be more widely disseminated among offices, with others calling for the creation of a platform for offices working in similar cultural and legal contexts to share best practices on SOGI-related issues.⁴⁴

56. The actions of the UNHCR have brought about the recognition of sexual orientation and gender identity as characteristics covered by the Refugee Convention, and UNHCR is now in the process of mainstreaming LGBT people into its work. A similar pattern must be achieved in respect of IHL. As with refugee law, the ingredients for recognising sexual orientation in IHL are already present. These ingredients are the multiple decisions of courts and bodies that have interpreted similarly worded treaties. However, it must be vocalised that these decisions also inform the meaning of Common Article 3 of the Geneva Conventions, and IHL more broadly. National governments, the Security Council, and other actors must express their view that IHL prohibits the targeting of civilians and combatants on the basis of their sexual orientation or gender identity. The ICRC documents the current content of IHL. The ICRC should be prompted by these governments and entities to state in its publications that sexual orientation and gender identity are included in IHL, and the ICRC should then publish guidance similar to that published by UNHCR.

57. Strengthening the legal protection of LGBT people during times of conflict will not eradicate the vulnerability of LGBT people, but it can help reduce vulnerability. It will fill a perceived gap in IHL, signal to state and non-state actors that targeting LGBT people is deemed illegal under IHL, and provide a basis for bringing prosecutions at the ICC or other courts when LGBT people are targeted by the likes of ISIS.

General vulnerability to violence

58. The lack of legal protection in IHL does not alone explain the particular vulnerability of LGBT people in times of conflict or disaster. Addressing the gaps in IHL will only partially address the problem. Further, IHL is not relevant outside times of conflict, including natural disaster or violence short of an armed conflict. LGBT people still face particular vulnerabilities and hardships in these situations. These vulnerabilities must be understood in order to address the problems faced by LGBT people in times of conflict, disasters and their aftermath.
59. A brief analysis of LGBT people's general vulnerabilities informs about their increased vulnerabilities during times of conflict and disaster. There is no shortage of evidence that LGBT people are uniquely targeted for violence and abuse, especially where the state is dysfunctional or resources are scarce.

⁴⁴ UNHCR, at n. 2 above.

60. The breadth and scale of the problems faced by LGBT people is evident from an unprecedented statement in September 2015, in which 12 UN entities released a joint statement urging states to act urgently to end violence and discrimination against LGBT people. The statement noted the impacts of *'widespread physical and psychological violence against LGBTI persons'* and continued:

The United Nations and others have documented widespread physical and psychological violence against LGBTI persons in all regions - including murder, assault, kidnapping, rape, sexual violence, as well as torture and ill-treatment in institutional and other settings. LGBTI youth and lesbian, bisexual and transgender women are at particular risk of physical, psychological and sexual violence in family and community settings. LGBTI persons often face violence and discrimination when seeking refuge from persecution and in humanitarian emergencies. They may also face abuse in medical settings, including unethical and harmful so-called "therapies" to change sexual orientation, forced or coercive sterilization, forced genital and anal examinations, and unnecessary surgery and treatment on intersex children without their consent. In many countries, the response to these violations is inadequate, they are underreported and often not properly investigated and prosecuted, leading to widespread impunity and lack of justice, remedies and support for victims. Human rights defenders combatting these violations are frequently persecuted and face discriminatory restrictions on their activities.⁴⁵

61. The fact that 12 UN entities made this joint statement shows how violence against LGBT people impacts the UN's and the international community's work across the board and how current reactions to it are deficient. These 12 entities with diverse remits are: the International Labour Organization, OHCHR, UN Development Programme, UNESCO, UN Population Fund, UNHCR, UNICEF, UN Office on Drugs and Crime, UN Women, the World Food Programme, the World Health Organization, and UNAIDS.

62. Turning now to specific examples, there are reports from a number of countries – including South Africa,⁴⁶ the Democratic Republic of Congo,⁴⁷ India,⁴⁸ Jamaica,⁴⁹ and Zimbabwe,⁵⁰ of lesbian and bisexual women being subjected to so-called 'corrective rape' to 'cure' them of their sexual orientation. Statistics for corrective rape are difficult to obtain due to a lack of reporting, but one support group in Cape Town told researchers in 2009 that it dealt with 10 new cases every week.⁵¹ Action Aid draws a direct link between socioeconomic hardship and vulnerability to 'corrective rape':⁵²

And it is black lesbians from townships – who lack sufficient support systems and are already disadvantaged by cultural, economic and social discrimination – who are particularly at risk. Gay rights group Triangle's 2008 research revealed that, while 44% of white lesbians from the Western Cape lived in fear of sexual assault, 86% of their black counterparts felt the same.

⁴⁵ Joint statement, at n. 6 above.

⁴⁶ Strudwick, P., 'Crisis in South Africa: The shocking practice of 'corrective rape' - aimed at 'curing' lesbians', *The Independent*, 4 January 2014. Available at: <http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape-aimed-at-curing-lesbians-9033224.html>

⁴⁷ Bangre, H., 'Gays find courage to come out in Kinshasa', *Agence France-Presse*, 17 May 2014. Available at: <https://sg.news.yahoo.com/gays-courage-come-kinshasa-035244076.html>

⁴⁸ Keating, F., 'India: Parents use 'corrective rape' to cure their gay children', *International Business Times*, 1 June 2015. Available at: <http://www.ibtimes.co.uk/india-parents-use-corrective-rape-cure-their-gay-children-1503912>

⁴⁹ Louw, A., 'Men are also 'corrective rape' victims', *Mail and Guardian*, 11 April 2014. Available at: <http://mg.co.za/article/2014-04-11-men-are-also-corrective-rape-victims>

⁵⁰ US State Department's Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2014: Zimbabwe*, 2015.

⁵¹ Strudwick, at n. 44 above.

⁵² Action Aid, *Hate crimes: The rise of 'corrective' rape in South Africa*, March 2009, p 8.

Available at: https://www.actionaid.org.uk/sites/default/files/publications/hate_crimes_the_rise_of_corrective_rape_in_south_africa_september_2009.pdf

63. Not only are LGBT people especially vulnerable, particularly in times of hardship, but the violations committed against them are grave. As the UK Foreign & Commonwealth Office observed in its Human Rights and Democracy Report 2013:

[T]he LGBT community [in many countries] continues to experience violence; hate crimes; intolerance; violation and abuse of their human rights, including torture inhuman or degrading treatment; restrictions on their freedom of expression, association and peaceful assembly; discrimination in employment; and restricted access to health services and education.⁵³

64. A report by OHCHR in May 2015 found that:

[V]iolence motivated by homophobia and transphobia is often particularly brutal, and in some instances characterized by levels of cruelty exceeding that of other hate crimes.⁵⁴

65. The report noted that *'data are patchy but, wherever available, suggest alarmingly high rates of homicidal violence.'* The statistics cited in the report include the following:

a) In Brazil, authorities documented 310 murders in 2012 in which homophobia or transphobia was a motive.

b) Within the 25 member states of the Organization of American States, The Inter-American Commission on Human Rights reported 594 hate-related killings of LGBT people between January 2013 and March 2014.⁵⁵

c) The Trans Murder Monitoring project, which collects reports of homicides of transgender persons, recorded 1,612 murders in 62 countries between 2008 and 2014, equivalent to a killing every two days.

d) Within the United States, the National Coalition of Anti-Violence Programs reported 18 hate violence homicides and 2,001 incidents of anti-LGBT violence in the United States in 2013.

e) A Europe-wide survey of 93,000 LGBT people conducted in 2013 for the European Union Agency for Fundamental Rights found that a quarter of all respondents had been attacked or threatened with violence in the previous five years.

⁵³ UK Foreign and Commonwealth Office, *Human Rights and Democracy Report 2013*.

Available at: <https://www.gov.uk/government/publications/human-rights-and-democracy-report-2013/human-rights-and-democracy-report-2013>

⁵⁴ UN Human Rights Council, at n. 5 above.

⁵⁵ *Ibid*, para. 27.

66. Violence against LGBT people is committed by state actors too. In countries where male homosexuality is criminalised, forced anal examinations are used as a flawed means of obtaining evidence. These invasive examinations have been long-discredited as medically worthless yet a number of countries continue to use them during investigations – including, in recent years, Egypt,⁵⁶ Malawi,⁵⁷ Zambia,⁵⁸ Lebanon,⁵⁹ and Uganda.⁶⁰ The UN Special Rapporteur on Torture,⁶¹ the UN Human Rights Council Working Group on Arbitrary Detention,⁶² and the African Commission on Human and Peoples' Rights⁶³ have all affirmed that medical procedures performed without informed consent constitute cruel, inhuman or degrading treatment and thus breach international law. Forced examinations are also a clear violation of the World Medical Association International Code of Medical Ethics, which states that medical practitioners must respect a patient's right to accept or refuse treatment and provide services 'with compassion and respect for human dignity'.⁶⁴
67. Given the level of violence that LGBT people risk at the best of times, it is unsurprising that they are the victims of serious violence and other human rights violations in time of conflict and disasters, when resources are scarce, laws are left unenforced and latent homophobia can rise to the surface and be acted upon with impunity. Strategies to tackle the acute problems faced by LGBT people in times of trouble must also look to address LGBT rights more generally.⁶⁵ The decriminalisation of homosexuality is a key step to reducing homophobia. While it remains permissible over large swathes of the globe to imprison a person on the basis of his or her sexual orientation or gender identity, homophobic views are validated even in places where homosexuality is not a crime.

⁵⁶ Dearden, L., 'Egypt still using anal examinations to detect and imprison 'chronic homosexuals'', *The Independent*, 17 February 2015.

⁵⁷ Amnesty International, 'Malawi: Amnesty International calls for the unconditional release of gay couple', 6 January 2010.

⁵⁸ Amnesty International, 'Zambia urged to release two men charged with same-sex sexual conduct', 8 May 2013.

⁵⁹ Human Rights Watch, 'Lebanon: stop 'Tests of Shame'', 10 August 2012. Available at: <https://www.hrw.org/news/2012/08/10/lebanon-stop-tests-shame>

⁶⁰ Chapter Four Uganda, 'The Abuse of the Rights of Sexual Minorities in Uganda's Criminal Justice System', 27 February 2015. Available at: http://diversity.berkeley.edu/sites/default/files/the_abuse_of_sexual_minorities_in_ugandas_criminal_justice_system.pdf

⁶¹ See UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57*, 5 January 2016. Available at: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/31/57&Lang=E>; See also UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/5*, 1 February 2013. Available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf

⁶² UN Human Rights Council Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention. Addendum: Opinions adopted by the Working Group on Arbitrary Detention*, Opinion No. 25/2009, 18 May 2009.

⁶³ African Commission on Human and Peoples Rights, *Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV services*, 54th Ordinary Session, 5 November 2013. Available at <http://www.achpr.org/sessions/54th/resolutions/260/>

⁶⁴ World Medical Association, *World Medical Association International Code of Medical Ethics*, adopted at the 57th WMA General Assembly, October 2006.

⁶⁵ This topic is covered in detail in another note in this series, *Criminalising Homosexuality and International Human Rights Law and Criminalising Homosexuality and Working Through International Organisations*.

Including LGBT people in responses to conflict and disaster

68. Notwithstanding the heightened vulnerability of LGBT people in times of conflict and disaster, international and bilateral response programmes pay little, if any, attention to the vulnerability and the needs of LGBT people. For example, the ICRC's *Strategy 2015-2018* makes no mention either, despite the opening paragraph of the ICRC's vision for 2015-2018 being:

*The ICRC's overarching goal is to address the needs and vulnerabilities of people affected by armed conflicts and other situations of violence – in all their many dimensions – in line with the core principles of its action: humanity, neutrality, impartiality, and independence. At the centre of its action is the commitment to protect and assist victims, based on the applicable international legal frameworks and through a sustained dialogue with all the parties concerned.*⁶⁶

69. LGBT people are particularly vulnerable. Ignoring LGBT people leaves a gap in planned responses to conflicts and natural disasters. The above quote from the ICRC is telling for another reason; the reference to 'applicable legal frameworks' renders the ICRC hamstrung in what it can do for LGBT people. As discussed above, little has been said to affirm that applicable legal frameworks protect LGBT people. This again illustrates the continued effects of past criminalisation on today's LGBT people; as they were not recognised in the 1940s when international law was codified, LGBT people continue to be ignored today. It also illustrates the importance of national governments taking action to build state practice and opinion on the inclusion of sexual orientation and gender identity in IHL. This will allow the ICRC to incorporate sexual orientation and gender identity into its work, strategies and recommendations.
70. With regards to how LGBT people can be included in post-conflict and post-disaster programmes, several commentators and non-governmental organisations have expressed how this can be done. In considering the impact of natural disasters on LGBT people, the Deputy Director of Physicians for Human Rights, Richard Sollom, recommended that:

“ [E]ngagement with LGBTI NGOs and community organisations [is] beneficial as these groups can provide efficient and meaningful support in the wake of disasters.⁶⁷

⁶⁶ ICRC *Strategy 2015-2018*, adopted by the ICRC Assembly on 18 June 2014. Available at: <https://www.icrc.org/eng/assets/files/publications/icrc-002-4203.pdf>

⁶⁷ Knight and Sollom, at n. 36 above.

71. Another option is to provide specific facilities to cater to the needs of LGBT people, as occurred following the 2014 earthquake in Nepal, when charities set up 15 relief camps for sexual minorities. Dibya Raj Paudel of the Nepal Red Cross Society explained the rationale for this focus on LGBT people:

“ They are more vulnerable than others in terms of their access to relief and safety after the earthquake... many of them don't get any help from their families and are left alone after the disaster.⁶⁸

72. Addressing the vulnerabilities and needs of LGBT people will have to be tailored to the host nation's society and circumstances. Initiatives that are overtly LGBT may discourage those in need from seeking help for fear of being 'outed' or targeted in vigilante attacks due to raising their visibility as LGBT. OutRight recommends that governments consult local LGBT organisations when planning responses to future disasters and, if not a detrimental step in itself, 'work with police, military, and security forces to ensure that LGBT people are not stigmatized in the course of responding to a disaster'.⁶⁹

State-building as a means to remove structural homophobia

73. As well as challenges, post-conflict and post-disaster situations provide opportunities with regards to the protection of LGBT people from violence and persecution. International and bilateral state-building efforts that occur post-conflict or post-disaster can be used to correct structural deficiencies that allow homophobia to thrive.

74. Many countries retain archaic criminal codes that criminalise homosexuality, often inherited from British colonial rule. Efforts to rebuild a state can include overhauling these archaic criminal codes, both to erase the criminalisation of homosexuality and to produce victim-centred sexual offences laws that are fit for the 21st century.

75. Contemporary beneficiaries could be Liberia, Sierra Leone, Myanmar (Burma), and Sri Lanka, the latter three of which retain British-era laws that criminalise homosexuality. The post-Ebola reconstruction of Liberia and Sierra Leone, coupled with health arguments for decriminalisation, may be all that is needed to end criminalisation subtly and quietly in these countries. Likewise the emergence of democracy in Myanmar (Burma) and the end of Sri Lanka's civil war may too provide an opportunity to update archaic sexual offences laws.

Providing asylum to LGBT people

76. Many of the problems and potential solutions discussed above require international or bilateral cooperation. Closer to home, national governments can take steps in the domestic sphere. Asylum applications from individuals persecuted on the basis of their sexual orientation or gender identity are a manifestation at home of foreign conflicts, disaster and other situations. Conflicts and disasters are not the only source of LGBT asylum-seekers. As discussed in other briefing notes in this series, the Human Dignity Trust takes the view that criminalisation in and of itself amounts to persecution, so that LGBT people will be forced to seek refuge abroad while laws that criminalise homosexuality persist.

77. While providing asylum does not address the root causes of violence and persecution directed towards LGBT people (in conflicts, disasters or otherwise), it is an important means of providing support when no other mechanism will alleviate the situation in the short-term. The asylum process for LGBT people in countries that receive LGBT asylum-seekers can be improved. For instance, a report from the OHCHR in May 2015 found that:

[A]t international borders, migrants and refugees may be subjected to invasive physical screenings and examinations and denied entry on discriminatory grounds.⁷⁰

[S]ixteen gay and transgender individuals in the United States were allegedly subjected to solitary confinement, torture and ill-treatment, including sexual assault, while in detention in immigration facilities.⁷¹

78. In a submission to the independent review into the welfare in detention of vulnerable persons, the UK Lesbian and Gay Immigration Group wrote:

Around the world, serious concerns as to the quality of asylum decision-making [in the UK]... and serious concerns have been expressed as to the experiences of LGBTI people in immigration detention. LGBT detainees frequently experience social isolation, physical and sexual violence and harassment by both facility staff and other detainees. Trans people are particularly at risk.⁷²

⁶⁸ Sharma, G., 'Nepal sets up post-quake camps for sexual minorities', *Reuters*, 1 June 2015. Available at: <http://www.reuters.com/article/2015/06/01/us-quake-nepal-lgbt-idUSKBN00H2YJ20150601>

⁶⁹ OutRight Action International and SEROViE, at n. 34 above, p 9.

⁷⁰ UN Human Rights Council, at n. 2 above, para. 64.

⁷¹ *Ibid*, para. 35

⁷² *Ibid*.

79. Certain minimum standards must be adhered to. In December 2014, the European Court of Justice ordered states to cease the use of intrusive questioning and medical tests purportedly designed to reveal applicants' sexual orientation.⁷³ Similarly, former UN High Commissioner for Human Rights, Navi Pillay, made observations during her time in office about inadequate procedures for LGBT asylum-seekers. She also raised the issues of resettlement in safe countries and the dangers of sending LGBT people back to their home countries (refoulement):

“ Even in countries that recognize these grounds for asylum, practices and procedures often fall short of international standards. Review of applications is sometimes arbitrary and inconsistent. Officials may have little knowledge about or sensitivity towards conditions facing LGBT people. Refugees are sometimes subjected to violence and discrimination while in detention facilities and, when resettled, may be housed within communities where they experience additional sexuality and gender-related risks. Refoulement of asylum-seekers fleeing such persecution places them at risk of violence, discrimination and criminalisation.⁷⁴ ”

80. In that regard, states also have an obligation not to return refugees to places where their lives or freedom would be threatened on account of actual or perceived sexual orientation and gender identity.⁷⁵ The OHCHR has emphasised:

Ensuring that no one fleeing persecution on grounds of sexual orientation or gender identity is returned to a territory where his or her life or freedom would be threatened, that asylum laws and policies recognize that persecution on account of sexual orientation or gender identity may be a valid basis for an asylum claim; and eliminating intrusive, inappropriate questioning on asylum applicants' sexual histories, and sensitizing refugee and asylum personnel.⁷⁶

81. Similarly, UNHCR's report of December 2015 identified problems faced when resettling LGBT asylum-seekers, in terms of the limited number of recipient states:

While a few of these offices indicated having successfully facilitated local integration for LGBTI refugees, no office reported having facilitated voluntary repatriation due to the continued risk of persecution in countries of origin. Almost 80% of participating offices indicated that they prioritise LGBTI refugees for resettlement. Of these offices, roughly 70% reported having actually facilitated resettlement for LGBTI refugees. The limited number of resettlement countries viable for LGBTI refugees was frequently cited as a significant impediment to facilitating resettlement for LGBTI refugees.⁷⁷

82. In an act of good practice, in December 2015 the UK Government confirmed that LGBT Syrians qualify as a vulnerable group for the purpose of the UK's Syria resettlement programme.⁷⁸ Likewise, Canada and the United States have longstanding resettlement programmes that include LGBT people and both launched Syria-specific programmes in 2015. The UNHCR estimates that some 42 states have granted asylum to individuals with a well-founded fear of persecution owing to sexual orientation or gender identity.⁷⁹

83. In domestic policy, non-criminalising governments can ease the suffering of LGBT victims of conflict and disaster by adhering to best practice in their asylum policies and processes, and by acknowledging that they provide rare safe havens for LGBT refugees, whereas many other places cannot due to their laws that criminalise homosexuality.

73 UK Lesbian and Gay Immigration Group, 'Written Submission to the Independent Review into the Welfare in Detention of Vulnerable Persons', 29 May 2015, para.65.

74 OHCHR, 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity', 2011, p. 13.

75 See also UNHCR, *Guidelines on international protection No. 9*, 23 October 2012; CCPR/C/108/D/2149/2012.

76 OHCHR, 'Discrimination and violence against individuals based on their sexual orientation and gender identity', 4 May 2015.

77 UNHRC, at n.3 above.

78 As reported by Wheaton, O., 'David Cameron: We will resettle LGBT refugees from Syria and Iraq', *The Metro*, 9 December 2015.

Available at: <http://metro.co.uk/2015/12/09/david-cameron-we-will-resettle-lgbt-refugees-from-syria-and-iraq-5555194/#ixzz3u1qvVmyF>

79 UK Lesbian and Gay Immigration Group, 'Written Submission to the Independent Review into the Welfare in Detention of Vulnerable Persons', 29 May 2015, para.64.

Conclusions

84. LGBT people face violence and persecution in times of peace. In times of conflict, disaster and civil unrest, this pre-existing homophobia becomes amplified. LGBT people thus face vulnerabilities above and beyond the population at large. These vulnerabilities are compounded by a perceived lack in legal protection in IHL for LGBT people. These gaps in legal protection and the persistence of homophobia can both be viewed as legacies of the criminalisation of homosexuality. Even where homosexuality is no longer a crime, LGBT people in times of conflict, disaster and civil unrest are affected by these legacies. They are vulnerable to violence and persecution by state and non-state actors, they are denied assistance and resources, and often ignored in aid and reconstruction programmes.
85. The international community has tailored specific responses to other vulnerable groups, in particular women and children. The same must be done for LGBT people. UNHCR has made efforts to mainstream sexual orientation and gender identity into its work and, in doing so, it has brought its refugee work in line with other fields of international law. The same process must now be applied to IHL; governments, international organisations and the ICRC must act to achieve this. The legacy of criminalising homosexuality in the 1940s should, and must, be corrected today by bringing the interpretation of IHL into line with all other fields of international law.
86. The continued criminalisation of homosexuality across the globe also manifests in non-criminalising countries, which are the only viable recipient states for LGBT asylum-seekers fleeing conflict, disasters and other situations. At present, non-criminalising countries must ensure that their asylum policies are adequate to provide safe havens for LGBT people, who have nowhere else to turn. In the medium- to long-term, these governments must seek to bring about the decriminalisation of homosexuality for the sake of LGBT people and to reduce the number of asylum applications that they receive.

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