

## **ADDRESSING THE LGBT+ PROTECTION GAP IN ARMED CONFLICT: THE LEGALITY OF REPEALING ANTI-LGBT+ LAWS IN OCCUPIED TERRITORIES**

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*Lesbian, gay, bisexual, transgender, intersex, and gender non-conforming individuals are among the least protected groups in armed conflict. Their existing vulnerability to discrimination and violence is specifically exacerbated in the context of situations of occupation. However, there have been very few efforts to respond to these risks in the context of armed conflicts, leaving LGBTQIA+ communities as a blind spot in the monitoring of civilian protection concerns. In occupied territories, there is an inherent and unresolved conflict between international humanitarian law's imperative to maintain the status quo ante, and a State's obligation to protect and promote the human rights of LGBTQIA+ individuals within its jurisdiction. Under international humanitarian law, an Occupying Power is generally bound by a presumption of continuity that requires it to maintain the domestic laws in force. However, adherence to this rule in regions such as the Occupied Palestinian Territories and eastern Ukraine has seen LGBTQIA+ persons subject to rape, torture and lethal violence at the hands of local security and police forces. This has generated an impetus to reexamine the scope of an Occupying Power's legislative prerogative in order to better reflect the needs of those with diverse sexual orientations, gender identities, and gender expressions. This paper demonstrates how a queer-sensitive interpretation of the law of occupation and international human rights law may be applied to advance legislative protections for LGBTQIA+ persons in occupied territories. It proposes that the exception to the conservationist principle that permits a Belligerent Occupant to legislate to ensure humane treatment of the civilian population, when read in conjunction with contemporary interpretations of international human rights law, allows an Occupying Power to abrogate a limited set of provisions that constitute cruel, inhuman, or degrading treatment, such as the death penalty or corporal punishment. This does not grant a blank cheque to an Occupant to reform the law of an occupied territory, however it does allow the most harmful laws to be repealed.*

## TABLE OF CONTENTS

<b>I INTRODUCTION .....</b>	<b>3</b>
<b>II THE SCOPE OF THE LEGISLATIVE PREROGATIVE OF OCCUPYING POWERS .....</b>	<b>6</b>
A DEFINING THE GENERAL PROHIBITION ON REPEALING LOCAL LEGISLATION .....	7
B EXCEPTIONS TO THE PRESUMPTION OF CONTINUITY .....	9
<b>III THE EXPANDING PROTECTION FOR LGBT+ PERSONS UNDER INTERNATIONAL HUMAN RIGHTS LAW .....</b>	<b>12</b>
A THE CONCURRENT APPLICATION OF IHL AND IHRL IN OCCUPATIONS .....	12
B THE OPERATION OF THE PRINCIPLE OF NON-DISCRIMINATION IN RELATION TO LGBT+ PERSONS .....	13
1 <i>Non-Discrimination and the Equal Protection of the Law</i> .....	14
2 <i>Non-Discrimination in the Enjoyment of Other Human Rights</i> .....	15
C THE NATURE OF STATES' HUMAN RIGHTS OBLIGATIONS UNDER THE PRINCIPLE OF NON-DISCRIMINATION .....	16
<b>IV RECONCILING THE PRINCIPLES OF IHL AND IHRL: UNDERSTANDING A BELLIGERENT OCCUPANT'S LEGISLATIVE POWERS WITH RESPECT TO LGBT PEOPLE IN OCCUPIED TERRITORIES .....</b>	<b>19</b>
A THE GENERAL APPROACH TO RESOLVING NORM CONFLICTS BETWEEN IHL AND IHRL .....	20
B THE CASE FOR PROMOTING LGBT+ PROTECTIONS UNDER THE LAW OF OCCUPATION: EXPANDING THE INTERPRETATIONS OF THE EXCEPTIONS TO THE PRESUMPTION OF CONTINUITY THROUGH A RIGHTS-BASED FRAMEWORK .....	20
C DELIMITING THE RIGHTS AND DUTIES OF OCCUPYING POWERS TO LEGISLATE TO PROTECT LGBT+ PERSONS .....	22
1 <i>Repealing Criminal Laws</i> .....	22
2 <i>Repealing Discriminatory Civil Laws</i> .....	24
3 <i>The Rules Applicable in Cases of Prolonged Occupation</i> .....	24
4 <i>The Involvement of the United Nations Security Council</i> .....	25
<b>V CONCLUSION .....</b>	<b>26</b>

## I INTRODUCTION

The protection of the rights of civilians in territories controlled by a Belligerent Occupant is a core practical and legal challenge facing contemporary international humanitarian law (“IHL”).<sup>1</sup> This is a particular issue for lesbian, gay, bisexual, transgender, intersex and gender non-conforming (“LGBT+”) individuals, whose existing vulnerability to violence and discrimination is exacerbated in occupation contexts.<sup>2</sup> For example, homosexual men in the Occupied Palestinian Territories have been victims of torture and lethal violence at the hands of the Palestinian National Security Forces,<sup>3</sup> and LGBT+ persons in the occupied regions of eastern Ukraine have been subject to police beatings and corrective rape.<sup>4</sup> However, conflict-related risks faced by minorities on the basis of their sexual orientation, gender identity, and gender expression “[have] been a blind spot in the monitoring of civilian protection concerns,” and there have been limited efforts to advance their rights under the IHL framework.<sup>5</sup>

The law of occupation, which is the branch of IHL that regulates the total or partial control of a territory by a hostile army,<sup>6</sup> requires an Occupying Power to maintain the domestic laws of that territory, unless it presents an obstacle to the application of other rules of IHL.<sup>7</sup> Although this conservationist principle is important to preserve the legal sovereignty of an occupied territory,<sup>8</sup> this seemingly justifies the maintenance of oppressive systems, such as the criminalisation of same-sex relations, on the basis that these are deeply rooted in cultural beliefs and national laws, even when this runs contrary to a State’s fundamental obligation under international human rights law (“IHRL”) to protect and promote the rights of those under its effective control.

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<sup>1</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS: RECOMMITTING TO PROTECTION IN ARMED CONFLICT ON THE 70<sup>TH</sup> ANNIVERSARY OF THE GENEVA CONVENTIONS 52-54 (2019).

<sup>2</sup> Alon Margalit, *Still a Blind Spot: The Protection of LGBT Persons During Armed Conflict and Other Situations of Violence*, 100 INT’L REV. RED CROSS 237, 238-39 (2018).

<sup>3</sup> MICHAEL KAGAN & ANAT BEN-DOR, NOWHERE TO RUN: GAY PALESTINIAN ASYLUM SEEKERS IN ISRAEL 4, 6 (2008).

<sup>4</sup> Kate Bond & Anastasia Vlasova, *Gay and Displaced on the Frontlines of Ukraine’s Conflict*, UNHCR (Sept. 15, 2017), <https://www.unhcr.org/news/stories/2017/9/597ef1fc4/gay-displaced-frontlines-ukraines-conflict.html?query=LGBT>.

<sup>5</sup> Rep. of the Sec’y Gen., Conflict Related Sexual Violence, ¶ 14, U.N. Doc. S/2015/203 (2015). *See also* Margalit, *supra* note 2, at 238-39; Human Rights Council Res. 17/19, U.N. Doc. A/HRC/Res/17/19, ¶ 1 (June 17, 2011).

<sup>6</sup> Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land art. 42, Oct. 18, 1907 [hereinafter Hague Regulations].

<sup>7</sup> *Id.* at art 43; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 64, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

<sup>8</sup> MYRES S MCDUGAL & FLORENTINO P FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 768 (1961).

While the international law framework provides that the rules of IHL and IHRL are to be treated as complementary, and there is an increasing recognition of the interrelationship between the two regimes,<sup>9</sup> the general presumption is that the principles of IHL are to be followed in cases where provisions conflict.<sup>10</sup> However, the scope of the operation of the conservationist principle is being challenged, particularly in light of evolving international jurisprudence applying human rights norms in situations of occupation.<sup>11</sup> There is, therefore, an inherent and unresolved conflict between IHL's imperative to maintain the *status quo ante* in occupied territories, and a State's obligation to protect and fulfil the human rights of LGBT+ individuals within its jurisdiction,<sup>12</sup> especially given the sensitive and controversial nature of such legislative changes.<sup>13</sup> As a result, the extent to which a Belligerent Occupant is able to repeal legislative provisions that are contrary to IHRL is a matter of significant contention.<sup>14</sup> As IHRL is becoming increasingly relevant in armed conflict, it is important for States to understand how this interacts with the law of occupation, particularly if human rights are to be used as a justification for legislative changes.<sup>15</sup> Recent practice, such as in Iraq and Afghanistan, has shown that Occupying Powers that do not comply with the law of occupation, either by failing to maintain public order and civil life, or by making too many changes to the national system, face serious difficulties with the domestic population and significant criticism from the international community.<sup>16</sup> It is therefore necessary to take a clear position on this issue to prevent inconsistencies in the application of the law and to ensure vulnerable groups

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<sup>9</sup> See, for example, Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310, 311 (2007); Nancie Prud'homme, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, 40 ISR. L. REV. 356 (2007); Anthony E. Cassimatis, *International Humanitarian Law, IHRL and Fragmentation of International Law*, 56 INT'L COMPAR. L. Q. 623 (2008); Marko Milanovic, *A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law*, 14 J. CONFLICT SEC. L. 459 (2009); Martti Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 56, U.N. Doc. A/CN.4/L.682 and Add.1 (Apr. 13, 2006).

<sup>10</sup> *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgement, 2005 I.C.J. 168 ¶ 178 (Dec. 19).

<sup>11</sup> G.A. Res. 2675 (XXV) (Dec. 9, 1970); Human Rights Comm., Concluding Observations of the Human Rights Committee: Israel, U.N. Doc. CCPR/C/79/Add.93, ¶ 10 (Aug. 18, 1998); Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights* 100 AM. J. INT'L L. 580, 582 (2006).

<sup>12</sup> Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (May 26, 2004) [hereinafter General Comment No. 31].

<sup>13</sup> Margalit, *supra* note 2, at 262.

<sup>14</sup> Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17, 23 (2004); TRISTAN FERRARO, EXPERT MEETING: OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY 58-59 (2012).

<sup>15</sup> FERRARO, *supra* note 14, at 54.

<sup>16</sup> Marco Sassoli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EUR. J. INT'L L. 661, 693 (2005).

are not left unprotected.<sup>17</sup> There is a significant impetus to determine the specific legal obligations of Occupying Powers to address the protection gap for LGBT+ persons,<sup>18</sup> with a focus on responses that coordinate the overlapping legal regimes of IHL and IHRL in a way that places greater emphasis on the rights of individuals with diverse sexual orientations, gender identities, and gender expressions.<sup>19</sup>

This paper addresses the fundamental question of the scope of the legislative power of a Belligerent Occupant with relation to anti-LGBT+ laws in an occupied territory. It assesses whether IHRL's non-discrimination provisions can generate a redefinition of the scope of an Occupying Power's obligations under IHL, permitting the abrogation of discriminatory laws that target LGBT+ persons. In doing so, this paper assesses the *jus in bello* question of the limitations of an Occupant's law-making powers in territories once they have been occupied, and it does not consider the legality of commencing occupations in accordance with the principles of *jus ad bellum*. The paper begins by discussing the law of occupation's prohibition on repealing local legislation, outlining the restrictions this imposes on Occupying Powers. It then assesses non-discrimination provisions in IHRL and the corresponding legislative obligations these impose on States to provide for the specific needs and rights of LGBT+ individuals. It concludes by applying a norm conflict resolution framework to analyse how the conservationist principle of IHL and the norms of IHRL be reconciled in situations of occupation and work together in order to safeguard the rights and advance the protection of LGBT+ persons.

In addressing its core question, this paper adopts a queer theoretical framework. Queer theory critiques the structural inequality that is maintained through the heteronormative construction of international law, and the "continuing silence" surrounding the specific experiences of LGBT+ persons in conflict settings, due to their increased vulnerability in these situations,<sup>20</sup> emphasising the need to expressly frame its principles in a way that provides for the rights of LGBT+ individuals to counter this.<sup>21</sup> As a theoretical framework, it is used as a way to propose

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<sup>17</sup> Ben-Naftali & Shany, *supra* note 14, at 22; FERRARO, *supra* note 14, at 54.

<sup>18</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 1, at 52-54; Ben-Naftali & Shany, *supra* note 14, at 21.

<sup>19</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 1, at 52-54; Droege, *supra* note 9, at 310-11; Ben-Naftali & Shany, *supra* note 14, at 22.

<sup>20</sup> Tamsin Phillipa Paige, The Maintenance of International Peace and Security Heteronormativity, in *QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS* 91, 97 (Dianne Otto ed., 2017).

<sup>21</sup> Dianne Otto, *Introduction: Embracing Queer Curiosity*, in *QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS* 1, 1-2 (Dianne Otto ed., 2017).

reinterpretations of substantive law so that it better reflects the diverse experiences of all people.<sup>22</sup> Using this approach, as opposed to relying on broad human rights standards, is particularly important for queer communities, as traditional interpretations of IHRL do not necessarily translate to the particular needs of the LGBT+ community, especially due to the complex political and cultural dimensions involved.<sup>23</sup> A failure to expressly recognise their unique circumstances contributes to the maintenance of structural inequalities in international law.<sup>24</sup> In the context of armed conflict, applying a queer-sensitive lens allows for critical engagement with the distinctive voices of queer communities which have been ignored in traditional epistemologies, in order to consider how norms of IHRL can be used alongside IHL to better protect LGBT+ individuals in occupied territories.<sup>25</sup>

## II THE SCOPE OF THE LEGISLATIVE PREROGATIVE OF OCCUPYING POWERS

This part defines the legislative powers a Belligerent Occupant has under IHL. It begins by outlining the presumption of continuity that requires States to maintain the laws in force in an occupied territory. It then examines the scope of exceptions to this principle, considering the extent to which a queer-specific application of these rules enables an Occupying Power to legislate with respect to LGBT+ individuals. This legislative prerogative is governed by the provisions outlined in the *Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hague Convention IV)* (“Hague Regulations”) and the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (“Geneva Convention IV”). These provisions apply for the duration of an occupation, which commences when a territory is occupied by the armed forces of a hostile State who are physically present and imposing their own authority over a region, such that the local sovereign is unable to do so.<sup>26</sup> They continue to the extent that an Occupying Power “exercises the functions of government in such territory.”<sup>27</sup> While the conservationist principle established by these rules generally requires States to preserve the laws of an occupied

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<sup>22</sup> Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85(4) AM. J. INT’L L. 613, 634 (1991).

<sup>23</sup> Po-Han Lee, *A Pluralist Approach to ‘the International’ and Human Rights for Sexual and Gender Minorities*, 128 FEMINIST REV. 79, 80 (2021).

<sup>24</sup> Valerie Oosterveld, *Feminist Debates on Civilian Women and International Humanitarian Law*, 27 WINDSOR Y.B. ACCESS JUST. 385, 387 (2009).

<sup>25</sup> Lee, *supra* note 23, at 80.

<sup>26</sup> Hague Regulations, *supra* note 6, at art. 42; Armed Activities on the Territory of the Congo, *supra* note 10, at ¶ 172.

<sup>27</sup> Geneva Convention IV, *supra* note 7, at art. 6(3).

territory,<sup>28</sup> the exceptions allowing laws to be abrogated where necessary to comply with other IHL rules may provide some scope to repeal anti-LGBT+ laws.

### *A Defining the General Prohibition on Repealing Local Legislation*

The power of an Occupant to make legislative changes in an occupied territory is delineated by art 43 of the *Hague Regulations* and art 64 of *Geneva Convention IV*.

Article 43 of the *Hague Regulations* provides:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Article 64 of *Geneva Convention IV* states:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

These two provisions must be understood and interpreted together. Per art 154 of *Geneva Convention IV*, the *Hague Regulations* are to be treated as supplementary to the *Convention*.<sup>29</sup> The terms of art 64 act as a clarification and amplification of the general principles detailed in art 43, expressing “in more precise and detailed form,” the terms “unless absolutely prevented,”<sup>30</sup> as opposed to being a revision of the terms of an Occupying Power’s legislative

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<sup>28</sup> Droege, *supra* note 9, at 337; MICHAEL SIEGRIST, THE FUNCTIONAL BEGINNING OF BELLIGERENT OCCUPATION (2011).

<sup>29</sup> Geneva Convention IV, *supra* note 7, at art. 154.

<sup>30</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FOURTH GENEVA CONVENTION 335 (1958) [hereinafter COMMENTARY ON GENEVA CONVENTION VI].

prerogative.<sup>31</sup> This is reflected in the predominance of art 43 that has been maintained in subsequent scholarship and judicial practice when considering the interpretation of art 64.<sup>32</sup> Importantly, although paragraph one of art 64 of *Geneva Convention IV* refers solely to the penal laws of an occupied territory, the general language of “provisions” in paragraph two is taken to extend to laws in general, including civil laws as well as administrative regulations, decrees, ordinances, and court precedents, in light of the *Hague Regulations*’ broad reference to “the laws in force in the country.”<sup>33</sup>

The fundamental assumption of the law of occupation is that an Occupant’s role is temporary and transitional, and thus any changes to the existing legal order in an occupied territory should be minimal.<sup>34</sup> The authoritative commentary to *Geneva Convention IV* emphasises this point, stressing that the core principle is the “idea of the continuity of the legal system,” that “applies to the whole of the law.”<sup>35</sup> The operation of arts 43 and 64 serve as a clear limitation to an Occupying Power’s legislative authority, only permitting changes necessary for the purposes enumerated in the two Conventions.<sup>36</sup> Notably, the drafting committee of *Geneva Convention IV* expressly excluded suggestions from delegates to include more permissive language that would have given a Belligerent Occupant greater power to modify legislation, on the basis that it would have “greatly exceeded the limited right laid down in the *Hague Regulations*.”<sup>37</sup> Thus, the concept of necessity is to be understood in a restrictive way, permitting only those changes that are essential for one of the enumerated purposes.<sup>38</sup>

In light of the operation of this basic presumption, interpretations indicate that this prohibits an Occupying Power implementing widespread reforms in an occupied territory that could not be

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<sup>31</sup> Joyce A. C. Gutteridge, *The Geneva Conventions of 1949*, 26 BRITISH Y.B. INT’L L. 324 (1949); GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 194 (1968); Yutaka Arai-Takahashi, *Preoccupied with Occupation: Critical Examinations of the Historical Development of the Law of Occupation*, 94 INT’L REV. RED CROSS 51, 67 (2012).

<sup>32</sup> Eyal Benvenisti, *The Laws of Occupation and Commercial Law Reform in Occupied Territories: A Reply to Jose Alejandro Carballo*, 23 EUR. J. INT’L L. 199, 209 (2012).

<sup>33</sup> See, for example, HCJ 3278/02 Center for the Defense of the Individual founded by Dr. Lota Salzberger and others v Commander of the IDF Forces in the West Bank (2002) (Isr.); HCJ 3239/02 Marab v IDF Commander in the West Bank (2003) (Isr.); HCJ 1890/03 Bethlehem Municipality and 21 others v The State of Israel – Ministry of Defense (2005) (Isr.).

<sup>34</sup> Droege, *supra* note 9, at 337; SIEGRIST, *supra* note 28.

<sup>35</sup> COMMENTARY ON GENEVA CONVENTION VI, *supra* note 30, at 335.

<sup>36</sup> Hague Regulations, *supra* note 6, at art. 43; Geneva Convention IV, *supra* note 7, at art. 64.

<sup>37</sup> Roberts, *supra* note 11, at 588, quoting *Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War* 139 (Final Record of the Diplomatic Conference of Geneva, 1949).

<sup>38</sup> Sassoli, *supra* note 16, at 671.



reversed by the local sovereign once an occupation concludes.<sup>39</sup> The transitory nature of the rights and duties of the Belligerent Occupant precludes definitive or large-scale changes to the institutional or social structures of an occupied territory.<sup>40</sup> This has been criticised for its rigidity,<sup>41</sup> especially in situations of prolonged occupation, as it significantly curtails the ability of an Occupant to legislate for social development that could promote the rights of individuals under its control, preventing civil life from fully evolving.<sup>42</sup>

The application of this strict necessity test provides a particular challenge to an Occupying Power's ability to promote the rights of LGBT+ individuals under its effective control, reducing protections available to this already vulnerable group. The obligation to maintain standards that are as close to the local cultural and legal traditions as possible limits the validity of promoting legislative protections for these communities, as challenging the ordering principles of heteronormativity in the law will necessarily result in changes to the cultural and legal framing of rights in an occupied territory.<sup>43</sup> This may be viewed as a form of "ideological colonisation" that is prohibited under IHL.<sup>44</sup> However, the consequences of this restrictive approach on the protection of the rights of LGBT+ communities can be seen in the Occupied Palestinian Territories. Despite having some of the most developed rights protections for LGBT+ individuals in the Middle East,<sup>45</sup> Israel has not repealed legislation prohibiting same-sex acts "against the order of nature" in Palestine, as this would be *prima facie* contrary to the law of occupation.<sup>46</sup> Palestinian men have consequently been left vulnerable to imprisonment and torture by Palestinian National Security Forces.<sup>47</sup> This demonstrates the inadequacy of IHL in protecting the rights of those with diverse sexual orientations, gender identities, and gender expressions.

### *B Exceptions to the Presumption of Continuity*

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<sup>39</sup> FERRARO, *supra* note 14, at 64.

<sup>40</sup> Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 139, 141 (2005).

<sup>41</sup> ROBERT KOLB, *IUS IN BELLO: LE DROIT INTERNATIONAL HUMANITAIRE DES CONFLITS ARMES* 18687 (2002).

<sup>42</sup> Roberts, *supra* note 11, at 582; YORAM DINSTEIN, *INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 116-20 (2009).

<sup>43</sup> Lee, *supra* note 23, at 80; Victor Madrigal-Borloz (Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity), *Practices of Exclusion*, U.N. Doc. A/76/152, ¶ 14 (July 15, 2021).

<sup>44</sup> Jasbir Puar, *Rethinking Homonationalism*, 45 INT'L J. MIDDLE EAST STUD. 336, 337-9 (2013).

<sup>45</sup> Aeyal Goss, *The Politics of LGBT Rights in Israel and Beyond: Nationality, Normativity, and Queer Politics*, 46 COLUM. HUM. RTS. L. REV. 81, 81-3 (2015).

<sup>46</sup> British Mandate Criminal Code Ordinance No. 74 1936, § 152(2) (Palestine).

<sup>47</sup> KAGAN & BEN-DOR, *supra* note 3, at 4, 6.

While the conservationist foundation of the law of occupation is relatively rigid, there are some exceptions to the general prohibition on legislative change that are provided within the scope of art 43 of the *Hague Regulations* and art 64 of *Geneva Convention IV*. Article 43 permits an Occupying Power to take measures to “restore, and ensure...public order and safety.”<sup>48</sup> Article 64 enables an Occupant to “fulfil its obligations under the *Convention*, to maintain orderly government...and to ensure the security” of its forces.<sup>49</sup> When read together, the exceptions encompasses an Occupant’s duty to fulfil its obligations under *Geneva Convention IV*, the need to maintain an orderly government, and preserve its own security.<sup>50</sup> These exceptions are strictly limitative, and do not allow a Belligerent Occupant to abrogate or suspend the laws in force in an occupied territory for any other reason,<sup>51</sup> “and not, in particular, merely to make it accord with their own legal conceptions.”<sup>52</sup> These exceptions are discretionary, and impose no concrete obligation on an Occupying Power to legislate in any way.<sup>53</sup> Additionally, these exceptions are still subject to the requirement that any changes instituted in a territory must be reversible.<sup>54</sup>

The need to uphold the provisions of *Geneva Convention IV* can be applied to provide grounds for an Occupying Power to legislate to protect LGBT+ individuals. Although IHL is silent on the needs and vulnerabilities of these communities,<sup>55</sup> an expanded interpretation of the duty of humane treatment and the prohibition of adverse distinction provides a legal basis for repealing discriminatory laws in occupied territories. The duty of humane treatment refers to an Occupying Power’s absolute obligation to respect the honour of civilians and those no longer taking a direct part in active hostilities, prohibiting ill-treatment such as murder, torture, humiliating and degrading treatment, and other outrages upon personal dignity.<sup>56</sup> The prohibition on adverse distinction prevents an Occupying Power imposing measures that may negatively differentiate between protected persons.<sup>57</sup> *Geneva Convention IV* refers specifically

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<sup>48</sup> Hague Regulations, *supra* note 6, at art. 43.

<sup>49</sup> Geneva Convention IV, *supra* note 7, at art. 64.

<sup>50</sup> FERRARO, *supra* note 14, at 57; DINSTEIN, *supra* note 42, at 112-16.

<sup>51</sup> Ben-Naftali & Shany, *supra* note 14, at 24.

<sup>52</sup> *Id.*; COMMENTARY ON GENEVA CONVENTION VI, *supra* note 30, at 335.

<sup>53</sup> Hague Regulations, *supra* note 6, at art. 43; Geneva Convention IV, *supra* note 7, at art. 64.

<sup>54</sup> FERRARO, *supra* note 14, at 54, 67; Sylvain Vité, *L'applicabilité du Droit International de L'occupation Militaire aux Activités des Organisations Internationales*, 86 INT’L REV. RED CROSS 11, 17 (2004).

<sup>55</sup> HUMAN DIGNITY TRUST, CRIMINALISING HOMOSEXUALITY AND LGBT RIGHTS IN TIMES OF CONFLICT, VIOLENCE AND NATURAL DISASTERS (2015).

<sup>56</sup> JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 306 (2005).

<sup>57</sup> *Id.* at 308.

to grounds of race, religion, and political opinion,<sup>58</sup> however, the criteria provided is non-exhaustive, and thus should be taken to extend to LGBT+ persons, as “any discriminatory measure whatsoever is banned.”<sup>59</sup>

When applied to the legislative prerogative of an Occupant, the authoritative commentary to *Geneva Convention IV* provides that the requirement that these laws “remain in force” in an occupied territory is subject to a reservation that “makes it possible to abrogate any discriminatory measures incompatible with humane requirements.”<sup>60</sup> Thus, this exception should be understood as permitting the repealing of LGBT+ laws that lead to inhumane treatment, such as those that impose the death penalty,<sup>61</sup> prescribe corporal punishment for same-sex activities,<sup>62</sup> or enable the arbitrary detention of people on the basis of their sexual orientation, gender identity, or gender expression.<sup>63</sup> For example, arts 171-173 of the *Criminal Code* in the occupied region of Northern Cyprus, which allowed for three-year prison sentences for those convicted of homosexuality, was repealed in accordance with IHL to bring its laws in line with Turkey and the rest of the European Union.<sup>64</sup> Additionally, this legislative power may also be applied to repeal laws that prevent the non-discriminatory execution of an Occupying Power’s positive obligations under *Geneva Convention IV*, such as those relating to labour, public health, hygiene, and the provision of food.<sup>65</sup> Accordingly, a queer-sensitive interpretation of IHL suggests that Occupant is granted a limited power to repeal anti-LGBT+ laws that prevent it fulfilling its obligations to promote humane treatment and prevent adverse distinction.

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<sup>58</sup> Geneva Convention IV, *supra* note 7, at art. 27.

<sup>59</sup> COMMENTARY ON GENEVA CONVENTION VI, *supra* note 30, at 206.

<sup>60</sup> *Id.* at 335.

<sup>61</sup> LUCAS RAMÓN MENDOS ET. AL., STATE-SPONSORED HOMOPHOBIA 2020: GLOBAL LEGISLATION OVERVIEW UPDATE 31 (2020); Anand Grover (Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health), *Report Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, U.N. Doc. A/HRC/14/20, ¶ 20 (Apr. 27, 2010); Iran Islamic Penal Code 2013 arts. 233, 234 (Iran); Penal Code 2017 §§ 645-650 (Afg.).

<sup>62</sup> MENDOS ET. AL., *supra* note 61, at 52; Penal Code 1976 §§ 337, 337A, 337B (Malay.); Penal Code 2004 art. 1 (Qatar); Esther van Eijk, *Sharia and National Law in Saudi Arabia*, in SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 139, 143 (Jan Michiel Otto ed., 2010).

<sup>63</sup> *See, for example*, MENDOS ET. AL., *supra* note 61, at 118; Iran Islamic Penal Code, *supra* note 61 art 237; Penal Code 1999 § 153 (Malawi); Penal Code 1960 § 104(1)(a) (Ghana).

<sup>64</sup> MENDOS ET. AL., *supra* note 61, at 105; VICTORIA BARNES & KAREN COPPENS, REFORM OF DISCRIMINATORY SEXUAL OFFENCES LAWS IN THE COMMONWEALTH AND OTHER JURISDICTIONS: CASE STUDY OF NORTHERN CYPRUS 10, 54 (2017).

<sup>65</sup> COMMENTARY ON GENEVA CONVENTION VI, *supra* note 30, at 337. *See* Geneva Convention IV, *supra* note 7, at arts. 52, 55, 56.

### III THE EXPANDING PROTECTION FOR LGBT+ PERSONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

This part outlines States' human rights obligations in relation to legislation impacting LGBT+ persons in occupied territories, in light of the continued applicability of IHRL during armed conflict. It details the scope of the operation of the principle of non-discrimination as it applies to the unique circumstances of those with diverse sexual orientations, gender identities, and gender expressions. It then examines the corresponding duties imposed on States to respect, protect, promote, and fulfil these rights. This responds to the fundamental challenge that the existence of discriminatory laws pose to the full realisation of the rights of LGBT+ individuals.<sup>66</sup> The mere existence of provisions that affect the liberty and security of these communities, such as those that criminalise same-sex relations and diverse gender expressions, permit discrimination in employment, or exclude same-sex couples from municipally-operated housing systems, reduces their protections and implicitly encourages discrimination, prejudice, hate speech, and violence.<sup>67</sup> These vulnerabilities are compounded in situations of armed conflict and occupation.<sup>68</sup> It is therefore necessary to assess IHRL through a queer-sensitive lens to address this issue.

#### *A The Concurrent Application of IHL and IHRL in Occupations*

Although IHRL was initially developed as a peacetime regime, the changing nature of armed conflict and the evolution of international law has led to a recognition of the applicability of human rights norms in situations of occupation. This is best illustrated in the International Court of Justice's judgement in the *Case Concerning Armed Activities on the Territory of the Congo*, which confirmed that an Occupant is under a legal duty to "secure respect for the applicable rules of IHRL and IHL, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party."<sup>69</sup> Similar interpretations have been applied by the United Nations and the human rights treaty bodies in relation to

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<sup>66</sup> Madrigal-Borloz, *supra* note 43, at ¶ 35.

<sup>67</sup> *Id.* at ¶¶28, 30; Human Rights Comm., Views: Communication No 2172/2012, U.N. Doc. CCPR/C/119/D/2172/2012 (June 28, 2017); Azul Rojas Marín v. Peru, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 402 (Mar. 12, 2020).

<sup>68</sup> Margalit, *supra* note 2, at 238-9.

<sup>69</sup> Armed Activities on the Territory of the Congo, *supra* note 10, at ¶ 178.

situations of occupation.<sup>70</sup> States have generally accepted this position, with the exception of Israel and the United States who are persistent objectors.<sup>71</sup> Consequently, human rights norms are not displaced in armed conflict,<sup>72</sup> and therefore have a continued relevance in reinforcing the protection of LGBT+ persons in occupied territories.

### *B The Operation of the Principle of Non-Discrimination in relation to LGBT+ Persons*

The fundamental basis for advancing the protection of LGBT+ persons under IHRL is the operation of the principle of non-discrimination, which lies at the heart of the human rights regime.<sup>73</sup> This encompasses two distinct rights: the right to the equal protection of the law, and the right to non-discrimination in the enjoyment of other human rights.<sup>74</sup> The application of this principle to LGBT+ individuals has been confirmed in the evolving international jurisprudence recognising that the non-discrimination provisions in the core international and regional human rights treaties includes protections for those with diverse sexual orientations, gender identities, and gender expressions within the meaning of “sex” or “other status.”<sup>75</sup>

However, constructions of the scope of the right to non-discrimination are traditionally examined through the lens of the needs of groups such as racial minorities and women,<sup>76</sup>

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<sup>70</sup> See, for example, Final Act of the International Conference on Human Rights, U.N. Doc. A/Conf.32/41 (May 13, 1968); Human Rights Comm., Concluding Observations of the Human Rights Committee: Cyprus, U.N. Doc. CCPR/C/79/Add.39 (Sept. 21, 1994); Human Rights Comm., Concluding Observations of the Human Rights Committee: Israel, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003); Comm. on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, U.N. Doc. E/C.12/1/Add.90 ¶¶ 14-15 (June 26, 2003); Comm. on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel, U.N. Doc. CERD/C/304/Add.45 (Mar. 30, 1998).

<sup>71</sup> Droege, *supra* note 9, at 323.

<sup>72</sup> Christian Tomuschat, *Human Rights Law and International Humanitarian Law*, 21(1) EUR. J. INT’L L. 15, 15 (2010).

<sup>73</sup> Dodo Karsay et al, SEXUAL ORIENTATION, GENDER IDENTITY AND EXPRESSION, AND SEX CHARACTERISTICS AT THE UNIVERSAL PERIODIC REVIEW (November 2016) 17.

<sup>74</sup> Human Rights Comm., General Comment No 18: Non-Discrimination, U.N. Doc. HRI/GEN/1/Rev.9, ¶12 (Nov. 10, 1989) [hereinafter General Comment No 18].

<sup>75</sup> International Covenant on Civil and Political Rights art. 2(1), Mar. 23, 1976, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 2(2), Jan. 3, 1976, 993 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination Against Women art. 1, Sept. 3, 1981, 1249 U.N.T.S. 13; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment art. 1(1), June 26, 1987, 1465 U.N.T.S. 85; Human Rights Comm., Views: Communication No 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994) [hereinafter *Toonen v. Austr.*]; Comm. on Economic, Social and Cultural Rights, General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights, U.N. Doc. E/C.12/GC/20, ¶ 32 (July 2, 2009) [hereinafter General Comment No. 20].

<sup>76</sup> Otto, *supra* note 21, at 1-2; Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 75; International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1968, 660 U.N.T.S. 195; *Barcelona Traction, Light and Power Company, Ltd. (Bel. v. Spain)*, Second Phase, 1970 I.C.J. 3, ¶ 34 (Feb. 5).

without acknowledging the specific vulnerabilities and needs of LGBT+ individuals.<sup>77</sup> This lack of recognition contributes to upholding structural inequalities of international law, and the maintenance of the silence of queer voices globally.<sup>78</sup> Thus, interpretations of IHRL must engage in a process of “adding in” the voices of those with diverse sexual orientations, gender identities, and gender expressions, integrating an LGBT+ perspective into understandings of the principle of non-discrimination.<sup>79</sup>

### *1 Non-Discrimination and the Equal Protection of the Law*

Under IHRL, all persons are entitled to equality before the law and the equal protection of the law, without any discrimination.<sup>80</sup> This is an autonomous right that prohibits “discrimination in law or in fact in any field regulated and protected by public authorities.”<sup>81</sup> It includes any distinction, restriction, or preference based on a person’s sexual orientation, gender identity, or gender expression which has the purpose or effect of removing or impairing equality before the law or the equal protection of the law.<sup>82</sup>

Under this principle, legislative provisions that discriminate against LGBT+ individuals violate IHRL. For example, the continued operation of laws such as those that prohibit same-sex relationships,<sup>83</sup> restrict same-sex couples from accessing housing services,<sup>84</sup> deny a person legal recognition of their preferred gender,<sup>85</sup> or limit social security benefits<sup>86</sup> contravene human rights standards. This interpretation is consistent with the approach adopted by the United Nations treaty bodies, which have repeatedly emphasised the obligation of States Parties to repeal laws that criminalise sexual orientations or gender expressions, along with

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<sup>77</sup> Oosterveld, *supra* note 24, at 387.

<sup>78</sup> *Id.*

<sup>79</sup> Otto, *supra* note 21, at 1-2.

<sup>80</sup> International Covenant on Civil and Political Rights, *supra* note 75, at art. 27.

<sup>81</sup> General Comment No. 18, *supra* note 74, at ¶ 12.

<sup>82</sup> INT’L COMM’N OF JURISTS, YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 10 (2007) [hereinafter YOGYAKARTA PRINCIPLES].

<sup>83</sup> Madrigal-Borloz, *supra* note 43, at ¶ 35; Toonen v. Austr., *supra* note 75; INT’L COMM’N OF JURISTS, YOGYAKARTA PRINCIPLES PLUS 10: ADDITIONAL PRINCIPLES AND STATE OBLIGATIONS ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS TO COMPLEMENT THE YOGYAKARTA PRINCIPLES 11 (2017) [hereinafter YOGYAKARTA PRINCIPLES PLUS 10].

<sup>84</sup> Human Rights Comm., Concluding Observations on the Sixth Periodic Report of Japan, U.N. Doc. CCPR/C/JPN/CO/6, ¶ 11 (Aug. 20, 2014).

<sup>85</sup> Human Rights Council, Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, U.N. Doc. A/HRC/29/23, ¶ 69 (May 4, 2015).

<sup>86</sup> YOGYAKARTA PRINCIPLES, *supra* note 82, at 19.

other laws that are used directly or indirectly to discriminate, prosecute, or harass people based on their actual or perceived sexual orientation or gender identity.<sup>87</sup> This imperative is particularly directed towards laws that condone or tolerate the torture or ill-treatment of LGBT+ individuals at the hands of State authorities, such as those in force in the Occupied Palestinian Territories and the occupied regions of Ukraine, which have resulted in the arrest and torture of homosexual men, lesbian women, and transgender individuals by the Palestinian National Security Forces and Ukrainian police respectively.<sup>88</sup> Additionally, in accordance with international jurisprudence, an individual's right to equality before the law and the equal protection of the law are violated even if discriminatory provisions are never enforced, as the mere existence of such laws impacting the liberty and security of LGBT+ individuals encourages the perpetuation of prejudicial attitudes and violence towards these groups.<sup>89</sup> Accordingly, these laws must be repealed to be consistent with IHRL.

## *2 Non-Discrimination in the Enjoyment of Other Human Rights*

All persons are additionally entitled to non-discrimination in the enjoyment of the other rights enumerated in the core IHRL treaties.<sup>90</sup> Importantly, this requires human rights norms to be applied in a manner that is sensitive to the particular vulnerabilities and needs of LGBT+ individuals.<sup>91</sup> For example, as “it is undisputed that adult consensual activity in private is covered by the concept of “privacy,”<sup>92</sup> the criminalisation of same-sex relations, either directly or through the application of “public decency” laws in territories, such as the occupied regions of Ukraine and Palestine, breaches human rights law. Additionally, the United Nations

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<sup>87</sup> See, for example, *Toonen v. Austr.*, *supra* note 75, at ¶¶ 8.3-10; Human Rights Comm., Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, ¶ 9 (Dec. 18, 2006); Human Rights Comm., Concluding Observations of the Human Rights Committee: United Republic of Tanzania, U.N. Doc. CCPR/C/TZA/CO/4, ¶ 22 (Aug. 6, 2009); Human Rights Comm., Concluding Observations of the Human Rights Committee: Kuwait, U.N. Doc. CCPR/C/KWT/CO/2, ¶ 30 (Nov. 18, 2011); Comm. on Economic, Social and Cultural Rights, Concluding Observations on the Second Period Report of the Islamic Republic of Iran, U.N. Doc. E/C.12/IRN/CO/2, ¶ 7 (June 10, 2013); Comm. on the Rights of the Child, Concluding Observations on the Combined Second and Third Periodic Reports of the Gambia, U.N. Doc. CRC/C/GMB/CO/2-3 2015 ¶¶ 29-30 (Feb. 20, 2015).

<sup>88</sup> KAGAN & BEN-DOR, *supra* note 3, at 19; Bond & Vlasova, *supra* note 4; Comm. against Torture, General Comment No 3: Implementation of Article 14 by States Parties, U.N. Doc. CAT/C/GC/3, ¶ 39 (Nov. 19, 2012).

<sup>89</sup> Madrigal-Borloz, *supra* note 43, at ¶¶ 28, 30.

<sup>90</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, *supra* note 75, at art. 1; Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 75, at art. 1; International Covenant on Civil and Political Rights, *supra* note 75, at art. 2(1); International Covenant on Economic, Social and Cultural Rights, *supra* note 75, at art. 2(2).

<sup>91</sup> Office of the United Nations High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law*, U.N. Doc. HR/PUB/12/06/Rev.1, at 2-3 (2019).

<sup>92</sup> *Toonen v. Austr.*, *supra* note 75, at ¶ 8.2.

Working Group on Arbitrary Detention has affirmed on a number of occasions that the detention of LGBT+ individuals is arbitrary, on the basis that it violates the ICCPR's non-discrimination provisions.<sup>93</sup>

A queer-specific interpretation of fundamental rights is most comprehensively expressed in the thirty *Yogyakarta Principles*. These principles, drafted by a committee of human rights experts in conjunction with civil society organisations, reflect the existing state of IHRL in relation to sexual orientation, gender identity, and gender expression, and address how human rights standards operate with respect to LGBT+ persons.<sup>94</sup> They detail a number of protections that must be afforded to these communities in accordance with their fundamental rights, such as access to appropriate medical services,<sup>95</sup> and effective legal representation.<sup>96</sup> Consequently, States must abrogate laws that deny an LGBT+ person's rights on the basis of their sexual orientation, gender identity, or gender expression in accordance with IHRL.

### *C The Nature of States' Human Rights Obligations under the Principle of Non-Discrimination*

The existence of rights for LGBT+ persons under IHRL places a corresponding duty on States Parties to human rights treaties to uphold these rights. In accordance with the general principles of international law, States are required to take steps to respect, protect, promote, and fulfil the rights of persons under their effective control, to the extent possible.<sup>97</sup> This binds Occupying Powers in relation to their actions in an occupied region, as IHRL obligations are engaged with respect to acts done by States in the exercise of their jurisdiction outside their own territory.<sup>98</sup>

The application of the non-discrimination principle, through the equal protection of the law and the freedom from discrimination in the enjoyment of other rights, imposes a fundamental

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<sup>93</sup> Comm'n on Human Rights, Opinions Adopted by the Working Group on Arbitrary Detention: Opinion No 7/2002 (Egypt), U.N. Doc. E/CN.4/2003/8/Add.1, ¶ 73 (Jan. 24, 2003); Comm'n on Human Rights, Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2004/3, ¶ 27 (Dec. 15, 2003); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention: Opinion No 22/2006 (Cameroon), U.N. Doc. A/HRC/4/40/Add.1, ¶ 26 (Feb. 2, 2007).

<sup>94</sup> YOGYAKARTA PRINCIPLES, *supra* note 82, at 7.

<sup>95</sup> *Id.* at 22.

<sup>96</sup> YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 83, at 11.

<sup>97</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 1, at 54; Office of the United Nations High Commissioner for Human Rights, *supra* note 91, at 9.

<sup>98</sup> Armed Activities on the Territory of the Congo, *supra* note 10, at ¶ 119; Concluding Observations of the Human Rights Committee: Israel, *supra* note 11, at ¶ 10; General Comment No. 31, *supra* note 12, at ¶ 10; Concluding Observations of the Human Rights Committee: Cyprus, *supra* note 70, ¶ 3.



obligation on States to prohibit and prevent discrimination in all aspects of society, both in public and private spheres.<sup>99</sup> A State must also take steps to remove the conditions that cause or perpetuate discrimination on the basis of a person's sexual orientation, gender identity, or gender expression.<sup>100</sup> This includes a positive obligation to prohibit, prevent, investigate, and punish violations of the rights of LGBT+ individuals by both public and private actors.<sup>101</sup> Finally, States are required to act to fulfil the rights of LGBT+ persons, including by introducing appropriate statutory provisions to ensure this, securing the advancement of individuals with diverse sexual orientations and gender identities, and taking action to eliminate prejudicial attitudes towards people from these backgrounds, both through the law, as well as programmes of education and training.<sup>102</sup>

In relation to specific statutory obligations, the protection of the rights of LGBT+ persons obliges States to repeal laws that prohibit, or are employed to prohibit, the expression of their identities, such as criminalising consensual same-sex relations and cross-dressing, as well as those that act as a barrier to access their basic rights such as housing, medical care, equal employment, and education.<sup>103</sup> Additionally, the obligation to promote and fulfil human rights necessitates positive legislative measures, including the implementation of provisions designed to combat the discriminatory targeting of LGBT+ individuals, affirm a person's self-defined gender identity, and recognise same-sex marriages or registered partnerships.<sup>104</sup> When understood in light of individual provisions of each core human rights treaty, States Parties to these conventions have a wide scope of duties to adopt all legislative, administrative, and other measures necessary to ensure that LGBT+ persons are able to fully realise their rights.

Despite the developments in international human rights jurisprudence regarding the recognition and promotion of the rights of LGBT+ persons, the implementation of these norms at a domestic level faces significant opposition from a number of States and groups worldwide

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<sup>99</sup> YOGYAKARTA PRINCIPLES, *supra* note 82, at 11; Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, *supra* note 85, ¶ 16.

<sup>100</sup> Margalit, *supra* note 2, at 246; International Covenant on Civil and Political Rights, *supra* note 75, at art. 26; YOGYAKARTA PRINCIPLES, *supra* note 82; Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, *supra* note 85, ¶ 16.

<sup>101</sup> Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, *supra* note 85; Comm. against Torture, General Comment No 2: Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2, ¶¶ 15-19 (Jan. 24, 2008).

<sup>102</sup> YOGYAKARTA PRINCIPLES, *supra* note 82, at 11.

<sup>103</sup> *Id.* at 7, 11, 14, 21.

<sup>104</sup> *Id.* at 7, 11, 18-19, 27-8.

that serve as a barrier to the full protection of these groups. Such a reluctance is evident in the language adopted in the Human Rights Council's 2016 Resolution on the protection against violence and discrimination based on sexual orientation and gender identity, which detailed the need for States to promote and protect all universally recognised human rights, regardless of their cultural or political system, however it subjected the implementation of the resolution to a State's national laws, as well as the moral and religious values of its people,<sup>105</sup> at the request of several States involved in the drafting process.<sup>106</sup>

However, just as custom, tradition or religious beliefs cannot be invoked to excuse violence and discrimination against women,<sup>107</sup> these should not be applied by an Occupying Power as an excuse for the failure to repeal anti-LGBT+ laws, especially those that condone or tolerate violence and other forms of ill-treatment. Doing so will contribute to the maintenance of harmful sexual and gender hierarchies in international law,<sup>108</sup> and will allow States to continue to operate with the belief that they can act with impunity, giving a false impression that LGBT+ rights are a "luxury."<sup>109</sup> Under IHRL, such an approach is justified on the basis of the "universality" of rights and the need to uphold the fundamental human dignity of all people,<sup>110</sup> as well as the fact that the freedom to manifest one's beliefs may be restricted to protect the rights of others.<sup>111</sup> This does not mandate the blanket application of a "Western model," as doing so risks promoting imperialism, and discounts the fact that the LGBT+ experience is not homogenous, with different communities having different needs based on their socio-political context.<sup>112</sup> However, rights-holders should not be deliberately denied access to their rights, nor

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<sup>105</sup> Human Rights Council, Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity, U.N. Doc. A/HRC/RES/32/2, pmbl. ¶¶ 2-3, 11 (June, 30 2016).

<sup>106</sup> Margalit, *supra* note 2, at 246.

<sup>107</sup> G.A. Res. 48/104, art. 4 (Dec. 20, 1993); Radhika Coomaraswamy (Special Rapporteur on violence against women, its causes and consequences), *Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, its Causes and Consequences*, U.N. Doc. E/CN.4/1995/42, ¶¶ 63-69 (Nov. 22, 1994); Human Rights Comm., General Comment No. 28: Equality of Rights between Men and Women, U.N. Doc. CCPR/C/21/Rev.1/Add.10, ¶ 5 (Mar. 29, 2000) [hereinafter General Comment No. 28].

<sup>108</sup> ODETTE MAZEL, QUEER JURISPRUDENCE: REPARATIVE PRACTICE IN INTERNATIONAL LAW 11-12 (2022).

<sup>109</sup> HUMAN DIGNITY TRUST, *supra* note 55, at ¶ 46.

<sup>110</sup> Dianne Otto, *Lost in Translation*, in INTERNATIONAL LAW AND ITS OTHERS 318, 319-20 (Anne Orford ed., 2009).

<sup>111</sup> Margalit, *supra* note 2, at 246; International Covenant on Civil and Political Rights, *supra* note 75, at art. 18; General Comment No. 28, *supra* note 107, at ¶ 5; Lustig-Prean and Beckett v. UK, App Nos. 31417/96 and 32377/96, ¶ 90 (July 25, 2000).

<sup>112</sup> Abadir M Ibrahim, *LGBT Rights in Africa and the Discursive Role of International Human Rights Law*, 15 AFRICAN HUM. RTS. L. J. 263, 267 (2015).

degraded in the process through the maintenance of discriminatory legislative frameworks.<sup>113</sup> The fundamental rights of those with diverse sexual orientations, gender identities and gender expressions must be upheld in an occupied territory under IHRL, and an Occupying Power cannot rely on the cultural norms or religious beliefs of a region to refuse to protect LGBT+ persons, as doing so would constitute a violation of its human rights obligations. Therefore, in order to comply with human rights law, a State must repeal anti-LGBT+ laws, and act to progressively promote the rights of these communities.

#### IV RECONCILING THE PRINCIPLES OF IHL AND IHRL: UNDERSTANDING A BELLIGERENT OCCUPANT'S LEGISLATIVE POWERS WITH RESPECT TO LGBT PEOPLE IN OCCUPIED TERRITORIES

In light of the above discussions concerning the obligations of Occupying Powers under both IHL and IHRL with relation to governing in an occupied territory, this part proposes an understanding of an Occupant's legislative prerogative that accounts for the specific needs of LGBT+ individuals in armed conflict. As outlined in part II, IHL's presumption of continuity requires an Occupying Power to refrain from changing the law in an occupied territory, with limited exceptions where necessary to ensure its security or to comply with *Geneva Convention IV*. This directly conflicts with the comprehensive obligations of a State, as a human rights duty-bearer, to adopt necessary domestic laws to respect, protect, promote, and fulfil the human rights of those within its jurisdiction, as detailed in part III. In accordance with principles of international law, instances of conflict are to be resolved in favour of the law of occupation.<sup>114</sup> However, as IHRL norms can be used to influence the interpretation of IHL principles,<sup>115</sup> there is scope to rely on this as a basis for taking action to protect LGBT+ individuals in occupied territories.<sup>116</sup> Accordingly, this section considers how this can be used to justify an Occupying Power repealing certain discriminatory penal and civil laws. It then addresses the unique circumstances of prolonged occupation and United Nations Security Council ("UNSC") approval, and how this influences the application of IHL's general presumption of continuity.

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<sup>113</sup> François Crépeau & Colleen Sheppard, *Introduction*, in HUMAN RIGHTS AND DIVERSE SOCIETIES: CHALLENGES AND POSSIBILITIES 1, 2 (François Crépeau & Colleen Sheppard eds., 2013); Po-Han Lee, LGBT Rights versus Asian Values: De/Re-constructing the Universality of Human Rights, 20 INT'L J. HUM. RTS. 978, 985 (2016).

<sup>114</sup> Koskenniemi, *supra* note 9, at 17, 26; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 2, ¶ 25 (July 8).

<sup>115</sup> Ben-Naftali & Shany, *supra* note 14, at 57; Koskenniemi, *supra* note 9, at 12, 84.

<sup>116</sup> Danio Campanelli, *The Law of Military Occupation Put to the Test of Human Rights Law*, 90 INT'L REV. RED CROSS 653, 657 (2008).

### *A The General Approach to Resolving Norm Conflicts between IHL and IHRL*

The international legal regime is highly fragmented, and the actions of States are increasingly being governed by fields of specialist systems which possess their own rules and institutions.<sup>117</sup> As these do not operate independently from one another,<sup>118</sup> conflicts arise where the fulfilment of a particular treaty obligation affects the performance of another, either through direct incompatibility, or where compliance with one norm undermines the object and purpose of the other.<sup>119</sup> In these cases, where overlapping regimes cannot be harmonised, the maxim of *lex specialis derogat leges generalis* is applied, which provides that the special law derogates from the general.<sup>120</sup> This is used either to view a particular rule as the application of a general one, or as an exception to the general rule.<sup>121</sup>

Although IHL and IHRL were originally developed as two separate regimes, the increasing relevance of IHRL in armed conflict has resulted in a complex and detailed relationship between the two systems concerning their concurrent application during occupation.<sup>122</sup> In general, the interaction between IHL and IHRL is characterised by a relationship of speciality versus generality, as IHL was developed specifically for armed conflict situations.<sup>123</sup> Thus the starting point for interpretation will be the language of the IHL provision, and conflicts between the two are to be resolved in its favour.<sup>124</sup> Nevertheless, IHRL is relevant in guiding how IHL is to be understood, as both regimes should be treated as mutually reinforcing.<sup>125</sup>

### *B The Case for Promoting LGBT+ Protections under the Law of Occupation: Expanding the Interpretations of the Exceptions to the Presumption of Continuity through a Rights-Based Framework*

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<sup>117</sup> Koskenniemi, *supra* note 9, at 10.

<sup>118</sup> Vienna Convention on the Law of Treaties art. 31(3)(c), Jan. 27, 1980, 1155 U.N.T.S 331.

<sup>119</sup> Cassimatis, *supra* note 9, at 627.

<sup>120</sup> Koskenniemi, *supra* note 9, at 19; ARNOLD D MCNAIR, THE LAW OF TREATIES 393-9 (1961).

<sup>121</sup> Martti Koskenniemi, *Study on the Function and Scope of the Lex Specialis Rule and the Question of 'Self Contained Regimes'*, U.N. Doc. ILC(LVI)/SG/FIL/CRD.1 and Add.1, at 4 (May, 7 2004).

<sup>122</sup> Droege, *supra* note 9, at 310-11; Marab v IDF Commander in the West Bank, *supra* note 33; Cyprus v. Turkey, App. No. 25781/94 (May 10, 2001); Al-Skeini v Secretary of State for Defence [2005] EWCA 1609 ¶ 48.

<sup>123</sup> Koskenniemi, *supra* note 9, at 17, 26; Legality of the Threat or Use of Nuclear Weapons, *supra* note 114, at ¶ 25.

<sup>124</sup> FERRARO, *supra* note 14, at 63; Koskenniemi, *supra* note 9, at 19; Campanelli, *supra* note 116, at 655.

<sup>125</sup> Droege, *supra* note 9, at 337; FERRARO, *supra* note 14, at 63; Legality of the Threat or Use of Nuclear Weapons, *supra* note 114, at ¶ 25; General Comment No. 31, *supra* note 12, at ¶ 11.

There is a distinct advantage in advocating for interpretations of the law of occupation that are consistent with IHRL protections for LGBT+ individuals, as international human rights jurisprudence has expanded on specific rights to be afforded to these communities, while there has been little effort to promote their protection under IHL, despite their special vulnerability in armed conflict.<sup>126</sup> From a rights-based perspective, there is no justification for the maintenance of a system of oppression against LGBT+ persons.<sup>127</sup> This is particularly the case as the foundational principles of occupation are more than a century old,<sup>128</sup> and strict interpretations of the regime do not sufficiently account for human rights developments in the last 50 years.<sup>129</sup> Emphasising the role of IHRL in situations of occupation may also help legitimise the participation of international human rights bodies as supervisory mechanisms to help ensure the protection of the rights of LGBT+ persons, in a similar manner to the European Court of Human Rights' involvement in cases concerning human rights abuses by Turkey in Northern Cyprus.<sup>130</sup>

The promotion of queer-sensitive interpretations of IHL may be critiqued on the basis that the repealing of anti-LGBT+ laws in an occupied territory is likely to have administrative and cultural flow-ons. Occupying Powers are not to be viewed as “liberators” engaged in widespread reformist projects,<sup>131</sup> and ideological colonialism is prohibited.<sup>132</sup> As the advancement of LGBT+ rights unavoidably needs to universalise a particular conception of sexual and gender minorities to promote the rights of every individual,<sup>133</sup> there is a risk of cultural nationalism being invoked in response to a perceived “moralising discourse” to push back against such measures.<sup>134</sup>

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<sup>126</sup> FERRARO, *supra* note 14, at 64.

<sup>127</sup> Madrigal-Borloz, *supra* note 43, at ¶ 17.

<sup>128</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 1, at 54.

<sup>129</sup> Roberts, *supra* note 11, at 582; David Kretzmer & Yaël Ronen, *International Human Rights Law, in THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 83, 84 (David Kretzmer & Yaël Ronen eds., 2nd edn., 2021).

<sup>130</sup> Roberts, *supra* note 11; Cyprus v. Turkey, *supra* note 122.

<sup>131</sup> Lee, *supra* note 23, at 84.

<sup>132</sup> Puar, *supra* note 44, 336-39.

<sup>133</sup> Lee, *supra* note 23, at 81; Chloe Schwenke, *An American's View of Trans\* Emergence in Africa and Feminist Responses, in BODIES IN RESISTANCE: GENDER AND SEXUAL POLITICS IN THE AGE OF NEOLIBERALISM* 329, 332 (Wendy Harcourt ed., 2016).

<sup>134</sup> Lee, *supra* note 23, at 80; JASBIR PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* (2007).

However, a State's social structures cannot be used as an excuse to justify human rights abuses,<sup>135</sup> and it is possible for rights-based interpretations of IHL to be pursued within the limits of the legal regime of the law of occupation. For example, while an Occupying Power would not be permitted to legalise same-sex marriage as this would require institutional changes, repealing provisions that condone the mistreatment of LGBT+ persons at the hands of State officials would be justified with reference to IHRL and IHL's obligation of humane treatment. This reasoning was relied on by Turkey to repeal provisions that criminalised same-sex relations in Northern Cyprus.<sup>136</sup> Despite the fact that the application of the *lex specialis* principle means that the full scope of IHRL is mitigated by the more specific norms of occupation law, it nevertheless serves an important function, contributing to the process of humanising IHL,<sup>137</sup> and challenging traditional framings of international law that have ignored the unique needs and interests of LGBT+ communities.<sup>138</sup>

### *C Delimiting the Rights and Duties of Occupying Powers to Legislate to Protect LGBT+ Persons*

An evolutive interpretation of the laws of occupation in accordance with the developing norms of IHRL justifies an Occupying Power making certain legislative changes to promote the rights of LGBT+ persons. An interpretation that gives precedence to the conservationist principle but permits some changes to a territory's laws to protect individuals with diverse sexual orientations, gender identities, and gender expressions from serious ill-treatment should be favoured. Although this may lead to some cultural shifts in an occupied territory, this is necessary to protect fundamental universal rights. Importantly, this does not give an Occupying Power a blank cheque to change legislation in the name of human rights protections, but rather enables a limited scope of power to respond to the most significant violations of the rights of LGBT+ persons, within the law of occupation regime.<sup>139</sup>

#### *1 Repealing Criminal Laws*

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<sup>135</sup> Margalit, *supra* note 2, at 264.

<sup>136</sup> BARNES & KAREN COPPENS, *supra* note 64, at 12-13.

<sup>137</sup> Milanovic, *supra* note 9, at 461.

<sup>138</sup> Otto, *supra* note 21, at 1.

<sup>139</sup> Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS. 104, 116 (1978).

In accordance with art 64 of *Geneva Convention IV*, an Occupying Power is permitted to repeal discriminatory penal laws where they lead to inhumane treatment.<sup>140</sup> As an Occupant is under an obligation to protect the inhabitants of an occupied territory from ill-treatment under both IHL and IHRL,<sup>141</sup> it has a duty to repeal any legislative provisions that violate these standards, such as those that impose a death penalty for consensual same-sex relationships or permit corporal punishment. Reference should be given to human rights-based and queer-sensitive interpretations of humane treatment, to understand what may be considered to be cruel, inhumane, or degrading, or outrages upon personal dignity.<sup>142</sup> For example, laws permitting arbitrary detention of LGBT+ persons are inhumane or degrading, as it enables the targeting of these communities based on physical appearance, and it often facilitates further mistreatment or extortion.<sup>143</sup> This requirement should be understood as applying not only to laws that directly permit ill-treatment, but also to those are used implicitly to mistreat LGBT+ persons, such as anti-terror laws in Saudi Arabia that are used to arrest and torture those with diverse sexual orientations.<sup>144</sup>

An Occupying Power may also introduce legislative provisions to prevent and punish this conduct, in accordance with its IHRL obligation to protect the rights of LGBT+ persons from rights violations by both State and non-State actors. This complies with IHL, as an Occupant is permitted to “subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the [*Geneva Convention IV*],”<sup>145</sup> and thus may take necessary steps to prevent inhumane treatment and assist victims.<sup>146</sup> For example, this was the basis for the introduction of laws in Northern Cyprus that criminalise sexual assault motivated by the perpetrator’s hatred or prejudice towards the victim’s sexual orientation or gender identity.<sup>147</sup> Consequently, the requirement to ensure humane treatment under both IHL and IHRL justifies a broad legislative power to repeal criminal laws that facilitate the mistreatment of LGBT+ persons.

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<sup>140</sup> Geneva Convention IV, *supra* note 7, at art. 64.

<sup>141</sup> Armed Activities on the Territory of the Congo, *supra* note 10, at ¶ 178.

<sup>142</sup> YOGYAKARTA PRINCIPLES, *supra* note 82, at 10; General Comment No. 20, *supra* note 75, at ¶ 5.

<sup>143</sup> Report of the Working Group on Arbitrary Detention, *supra* note 93, at ¶ 27.

<sup>144</sup> Elizabeth Peiffer, *The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria*, 11 WILLIAM AND MARY J. RACE, GENDER, SOCIAL JUSTICE/WOMEN L. 507 (2004).

<sup>145</sup> Geneva Convention IV, *supra* note 7, at art. 64.

<sup>146</sup> COMMENTARY ON GENEVA CONVENTION VI, *supra* note 30, at 205.

<sup>147</sup> Criminal Code 1959 art. 152(2) (Northern Cyprus).

## 2 Repealing Discriminatory Civil Laws

Provisions that are not of a penal character may be repealed where they prevent an Occupying Power from complying with its obligations under *Geneva Convention IV*.<sup>148</sup> As with criminal provisions discussed above, civil laws that result in inhumane treatment, such as those permitting conversion therapy,<sup>149</sup> are able to be abrogated.<sup>150</sup> Additionally, provisions that impact an Occupying Power's ability to satisfy its obligations concerning labour, public health, hygiene, and the provision of food under *Geneva Convention IV* may be repealed.<sup>151</sup> For example, an Occupant's duty to maintain public health may enable it to remove provisions that act to prevent an LGBT+ person accessing appropriate medical care, in accordance with its IHRL obligations to provide the highest attainable standard of health in a manner adapted to the needs of those with diverse sexual orientations and gender identities.<sup>152</sup> However, in accordance with the conservationist principle, an Occupying Power could not go beyond these strict exceptions to abrogate generally discriminatory provisions, such as those limiting access to municipally-owned housing. An Occupant is additionally prohibited from implementing legislation that expressly advances the protection of LGBT+ individuals, as would be required under IHRL.

## 3 The Rules Applicable in Cases of Prolonged Occupation

In light of prolonged occupations in territories such as Northern Cyprus and the Occupied Palestinian Territories, questions have been raised concerning whether this affects interpretations of occupation law.<sup>153</sup> In these cases, the welfare of the local population becomes a central consideration, which can be distinguished from traditional occupations which are primarily focused on its military function.<sup>154</sup> Thus, civilian needs should inform measures taken by an Occupying Power in the administration of an area of prolonged occupation.<sup>155</sup> For example, the upgrading of electricity networks and highways in Palestine was necessary to

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<sup>148</sup> Geneva Convention IV, *supra* note 7, at art. 64.

<sup>149</sup> Ilias Trispotis and Craig Purshouse, 'Conversion Therapy' As Degrading Treatment, 42 OXFORD J. L. STUD. 104, 105-6 (2022).

<sup>150</sup> Geneva Convention IV, *supra* note 7, at art. 64.

<sup>151</sup> COMMENTARY ON GENEVA CONVENTION VI, *supra* note 30, at 337.

<sup>152</sup> Geneva Convention IV, *supra* note 7, at art. 56; YOGYAKARTA PRINCIPLES, *supra* note 82, at 22.

<sup>153</sup> FERRARO, *supra* note 14, at 69; Arai-Takahashi, *supra* note 31, at 68.

<sup>154</sup> Dinstein, *supra* note 139, at 116.

<sup>155</sup> Arai-Takahashi, *supra* note 31, at 68; Campanelli, *supra* note 116, at 666.



prevent the territory from stagnating economically, even though it required institutional changes to accommodate it.<sup>156</sup>

However, as IHL has not developed any separate norms to apply in circumstances of extended occupation, an Occupant remains bound by the conservationist principle that requires the maintenance of the domestic legal system.<sup>157</sup> This prohibits an Occupying Power from implementing widespread legislative changes to accord with the full scope of its human rights obligations, as this would likely result in “active transformation and remodelling of the power and other value processes of the occupied country” that far exceeds the limits of IHL.<sup>158</sup> Thus, it is unlikely that a situation of prolonged occupation would justify any more legislative changes than are already permitted under the existing exceptions.

#### 4 *The Involvement of the United Nations Security Council*

A unique case may arise in the event of UNSC authorisation of more extensive measures being implemented to protect the rights of LGBT+ individuals in occupied territories. As the obligations in the *Charter of the United Nations* prevail over any other treaty commitment,<sup>159</sup> the requirement that States carry out the resolutions of the UNSC made in accordance with art 103 of the *Charter* takes precedence over obligations under both IHL and IHRL.<sup>160</sup> This is the only legal basis for engaging in transformative occupations that have the dominant goal of overhauling the political and institutional systems of a territory, which is generally prohibited under the law of occupation, as it operates contrary to the fundamental assumption that an Occupying Power acquires no sovereignty over an occupied territory.<sup>161</sup> It is also the only exception to the requirement that legislative changes in a territory are reversible at the end of an occupation.<sup>162</sup>

This approach was adopted with respect to the coalition forces’ actions in Iraq, authorising a number of significant changes. The UNSC’s Resolution 1483 from 22 May 2003 mandated

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<sup>156</sup> HCJ 351/80 Jerusalem District Electricity Co Ltd v Minister of Energy and Infrastructure et al (1981) (Isr.); HCJ 393/82 Jamiat Askan et al v IDF Commander of Judea and Samaria (1983) (Isr.).

<sup>157</sup> Roberts, *supra* note 11, at 582; Dinstein, *supra* note 139, at 116-20.

<sup>158</sup> McDUGAL & FLORENTINO P FELICIANO, *supra* note 8, at 768.

<sup>159</sup> *Fragmentation of International Law* (n 16) 70.

<sup>160</sup> Ibid 70-1; *Charter of the United Nations* art 25; *The Queen (on the application of Hilal Abdul-Razzaq Ali AlJedda) v Secretary of State for Defence* [2005] EWHC 1809 [104], [108].

<sup>161</sup> McDUGAL & FLORENTINO P FELICIANO, *supra* note 8, at 768; FERRARO, *supra* note 14, at 57; Sassoli, *supra* note 16, at 671.

<sup>162</sup> Arai-Takahashi, *supra* note 31, at 70.

that the coalition forces cooperate with the UN in “promoting the protection of human rights” while working to establish institutions for representative governance.<sup>163</sup> This enabled a vast judicial reform in Iraq, including the dismantling of the Ba’ath Party, and the institution of provisions such as those providing equal pay for equal work, prohibiting child labour, and establishing the Ministry of Human Rights.<sup>164</sup> While Resolution 1483 recognised that the US and the UK, as Occupying Powers, had a duty to respect the “obligations under applicable international law,”<sup>165</sup> it provided a framework that permitted the modification of the coalition’s obligations under the law of occupation, allowing action to be taken to promote human rights.<sup>166</sup>

The adoption of a resolution that obliged an Occupying Power to legislate for the protection of LGBT+ persons would provide a concrete justification for the promotion of their rights in an occupied territory. However, this is politically unlikely to occur, due to the reluctance of States to implement rights for LGBT+ individuals. A number of States have refused to cooperate with the Human Rights Council-appointed Independent Expert on sexual orientation and gender identity.<sup>167</sup> Others have refused to attend UNSC discussions concerning ISIL-perpetrated violence against LGBT+ persons, with the results of these meetings only further justifying the deployment of deadly weaponry in the Middle East, rather than advancing the rights of those with diverse sexual orientations and gender identities in Iraq and Syria.<sup>168</sup> In particular, Russia, which has a veto power, has some of the most repressive and violent anti-LGBT+ legislation in the world,<sup>169</sup> and is unlikely to support such measures. Thus, Occupying Powers remain confined to the scope of the exceptions outlined in the law of occupation to justify repealing provisions that discriminate against LGBT+ persons.

## V CONCLUSION

In situations of armed conflict and occupation, LGBT+ individuals are uniquely vulnerable to violence and other forms of harm. Discriminatory legislation in force in occupied territories

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<sup>163</sup> S.C. Res. 1483 (May 22, 2003).

<sup>164</sup> Margalit, *supra* note 2, at 263.

<sup>165</sup> S.C. Res. 1483, *supra* note 163, pmbl. ¶ 13.

<sup>166</sup> Arai-Takahashi, *supra* note 31, at 70.

<sup>167</sup> Margalit, *supra* note 2, at 264.

<sup>168</sup> Ratna Kapur, *Queering International Law: The (Im)Possibility of Queering International Human Rights Law* in QUEERING INTERNATIONAL LAW : POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS 131, 136 (Dianne Otto ed., 2017).

<sup>169</sup> Jennifer Suchland, *The LGBT Spectre in Russia: Refusing Queerness, Claiming ‘Whiteness’*, 25 J. FEMINIST GEOGRAPHY 1073, 1073-4 (2018).

enables ill-treatment at the hands of local officials, including arbitrary detention and torture, as has most recently occurred in the occupied regions of Palestine and Ukraine. However, LGBT+ voices continue to be marginalised in discussions of IHL, leading to a protection gap where their needs remain unmet by Occupying Powers and the international community. To address this issue, norms of IHRL relating to LGBT+ persons should be considered to develop appropriate safeguards for their rights and interests. Applying this through a queer-sensitive lens facilitates the reinterpretation of the law of occupation in such a way that expands rights-protections for these communities.

An Occupying Power is governed by the principles of both IHL and IHRL when exercising its jurisdiction over an occupied territory. While the operation of the *lex specialis* principle means that the law of occupation takes precedence when interpreting the legislative powers of an Occupant, human rights law is nevertheless relevant to guide interpretations and promote an expanded view of the rights of LGBT+ persons. The exceptions to the presumption of continuity, particularly concerning the ability of an Occupying Power to legislate to ensure compliance with *Geneva Convention IV*, are sufficiently broad and can be applied to respond to the unique needs of those with diverse sexual orientations, gender identities, and gender expressions. When considered together through a queer-sensitive lens, IHL and IHRL should be read as permitting the abrogation of anti-LGBT+ penal and civil laws that lead to the cruel, inhuman, or degrading treatment of these communities, as well as those that prevent an Occupying Power from fulfilling its other obligations under *Geneva Convention IV*, such as those relating to the maintenance of public health and the provision of food. Although IHL restricts an Occupant from legislating in full compliance with IHRL, it is able to abrogate the most harmful provisions, which is necessary to promote the realisation of the rights of LGBT+ persons in armed conflict.