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"Or any other similar criteria": Towards advancing the protection of LGBTQI detainees against discrimination and sexual and gender-based violence during non-international armed conflict

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Abstract

Discrimination and sexual and gender-based violence committed against lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) detainees remains one of the most pressing contemporary humanitarian challenges. This article focuses on the interpretation of the phrase "or any other similar criteria" as contained in Article 3 common to the four Geneva Conventions, upon which adverse distinction is

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prohibited, in order to qualify sexual orientation and gender identity as prohibited grounds of adverse distinction. The interpretation of "or any other similar criteria" will be embarked upon by employing the general rule of treaty interpretation provided for in the Vienna Convention on the Law of Treaties, so as to qualify sexual orientation and gender identity as "any other similar criteria" and ultimately to realize the protection of LGBTQI detainees against discrimination and sexual and gender-based violence during non-international armed conflict.

Keywords: LGBTQI, international humanitarian law, common Article 3, sexual and gender-based violence, adverse distinction.

Introduction

Discrimination and sexual and gender-based violence (SGBV)[1] directed at persons identifying as lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI)[2] remains one of the most pressing humanitarian challenges of our time.[3] It is an unfortunate reality that persons identifying as LGBTQI face immense hardship in light of acceptance and tolerance even at the best of times, solely based on the fact that their sexual orientation or gender identity is non-conformant with the

1 International Criminal tribunal for Rwanda (ICTR), *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, para. 688: "The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact." For Gender-based violence (GBV), see International Criminal Court (ICC) Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, 5 June 2014, p. 3: "Gender-based crimes are those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender." See also Inter-Agency Standing Committee (IASC), *The Gender Handbook for Humanitarian Action*, February 2018, p. 19: "GBV is an umbrella term for any harmful act that is perpetrated against a person's will and that is based on power imbalances and socially ascribed (i.e., gender) differences between women, girls, men and boys. It includes acts that inflict physical, sexual or mental harm or suffering, threats of such acts, coercion and other deprivations of liberty." For a discussion on the relationship between sexual violence and GBV, see Gloria Gaggioli, "Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law", *International Review of the Red Cross*, Vol. 96, No. 894, 2014, p. 509.

2 United Nations (UN) General Assembly, *Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, UN Doc. A/72/172, 19 July 2017, p. 3, para. 2: "Sexual orientation denotes a person's physical, romantic and/or emotional attraction towards others, while gender identity concerns a person's self-perceived identity, which may be different from the sex assigned at birth, as well as the expression of gender identity." For the acronym LGBTQI, see *ibid.*, p. 4, para. 7.

3 UN Office of the High Commissioner for Human Rights (UN Human Rights), *Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity*, UN Doc. A/HRC/29/23, 4 May 2015, p. 4.

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social norm of society.[4] The marginalization of LGBTQI persons as sexual and gender minorities specifically at risk is further exacerbated within the hyper-masculine context of armed conflict, in which hegemonic heteronormativity is prevalent.[5] Comparably to the risks faced by women and children during armed conflict, so too are LGBTQI persons – self-identified or perceived – made victims of extreme atrocities during armed conflict.[6] Such atrocities are especially prevalent within the context of detention;[7] in which LGBTQI individuals constitute a specifically risk-facing minority when at the mercy of specific Detaining Powers, including armed non-State actors.

Reports on recent conflicts such as those in the Syrian Arab Republic,[8] Yemen[9] and Colombia[10] all suggest patterns of SGBV committed against LGBTQI individuals in detention. Reports on the Syrian conflict, for example, allege that homosexual men were tortured and raped on the grounds of their sexual orientation by both government forces and armed non-State actors while in custody.[11] In Yemen, reports suggest that LGBTQI individuals endured sexual violence during interrogation while being accused of "spreading" homosexuality.[12] The Colombian conflict similarly documented numerous allegations of rape and sexual violence perpetrated against lesbian and transgender females in detention as a form of "corrective rape".[13]

Other forms of violence directed at LGBTQI individuals include murder and beatings, sexual assault, forced anal examinations in order to "prove" homosexuality, genital mutilation, and forced sterilization.[14] Moreover, SGBV

4 UN Human Rights, "Homophobic and Transphobic Violence Fact Sheet", 2017, p. 1, available at: https://www.unfe.org/wp-content/uploads/2017/05/Homophobic-and-Transphobic-Violence.pdf (all internet references were accessed in September 2021).

5 UN Human Rights, above note 3, p. 12, para. 42: "Discrimination against LGBT individuals is often exacerbated by other identity factors, such as sex, ethnicity, age and religion, and socioeconomic factors, such as poverty and armed conflict." For a discussion on the hyper-masculine context of armed conflict, see Adam Jones, "Straight as a Rule: Heteronormativity, Gendercide, and the Non-Combatant Male", *Men and Masculinities*, Vol. 8, No. 4, 2006.

6 UN Security Council, *Conflict-Related Sexual Violence*, UN Doc. S/2020/487, 3 June 2020, p. 6, para. 14. See also IASC, above note 1, p. 18.

7 UN Human Rights, above note 3, p. 9, para. 31; p. 10, paras 34–38; UN Security Council, *Conflict-Related Sexual Violence*, UN Doc. S/2015/203, 23 March 2015, paras 6, 20, 30, 61; UN Security Council, *Conflict-Related Sexual Violence*, UN Doc. S/2021/312, 30 March 2021, para. 60. For an understanding of the vulnerability that comes with detention and any form of deprivation of liberty, see Alain Aeschlimann, "Protection of Detainees: ICRC Action Behind Bars", *International Review of the Red Cross*, Vol. 87, No. 857, 2005, pp. 83–84: "Every detainee is in a situation of particular vulnerability, both vis-à-vis their captor and in relation to their environment."

8 UN General Assembly, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/25/65, 12 February 2014, p. 12, paras 67–70.

9 UN Human Rights, *Report of the Group of Eminent International and Regional Experts on Yemen*, UN Doc. A/HRC/45/6, 28 September 2020, pp. 11–12.

10 UN Security Council, 2015, above note 7, p. 7, para. 20.

11 UN General Assembly, above note 8.

12 UN Human Rights, above note 9, p. 12, para. 71.

13 UN Security Council, 2015, above note 7, p. 7, para. 20. See also Alon Margalit, "Still a Blind Spot: The Protection of LGBT Persons during Armed Conflict and Other Situation of Violence", *International Review of the Red Cross*, Vol. 100, No. 1–3, 2018, pp. 240–241.

14 UN Human Rights, above note 3, p. 7, paras 21–23; p. 9, paras 29–30; p. 10, paras 34–38.

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directed at men and boys is often done through means of exploiting homosexuality.[15] Reports on the conflicts in Burundi, the Central African Republic, the Democratic Republic of the Congo, South Sudan, Sri Lanka and the Syrian Arab Republic all allege incidents of rape, gang rape, forced public nudity and other forms of torture and inhumane and degrading treatment against men and boys, predominantly in detention facilities.[16] The rape of men and boys has been used to attack their socially constructed identities as "protectors" in order to humiliate and "feminize" them and to impute a sense of homosexuality to them.[17] These discriminatory attacks directed at perceived and self-identified LGBTQI individuals are said to constitute SGBV, driven by a desire to punish individuals whose appearance or behaviour appears to challenge gender stereotypes.[18]

Since the vast majority of modern-day armed conflicts are classified as non-international in character,[19] the need exists to explore the extent to which the law of non-international armed conflict (NIAC) protects LGBTQI individuals detained during NIAC against discrimination and SGBV. Since no overt recognition is afforded to sexual orientation or gender identity as grounds upon which adverse distinction is prohibited in the application of Article 3 common to the four Geneva Conventions,[20] this paper focuses on the interpretation of the phrase "or

15 A. Jones, above note 5, p. 453; see also Sandesh Sivakumaran, "Male/Male Rape and the 'Taint' of Homosexuality", *Human Rights Quarterly*, Vol. 27, No. 4, 2005.

16 UN Security Council, *Conflict-Related Sexual Violence*, UN Doc. S/2019/280, 29 March 2019, p. 6, para. 19; see also UN Security Council, above note 6.

17 UN Security Council, above note 6; see also S. Sivakumaran, above note 15; A. Jones, above note 5, p. 453.

18 UN Human Rights, above note 3, p. 7, para. 21; see also Chris Dolan, "Letting Go of the Gender Binary: Charting New Pathways for Humanitarian Interventions on Gender-Based Violence", *International Review of the Red Cross*, Vol. 96, No. 894, 2014, p. 489.

19 Annyssa Bellal, *The War Report: Armed Conflicts in 2018*, Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), Geneva, April 2019, p. 19: "At least a total of 51 non-international armed conflicts occurred in 2018 in the territory of 22 states." See also International Committee of the Red Cross (ICRC), *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III), para. 386: "While international armed conflicts still occur, the vast majority of recent armed conflicts have been non-international in character." For a definition of non-international armed conflict, see International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Duško Tadić aka "Dule"*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal against Jurisdiction, 2 October 1995, para. 70: "[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." For a discussion on conflict classification, see Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations", *International Review of the Red Cross*, Vol. 91, No. 873, 2009. The classification of armed conflicts done by the Geneva Academy does not necessary reflect the views of the ICRC.

20 Common Article 3 is found in all four Geneva Conventions: Geneva Convention (I) for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II) for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV).

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any other similar criteria" upon which adverse distinction is prohibited.[21] In interpreting "or any other similar criteria", the general rule of treaty interpretation will be employed as contained in Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT),[22] in order to qualify sexual orientation and gender identity as "any other similar criteria" upon which adverse distinction is prohibited.

As a point of departure, "or any other similar criteria" will be interpreted against the backdrop of its ordinary meaning by using the notion of "good faith" and in the context of its object and purpose.[23] Secondly, Additional Protocol II to the Geneva Conventions (AP II)[24] will be used as a measure in further interpreting the context of "or any other similar criteria", as an instrument related to common Article 3 and accepted as such by the parties to the Geneva Conventions.[25] Finally, international human rights law (IHRL) will be used in support of the interpretation of "or any other similar criteria", under the auspices of "relevant rules of international law applicable in the relations between the parties".[26] This will be followed by a short conclusion and summary remarks.

Establishing the meaning of "or any other similar criteria" as found in common Article 3 through the general rule of treaty interpretation

Article 31(1) of the VCLT states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[27] Therefore, considering "or any other similar criteria" against the backdrop of the general rule of treaty interpretation, the text of common Article 3 must be considered in its entirety. Common Article 3, as the sole treaty-based provision tasked with the oversight of all NIAC,[28] prohibits certain acts against certain groups of persons during conflict "not of an international character".[29] These acts include, *inter alia*,

21 Common Art. 3(1).
22 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980) (VCLT), Art. 31.
23 *Ibid.*, Art. 31(1).
24 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978).
25 VCLT, above note 22, Art. 31(2)(b).
26 *Ibid.*, Art. 31(3)(c).
27 *Ibid.*, Art. 31(1). For a discussion on the general rule of treaty interpretation, see Oliver Dörr, "Article 31: General Rule of Interpretation", in Oliver Dörr and Kristen Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary*, Springer, Berlin, 2018, pp. 557–616. See also Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff, Leiden and Boston, MA, 2009, pp. 415–441.
28 ICRC Commentary on GC III, above note 19, para. 388: "Despite these developments, common Article 3 remains the core provision of humanitarian treaty law for the regulation of non-international armed conflicts."
29 ICTY, *Tadić*, above note 19.

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violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,[30] as well as outrages upon personal dignity, which includes humiliating and degrading treatment.[31] Moreover, the prohibitions against these acts, together with the rest of the provisions of common Article 3, have attained the status of customary international humanitarian law binding on both States and armed non-State actors in a NIAC,[32] and are considered the minimum yardstick reflecting "elementary considerations of humanity", as confirmed by the International Court of Justice (ICJ) in the *Nicaragua* case.[33]

In consideration of the above, common Article 3(1) asserts that:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.[34]

In the context of the above, it should thus be clear that in all circumstances, individuals not or no longer actively participating in hostilities are to be protected throughout the duration of the conflict and that individuals placed *hors de combat* by, *inter alia*, detention are to be treated humanely.[35] As other scholars have rightly noted, the fact of being a self-identified LGBTQI individual, or even of being perceived as such, has no bearing on the question of whether such an individual is a civilian or combatant for the purposes of the principle of distinction.[36] Under the principle of distinction, LGBTQI non-combatants would be protected solely based on their status as civilians.[37] The issue arises when such individuals fall under the control of a party to the conflict, whether this entails individuals being arbitrarily detained on the basis of their sexual orientation or gender identity,[38] LGBTQI combatants placed *hors de combat* by detention,[39] or LGBTQI civilians lawfully interned for imperative security reasons who are then

30 Common Art. 3(1)(a).
31 Common Art. 3(1)(c).
32 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), pp. 306–319, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1.
33 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, *ICJ Reports 1986*, paras 218–219.
34 Common Art. 3(1) (emphasis added).
35 *Ibid*.; see also ICRC Commentary on GC III, above note 19, para. 608.
36 A. Margalit, above note 13, p. 253. See also AP II, Art. 13(2); ICRC Customary Law Study, above note 32, Rule 1, p. 3: "The Parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians." For a discussion on the principle of distinction, see Jean Pictet, "The Principles of International Humanitarian Law (II)", *International Review of the Red Cross*, Vol. 6, No. 67, 1966, p. 518.
37 Common Art. 3(1) ("Persons taking no active part in the hostilities … shall in all circumstances be treated humanely"); AP II, Art. 13(2).
38 See UN General Assembly, above note 8, p. 12, para. 70; UN Human Rights, above note 9, p. 12, para. 71; Theresia Thylin, "Violence, Toleration, or Inclusion? Exploring Variation in the Experiences of LGBT Combatants in Colombia", *Sexualities*, Vol. 23, No. 3, 2020, p. 4.
39 T. Thylin, above note 38, p. 6; see also Marco Sassòli, *International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 559.

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subjected to discrimination and violence during detention.[40] Clearly, sexual orientation and gender identity are not explicit grounds listed in common Article 3 upon which adverse distinction is prohibited. The provision provides for the prohibition of adverse distinction on the basis of race, colour, religion or faith, sex, birth or wealth, and then furthermore provides that no adverse distinction shall be made on "any other similar criteria" that have not been mentioned already upon which adverse distinction is prohibited.

The International Committee of the Red Cross (ICRC) Commentary on common Article 3 – as an authoritative and subsidiary source for the determination of the rules of international humanitarian law (IHL)[41] – states that the phrase "or any other similar criteria" makes the grounds listed upon which adverse distinction is prohibited a "non-exhaustive" list.[42] The Commentary then continues to describe other grounds not listed in common Article 3 that would in theory be equally prohibited grounds of adverse distinction, such as age, state of health and family connections.[43]

In the opinion of the present author, omitting sexual orientation and gender identity from the ICRC Commentaries as grounds similar to those listed in common Article 3 upon which adverse distinction is prohibited constitutes a missed opportunity.[44] Discrimination and violence directed at LGBTQI individuals is certainly not a new phenomenon, and continues to be widespread during contemporary armed conflicts, keeping in mind the sexual violence and torture of homosexual men in concentration camps during the Third Reich,[45] or contemporary armed conflicts such as that in Colombia, during which armed non-State actors demonstrated policies of "social cleansing" operations against LGBTQI individuals.[46] What is clear from the phrase "or any other similar criteria" is that this specific wording is open to wide interpretation – as

40 GC III, Arts 21, 22. For an understanding of detention outside a criminal process (internment) during non-international armed conflict, See ICRC Commentary on GC III, above note 19, paras 755–758; see also A. Margalit, above note 13, p. 254.

41 Statute of the International Court of Justice, 1 UNTS XVI, 24 October 1945 (ICJ Statute), Art. 38(1)(d); for an understanding of the influence of the commentaries of the ICRC on the Geneva Conventions, see Sandesh Sivakumaran, "The Influence of Teachings of Publicists on the Development of International Law", *International and Comparative Law Quarterly*, Vol. 66, No. 1, 2017.

42 ICRC Commentary on GC III, above note 19, para. 605.

43 *Ibid.*

44 The ICRC Commentary on GC III, above note 19, does, however, refer to "gender" and "sexual orientation" as prohibited grounds of discrimination in relation to the obligation of humanitarian bodies to provide impartial humanitarian assistance: see, for example, para. 831 ("The Geneva Conventions require a humanitarian organization wishing to offer its services on the basis of Common Article 3 to be 'impartial'") and fn. 778 ("[Humanitarian] assistance must be provided according to the principle of impartiality, which requires that it be provided solely on the basis of need and in proportion to need. This reflects the wider principle of non-discrimination: that no one should be discriminated against on any grounds of status, including … gender [and] sexual orientation").

45 Richard Plant, *The Pink Triangle: The Nazi War against Homosexuals*, Holt Paperbacks, New York, 2011, pp. 73–87.

46 T. Thylin, above note 38, pp. 6–8; Susann Abouheldahab, "Gender-Based Persecution as a Crime Against Humanity: A Milestone for LGBTQI Rights before the Colombian Special Jurisdiction for Peace", *EJIL: Talk!*, 4 May 2021, available at: www.ejiltalk.org/gender-based-persecution-as-a-crime-against-humanity-a-milestone-for-LGBTQI-rights-before-the-colombian-special-jurisdiction-for-peace/.

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mentioned, the phrase is non-exhaustive, which elevates the potential for inclusion of sexual orientation and gender identity as similar grounds upon which adverse distinction is prohibited. This brings the author to the task of interpreting the said phrase in order to elevate the protection afforded to LGBTQI individuals detained by State and armed non-State actors alike against discrimination and SGBV.

The textual interpretation: "Ordinary meaning"

The word "criteria" is defined as a standard or characteristic by which something can be judged or decided.[47] In the context of "or any other similar criteria", and keeping in mind the preceding terms "race, colour, religion or faith, sex, birth or wealth", it can reasonably be interpreted that "criteria", for the purposes of the prohibition of adverse distinction, refers to the differential characteristic traits present in all human beings, all of which set individuals apart from one another in societal standing. To confirm the qualification of sexual orientation and gender identity as "any other similar criteria" upon which adverse distinction is prohibited, it must be established that sexual orientation and gender identity are seen as criteria similar to race, colour, religion or faith, sex, birth or wealth. In making this determination, it is perhaps beneficial to consider how criteria other than sexual orientation and gender identity that are also not listed as prohibited grounds of adverse distinction are reflected upon.

Other similar grounds not mentioned in common Article 3 upon which adverse distinction is prohibited include that of nationality.[48] It is held, however, that the omission of nationality from the list of prohibited grounds of adverse distinction has no bearing on the imperative obligation of humane treatment, and should therefore be understood as falling within the concept of "any other similar criteria".[49] In general, a Detaining Power may not take advantage of the fact that certain differential characteristics are omitted from common Article 3 by interpreting such omission as falling outside the protective scope of common Article 3.[50] As indicated by the ICRC Commentary of 1960 on common Article 3, it is prohibited for an ill-intentioned Detaining Power to employ certain criteria as

47 Della Thompson, *The Oxford Quick Reference Dictionary*, Oxford University Press, New York, 1998, p. 200; see also "Criteria", *Collins Online Dictionary*, available at: www.collinsdictionary.com/dictionary/english/criteria.

48 ICRC Commentary on GC III, above note 19, para. 607: "Unlike other provisions of humanitarian law, common Article 3 does not list 'nationality' as a prohibited criterion."

49 *Ibid.*, para. 608, "Common Article 3 is strictly humanitarian in character. … It is focused exclusively on ensuring that every person not or no longer actively participating in the hostilities is treated humanely."

50 Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. 3: *Convention (III) relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, p. 40. In the context of the omission of nationality, it was held that "[i]t would be the very denial of the spirit of the Geneva Conventions to avail oneself of the fact that the criterion of nationality had been set aside as a pretext for treating foreigners, in a civil war, in a manner incompatible with the requirements of humane treatment, for torturing them, or for leaving them to die of hunger."

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a pretext for discrimination against one class of persons or another in order to avoid affording them humane treatment.[51]

The prohibition of adverse distinction on the basis of "any other similar criteria" in the application of common Article 3 is also imbedded in customary IHL.[52] Although "any other similar criteria" is not defined under customary IHL, interpreting the phrase in light of its ordinary meaning and in light of the notion of "good faith", it must be found that sexual orientation and gender identity qualify as "any other similar criteria" upon which adverse distinction is prohibited. According to the interpretive view of the author, "or any other similar criteria" suggests an all-encompassing and flexible blanket of protection that will be applicable to all spheres of differential criteria, which include sexual orientation and gender identity.

Other scholars concur with this interpretation.[53] Sassòli, for example, argues that adverse distinction found on grounds such as sexual orientation and gender identity is prohibited under the guise of "any other similar criteria", as reinforced by the interpretation of IHRL treaties.[54] Moreover, it is correctly argued that existing IHL prohibits LGBTQI abuse when such abuse shows a nexus to the armed conflict,[55] as it inevitably affects one of the categories of persons protected under IHL.[56]

"Object and purpose"

What lies at the heart of treaty interpretation is the notion of good faith, which implies the consideration of the object and purpose of a treaty.[57] The VCLT furthermore stresses that apart from its ordinary meaning, a treaty shall be interpreted in light of its object and purpose.[58] For common Article 3 as a "convention in miniature",[59] what is held to be the object and purpose is the obligation of "humane treatment".[60] Common Article 3 holds that persons taking

51 *Ibid.* See also M. E. Villiger, above note 27, p. 426: "The prohibition of the abuse of rights, flowing from good faith, prevents a party from evading its obligations and from exercising its rights in such a way as to cause injury to the other party."

52 ICRC Customary Law Study, above note 32, Rule 88, p. 308; ICJ Statute, above note 41, Art. 38(1)(b). Customary international law is considered a binding source of international law existing independently from treaty law and can therefore be used in aid of the interpretation of treaty law. In this regard, see ICJ, *Nicaragua*, above note 33, para. 174.

53 M. Sassòli, above note 39, p. 560; A. Margalit, above note 13. For an understanding of a "good faith" interpretation, see M. E. Villiger, above note 27, p. 425: "good faith requires the parties to a treaty to act honestly, fairly and reasonably, and to refrain from taking unfair advantage".

54 M. Sassòli, above note 39, p. 560. See also UN Human Rights, *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law*, HR/PUB/12/06/Rev.1, 2019.

55 ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber), 7 May 1997, para. 572; ICC, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Judgment (Trial Chamber), 8 July 2019, para. 731.

56 M. Sassòli, above note 39, p. 560; A. Margalit, above note 13, p. 251.

57 M. E. Villiger, above note 27, p. 426.

58 VCLT, above note 22, Art. 31(1).

59 ICRC Commentary on GC III, above note 19, para. 390.

60 *Ibid.*, para. 89: "The overall object and purpose of the Third Convention is to ensure that prisoners of war are humanely treated at all times, while allowing belligerents to intern captured enemy combatants to

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no active part in hostilities – those who have laid down their arms and those placed *hors de combat* – "shall in all circumstances be treated humanely".[61] The obligation of humane treatment has been described as the cornerstone of protections conferred by common Article 3, as well as "the leitmotiv of the four Geneva Conventions".[62] The obligation of humane treatment furthermore ensures that both State and armed non-State actors in a NIAC treat persons not or no longer actively participating in hostilities and falling under their power in a humane manner.[63] It is therefore of vital importance to understand what constitutes humane treatment as the object and purpose of common Article 3 in qualifying sexual orientation and gender identity as "any other similar criteria" upon which adverse distinction is prohibited.

Neither common Article 3 nor any other provision of international humanitarian treaty law defines "humane treatment".[64] The Commentary to common Article 3 does confirm, however, that the meaning of humane treatment is context-specific and must be considered in the concrete circumstances of each case.[65] Moreover, one factor that is considered to contribute to the understanding of humane treatment is the acknowledgement that women, men, girls and boys are affected differently by armed conflict, and that sensitivity to an individual's inherent status, capacity and needs, and how such status, capacity and needs differ throughout society, must be considered when applying the obligation of humane treatment.[66] In the context of LGBTQI persons detained during NIAC, the obligation of humane treatment would entail, for example, treatment with all due regard to the individual's sex, respect for convictions, and protection from the violence and dangers associated with armed conflict.[67]

Customary IHL similarly pronounces on the obligation of humane treatment.[68] The definition of "humane treatment" under customary IHL refers to humane treatment as an overarching concept with reference to respect for an individual's dignity and the prohibition of ill-treatment.[69] A significant observation worthy of mention regarding the definition of humane treatment

prevent them from returning to the battlefield." See also para. 90: "It should be recalled that common Article 3 provides the Third Convention, and the other Conventions, with an additional object and purpose, as it serves to protect persons not or no longer participating in hostilities, including persons deprived of liberty, in situations of non-international armed conflict."

61 Common Art. 3(1).

62 Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. 4: *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 204; GC III, Art. 13; GC IV, Art. 27; ICRC Commentary on GC III, above note 19, para. 584.

63 ICRC Commentary on GC III, above note 19, para. 584. For an in-depth discussion on the notion of "humane treatment", see Cordula Droege, "In Truth the Leitmotiv: The Prohibition of Torture and Other Forms of Ill-Treatment in International Humanitarian Law", *International Review of the Red Cross*, Vol. 89, No. 867, 2007; see also J. Pictet, above note 36, pp. 518–519.

64 ICRC Commentary on GC III, above note 19, para. 587.

65 *Ibid.*: "… taking into account both objective and subjective elements, such as the environment, the physical and mental condition of the person, as well as their age, social, cultural religious or political background and past experiences".

66 *Ibid.*, para. 587.

67 *Ibid.*, para. 592.

68 ICRC Customary Law Study, above note 32, Rule 87, p. 307.

69 *Ibid.*

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under customary IHL is the assertion that the notion of humane treatment develops over time under the influence of changes in society.[70] In this sense, as society becomes more aware of targeted violence directed at LGBTQI individuals,[71] or considering the progressive development of LGBTQI rights in terms of IHRL over recent years,[72] so too will the notion of humane treatment under IHL systematically evolve to integrate the specific needs and sensitivities of LGBTQI individuals detained during armed conflict.

Jurisprudence of the *ad hoc* international criminal tribunals seems to follow the construction of the notion of humane treatment found under customary IHL.[73] The International Criminal Tribunal for the former Yugoslavia (ICTY), in the *Aleksovski* case, defined humane treatment in relation to forms of mistreatment that are without question incompatible with the general guarantee of humane treatment.[74] The Trial Chamber noted that the purpose of common Article 3 is to uphold and protect the inherent human dignity of the individual by prescribing humane treatment without discrimination.[75] Therefore, considering the prohibited acts listed in common Article 3, including violence to life and person, mutilation, cruel treatment, torture and outrages upon personal dignity, these prohibited acts are specific examples of conduct that are indisputably in violation of the obligation of humane treatment.[76] It is therefore uncontroversial that common Article 3 prohibits all forms of SGBV against all protected persons – and specifically those placed *hors de combat* by detention for the purposes of this writing – as such violence amounts to a violation of the obligation of humane treatment, as well as the corresponding prohibitions against violence to life and person, mutilation, cruel treatment, torture and outrages upon personal dignity.[77]

The International Criminal Tribunal for Rwanda (ICTR) confirmed in both *Muvunyi*[78]and *Kamuhanda*[79] that sexual violence amounts to inhumane treatment, while the Special Court for Sierra Leone (SCSL) in *Brima* confirmed that sexual and other physical violence qualifies as inhumane treatment.[80] Therefore, prescribing

70 *Ibid.*, Rule 87, p. 308.
71 See, for example, HRC Res. 17/19, "Human Rights, Sexual Orientation and Gender Identity", UN Doc. A/HRC/RES/17/19, 14 July 2011; UN Human Rights, above note 3; UN Human Rights, above note 4; UN General Assembly, above note 2. See also International Commission of Jurists, *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, March 2007 (Yogyakarta Principles).
72 UN Human Rights, above note 54.
73 ICJ Statute, above note 41, Art. 38(1)(d). Judicial decisions are considered a subsidiary means for the determination of the rules of international law.
74 ICTY, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgment (Trial Chamber), 25 June 1999, para. 49.
75 *Ibid.*, para. 49.
76 ICRC Commentary on GC III, above note 19, para. 589.
77 *Ibid.*, para. 732.
78 ICTR, *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Judgment (Trial Chamber), 18 September 2006, para. 528.
79 ICTR, *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Judgment (Trial Chamber), 22 January 2004, para. 710.
80 SCSL, *Prosecutor v. Brima*, Case No. SCSL-2004-16-A, Judgment (Appeals Chamber), 22 February 2008, para. 184.

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common Article 3's obligation of humane treatment without discrimination as being in line with the reasoning of *Aleksovski*,[81] and without any adverse distinction on the basis of "any other similar criteria", LGBTQI detainees would be protected against any adverse distinction during detention, which includes SGBV. Thus, subjecting LGBTQI detainees to rape, forced stripping, anal examinations, genital mutilation or forced sterilization while in detention[82] amounts to a violation of common Article 3's obligation of humane treatment and the corresponding prohibition against acts of violence to life and person and outrages upon personal dignity, and is consequently prohibited.

Scholarly opinion points to the obligation of humane treatment as the basis upon which the general principle of humanity under the so-called "Geneva law" is founded.[83] Jean Pictet wrote that the "principle of Geneva" captures three duties towards victims of war: respect, protection and humane treatment, the last being a question of common sense and good faith.[84] For Kolb and Hyde, the principle of humanity consists of four facets: respect, protection, equality and humane treatment for all those not or no longer actively participating in hostilities.[85] Moreover, under Kolb and Hyde's construction of the principle of humane treatment, the obligation to afford humane treatment to protected persons is consequential to the fact of them being human beings who should therefore be afforded a minimum degree of human dignity.[86] From an operational and practical perspective, Sassòli argues that the obligation of a Detaining Power to afford humane treatment must be interpreted as requiring special care when a Detaining Power becomes aware of special risks affecting certain detainees.[87] In this sense, a lawful differentiation can be made, for example, by keeping homosexual and transgender detainees separate from other detainees, or even providing homosexual and transgender detainees with specially designated sanitary facilities.[88] This is because common Article 3 does not prohibit distinction that is non-adverse – i.e., distinction that is justified by substantively different needs and perspectives of persons protected under common Article 3 for the purposes of realizing their humane treatment.[89]

81 ICTY, *Aleksovski*, above note 74, para. 49.
82 UN General Assembly, above note 8; UN Human Rights, above note 4; UN Human Rights, above note 9; UN Human Rights, above note 14.
83 Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflict*, Bloomsbury, London, 2008, p. 45. For a discussion on the distinction between "Hague law" and "Geneva law", see Jean Pictet, "The Principles of International Humanitarian Law", *International Review of the Red Cross*, Vol. 6, No. 66, 1966, pp. 456–458; see also J. Pictet, above note 36, p. 519.
84 J. Pictet, above note 36, p. 519.
85 R. Kolb and R. Hyde, above note 83, pp. 45–46.
86 *Ibid.*
87 M. Sassòli, above note 39, p. 559.
88 See, for example, ICRC Commentary on GC III, above note 19, para. 2104: "[T]he requirement of separate dormitories may also extend to other categories of persons with distinct needs or facing particular risks where not doing so would violate the obligation of humane treatment."
89 *Ibid.*, para. 612: "This allows for differential treatment that in fact serves the purpose of realizing a person's humane treatment."

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It is thus clear that what lies at the epicentre of "humane treatment" of persons not or no longer actively participating in hostilities is human dignity and non-discrimination in the application of common Article 3.[90] For the current author, and for the purposes of placing humane treatment in the context of the protection of LGBTQI detainees against discrimination and SGBV during NIAC, "humane treatment" connotes, at the very minimum, treatment with all due regard for such individuals' status as such.[91] As scholars have rightly noted, the intrinsic reality of armed conflict inevitably results in having protected persons under IHL lead a difficult life within an inherently unfavourable environment. However, treatment of protected persons in such a chaotic environment must always be humane, appropriate and acceptable.[92] The current author acknowledges that although a Detaining Power may not be aware of the sexual orientation of a specific individual under its control, the obligation of the Detaining Power is, nevertheless, based on providing equal and non-discriminatory protection, without drawing an adverse distinction in affording humane treatment. Upon this basis, sexual orientation and gender identity qualify as "any other similar criteria" upon which adverse distinction is prohibited, in line with the object and purpose of common Article 3.

The next section of this article focuses on Additional Protocol II,[93] as an instrument made in connection with the conclusion of common Article 3 and accepted as such by the parties thereto for the purposes of Article 31(2)(b) of the VCLT.[94]

Additional Protocol II as an instrument related to common Article 3 for the purposes of Article 31(2)(b) of the VCLT

According to Article 31(2)(b) of the VCLT, the context of a treaty for the purposes of its interpretation shall comprise, in addition to the text, preamble and annexes, any instrument made in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.[95] AP II fulfils the requirements of an "instrument" for the purposes of Article 31(2)(b) of the VCLT in the following ways. Firstly, the Commentary to AP II describes AP II as

90 *Ibid.*, para. 591: "State practice has called for treatment that respects a person's inherent dignity as a human being."
91 *Ibid.*, para. 587. Sensitivity towards an individual's inherent status is held to contribute to the understanding of "humane treatment" enshrined in common Article 3.
92 R. Kolb and R. Hyde, above note 83, p. 46.
93 See above note 24.
94 VCLT, above note 22, Art. 31(2)(b).
95 *Ibid.*; see also M. E. Villiger, above note 27, pp. 429–430: "The agreement or instrument mentioned in para. 2 as a means of interpretation will concern a subject-matter of a treaty (and in particular the treaty term to be interpreted), and are, or were, 'germane' to the treaty, i.e., they stand in some connection with the conclusion of the treaty (but need not necessarily have eventuated at the time of the conclusion of the treaty)."

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the first real legal instrument for the protection of victims of NIAC.[96] Secondly, and although common Article 3 remains the core treaty-based provision tasked with the oversight of all NIAC,[97] AP II supplements and develops the general provisions of common Article 3, albeit only for those States that have ratified it.[98] Furthermore, as Article 31(2)(b) requires an instrument to be made in connection with the conclusion of a treaty, there will be no bearing on AP II being utilized in the interpretation of "or any other similar criteria", as AP II promotes the subject matter and purpose of common Article 3.[99] Moreover, even though AP II was not adopted until 1977, this cannot be construed so as to mean that AP II was not made in connection with the conclusion of the Geneva Conventions for the purposes of Article 31(2)(b), as the instrument does not need to have eventuated at the time of the conclusion of the related treaty.[100]

Despite the arguments raised above in favour of utilizing AP II for the purposes of the interpretation of "or any similar criteria", AP II is not necessarily free from any obstacles. AP II is only applicable to armed conflict taking place on the territory of a State that has ratified it,[101] as many States were opposed to the assertion that its provisions reflected existing customary IHL at the time of its adoption.[102] Moreover, for AP II to become applicable to a certain NIAC, AP II requires certain additional application criteria, including, *inter alia*, that the dissident armed forces or organized armed groups engaged in the conflict are organized under a responsible command structure, exercise control over a part of the State Party's territory, and are able to implement the provisions of AP II.[103] The high threshold of intensity necessary for an armed conflict to thus trigger the applicability of AP II means that many situations of armed conflict do not qualify as an AP II-type NIAC, and thus do not trigger its application.[104] Nevertheless, the provisions of AP II relevant for the purposes of this article, and for the protection of LGBTQI detainees against discrimination and SGBV during NIAC, restate and clarify customary IHL.[105] Therefore, the relevant provisions of AP II can be applied for the purposes of interpreting "or any other similar criteria" in

96 Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, ICRC, Geneva, 1987 (ICRC Commentary on AP II), para. 4337.

97 ICRC Commentary on GC III, above note 19, para. 388.

98 AP II, Art. 1(1). See also ICRC Commentary on GC III, above note 19, para. 388: "In comparison [to common Article 3], Additional Protocol II is not universally ratified, and its scope of application is more limited, without, however, modifying common Article 3's existing conditions of application."

99 See M. E. Villiger, above note 27, pp. 429–430.

100 *Ibid.*, p. 430.

101 AP II, Art. 1(1); see also ICRC Customary Law Study, above note 32, p. xxxiv.

102 Antonio Cassese, "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law", *UCLA Pacific Basin Law Journal*, Vol. 3, No. 1–2, 1984, p. 109.

103 AP II, Art. 1(1).

104 For an in-depth discussion on the scope of application of AP II, see Martha M. Bradley, "Revisiting the Scope of Application of Additional Protocol II: Exploring the Inherent Minimum Threshold Requirements", *African Yearbook on International Humanitarian Law*, No. 1, 2019.

105 AP II, Arts 2(1), 4(1), 4(2)(a), 4(2)(e); ICRC Customary Law Study, above note 32, p. 299 (fundamental guarantees); A. Cassese, above note 102, p. 110.

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its context, and for the purposes of qualifying sexual orientation and gender identity as such.[106]

To begin with, the preamble to AP II reinforces the principles of the famous Martens Clause of the 1899 and 1907 Hague Conventions respecting the laws and customs of war on land.[107] These principles, which have attained the status of customary international law,[108] recall that in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.[109] Although these principles were originally adopted in the context of "means and methods of warfare" for international armed conflicts, and applied in that context as seen in the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (Nuclear Weapons Advisory Opinion),[110] the ICJ nevertheless held that these two systems of law – the "Hague law" and "Geneva law" – "have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law".

The principles of the protection of humanity and the dictates of the public conscience have been held to serve as fundamental guidance in the interpretation of international customary or treaty rules.[111] Cassese argues, for example, that in case of doubt, rules belonging to IHL must be construed to be consonant with the general standards of humanity and the demands of public conscience.[112] Moreover, the Commentary to AP II holds that if a case is not covered by the law in force, whether due to a lacuna in the law or because the parties to the conflict do not consider themselves bound by common Article 3 or AP II, that does not mean that anything is permitted.[113] An *a contrario* interpretation is therefore prohibited, and the human person remains under the protection of the principles of humanity and the dictates of the public conscience.[114] Therefore, since sexual orientation and gender identity are not explicitly covered by the law in force in qualification of such characteristics as "any other similar criteria", the lack of explicit recognition of sexual orientation and gender identity under either

106 AP II, Arts 2(1), 4.
107 AP II, Preamble; see also Hague Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899, Preamble; Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, Preamble.
108 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996* (Nuclear Weapons Advisory Opinion), para. 84; ICJ, *Nicaragua*, above note 33, para. 218; ICJ, *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, 9 April 1949, *ICJ Reports 1949*, p. 22. For a discussion on the Martens Clause, see Antonio Cassese, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?", *European Journal of International Law*, Vol. 11, No. 1, 2000.
109 AP II, Preamble.
110 Nuclear Weapons Advisory Opinion, above note 108, para. 84.
111 A. Cassese, above note 108, p. 212.
112 *Ibid.*
113 ICRC Commentary on AP II, above note 96, para. 4434.
114 *Ibid.*

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common Article 3 or AP II[115] cannot be interpreted to suggest that it is permitted to subject LGBTQI detainees to discrimination and SGBV while in detention. The protection of LGBTQI detainees against discrimination and SGBV during detention is first and foremost to be found under the principles of humanity and the dictates of the public conscience.

Moving forward, AP II's personal field of application under Article 2(1) provides for the application of the Protocol without any adverse distinction.[116] Similar to that of common Article 3, AP II's non-discrimination clause makes no provision for sexual orientation and gender identity as grounds upon which adverse distinction is prohibited. However, as in the case of common Article 3, the list of prohibited grounds of adverse distinction is non-exhaustive, leaving room for the inference of sexual orientation and gender identity as "any other similar criteria". Praise must be given to AP II, though, in expanding the list of grounds upon which adverse distinction is prohibited, by adding, for example, "or other status", juxtaposed against "or any other similar criteria".[117] This holds the potential for inference of sexual orientation and gender identity as prohibited grounds of adverse distinction under both "or other status" as well as "or any other similar criteria". Moreover, AP II's personal field of application guarantees humane treatment to all whose liberty has been restricted for reasons related to the armed conflict.[118]

AP II furthermore provides for certain fundamental guarantees to all persons not taking a direct part in hostilities, or who have ceased to take part, whether or not their liberty has been restricted.[119] In the first instance, as with common Article 3, the general obligation of humane treatment is guaranteed without any adverse distinction.[120] The general obligation of humane treatment is then informed by a list of prohibited acts of absolute character that applies at all times and in all places and which includes, *inter alia*, violence to the life, health and physical or mental well-being of persons,[121] as well as outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.[122] The express list of prohibited acts under AP II is thus wider than that of common Article 3 due to the inclusion, for example, of rape, enforced prostitution and any form of indecent assault, which reaffirms and supplements common Article 3.[123] These

115 See AP II, Art. 2(1). According to the personal field of application, AP II applies without any adverse distinction founded on "race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria".
116 AP II, Art. 2(1).
117 *Ibid.*, Art. 2(1).
118 *Ibid.*, Arts 2(2), 5(3).
119 *Ibid.*, Arts 4(1)–4(2).
120 *Ibid.*, Art. 4(1).
121 *Ibid.*, Art. 4(2)(a).
122 *Ibid.*, Art, 4(2)(e).
123 ICRC Commentary on AP II, above note 96, para. 4539.

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fundamental guarantees are further supplemented by the customary IHL rules covering rape and other forms of sexual violence.[124]

While rape and indecent assault were added to the list of prohibited acts primarily out of concern for the protection of women and children,[125] such protection is nevertheless applicable to LGBTQI detainees who find themselves in the hands of a specific Detaining Power or armed non-State actor during NIAC, as persons not or no longer actively participating in hostilities. Moreover, these prohibited acts, which fall under the broader category of sexual violence,[126] are held today to encompass violence directed not only against women and girls, but also against men and boys.[127] Furthermore, and for the purposes of international criminal law, rape and any other form of sexual violence also constituting a serious violation of common Article 3 constitute a war crime when committed against any person.[128] The International Criminal Court (ICC) in its recent decision in *Ntaganda*, for example, acknowledged that the concept of "invasion" for purposes of the war crime of rape is intended to be gender-neutral so as to also cover same-sex penetration, and encompasses both male and female victims and perpetrators.[129] Moreover, it is recognized that acts of SGBV directed at LGBTQI detainees may include other acts which do not necessarily consist of rape.[130] Other acts which have similarly been construed as sexual violence, and are therefore equally applicable to LGBTQI detainees during NIAC, include forced public nudity and forced stripping as pronounced in *Akayesu*,[131] as well as genital mutilation as in *Bagosora*.[132] Therefore, acts constituting rape and indecent assault for the purposes of the fundamental guarantees contained in AP II should be construed as sufficiently gender-neutral so as to also cover protection of LGBTQI detainees during NIAC. Considering this context for the purposes of "or any other similar criteria", sexual orientation and gender identity qualify as prohibited grounds of adverse distinction.

As the context for the purposes of the interpretation of "or any other similar criteria" is now settled by the analysis of the relevant provisions of AP II, the final step in the interpretation process turns to the relevant rules of international law applicable in the relations between the parties, in accordance with Article 31(3)(c) of the VCLT.[133]

124 ICRC Customary Law Study, above note 32, Rule 93, p. 324.
125 ICRC Commentary on AP II, above note 96, para. 4539.
126 ICRC Commentary on GC III, above note 19, para. 734.
127 *Ibid.*, para. 736; See also UN Security Council, above note 6, p. 3, para. 4; ICRC Customary Law Study, above note 32, Rule 93, p. 327.
128 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Art. 8(2)(e)(vi); see also ICC, *Elements of Crimes*, 2011, Art. 8(2)(e)(vi)-1; ICRC Customary Law Study, above note 32, Rule 93, p. 327.
129 See ICC, *Ntaganda*, above note 55, para. 933.
130 UN Human Rights, above note 7.
131 ICTR, *Akayesu*, above note 1, para. 693; ICTY, *Prosecutor v. Miroslav Kvočka*, Case No. IT-98-30/1-T, Judgment (Trial Chamber), 2 November 2001, para. 180.
132 ICTR, *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgment and Sentence, 18 December 2008, para. 976; see also ICRC Commentary on GC III, above note 19, para. 734.
133 VCLT, above note 22, Art. 31(3)(c).

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International human rights law as "relevant rules of international law applicable in the relations between the parties"

This section explores the extent to which IHRL can be utilized as an interpretive tool in aiding the qualification of sexual orientation and gender identity as "any other similar criteria". To this end, the section will first consider the relationship between IHRL and IHL; it will then present the applicable IHRL instruments giving effect to the recognition of sexual orientation and gender identity as prohibited grounds of adverse distinction, and will lastly consider international jurisprudence giving effect to sexual orientation and gender identity as prohibited grounds of adverse distinction.

Looking towards IHRL as an interpretive tool for the qualification of sexual orientation and gender identity as "any other similar criteria", certain difficulties arise. This is because the question of whether and to what extent IHRL applies to armed non-State actors remains controversial.[134] It is today widely accepted that the rules of IHL are binding on both States and armed non-State actors in a NIAC, as enforced by the wording of common Article 3: "each Party to the conflict shall be bound to apply, as a minimum, the following provisions".[135] Customary IHL similarly requires that each party to the conflict must respect and ensure respect for IHL by its armed forces.[136] The same is not accepted for IHRL.[137] However, what this section seeks to achieve is not to apply IHRL to non-State actors; rather, it seeks to utilize IHRL as an interpretive tool for the purposes of qualifying sexual orientation and gender identity as "any other similar criteria" upon which adverse distinction is prohibited. Moreover, as Article 31(3)(c) of the VCLT specifically provides for the consideration of relevant rules of international law that are applicable in the relations between the parties, the parties as such, for the purposes of Article 31(3)(c), refer to States party to the treaties under IHRL, which are binding upon such States Parties.[138]

The relationship between IHL and IHRL

The relationship between IHL and IHRL can be traced back to the International Conference on Human Rights held in Tehran in 1968, at which Resolution XXIII,

134 Jann K. Kleffner, "The Applicability of the Law of Armed Conflict and Human Rights Law to Organised Armed Groups", in Erika De Wet and Jann K. Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations*, Pretoria University Law Press, Pretoria, 2014, p. 50.

135 Common Art. 3(1).

136 ICRC Customary Law Study, above note 32, Rule 139, p. 495.

137 J. K. Kleffner, above note 134, p. 50.

138 M. E. Villiger, above note 27, p. 433: "they are applicable in the relations between the parties, i.e., binding on all parties to the treaty at issue". See also M. E. Villiger, above note 27, p. 432: "These rules need have no particular relationship with the treaty other than assisting in the interpretation of its terms. On the whole, they will provide a contemporary interpretation of the ordinary meaning of a term."

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entitled "Human Rights in Armed Conflict", was adopted.[139] As a result, the Tehran Conference became the decisive event for the establishment of a relationship between IHL and IHRL.[140] A tendency thus developed in perceiving IHL as part of human rights law applicable during armed conflict,[141] as both these branches of law prohibit the killing of detainees, torture and rape, and uphold the requirement of humane treatment of detainees.[142] As both these branches of international law consist of a protective purpose – for example, IHL operates from the basis of the need to balance military necessity with the preservation of humanity and humane treatment during armed conflict,[143] while IHRL operates from the basis of the protection of human dignity during peacetime[144] – the possibility of overlap between these two special regimes increases.

The ICJ in its Nuclear Weapons Advisory Opinion held that the protection of the International Covenant on Civil and Political Rights (ICCPR) does not cease during time of war, subject to certain derogations in terms of Article 4.[145] In expounding on this approach, the ICJ in its subsequent Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Wall Advisory Opinion), held that for the relationship between IHL and IHRL, some rights may be exclusive matters of IHL and others exclusive matters of IHRL, while still others may be matters of both these branches of international law.[146] Even though the more popular view in recent times suggests that IHRL applies concurrently with IHL during armed conflict, it must be acknowledged that this view is not universally accepted and remains unsettled.[147]

The present question, however, concerns how to reconcile the qualification of sexual orientation and gender identity as "any other similar criteria" with IHRL, seeing that IHL operating as *lex specialis* during armed conflict falls silent as regards to sexual orientation and gender identity as prohibited grounds of adverse

139 UNGA Res. 2444, "Respect for Human Rights in Armed Conflict", UN Doc. A/RES/2444, 19 December 1968; see also United Nations, *Final Act of the International Conference on Human Rights, Tehran*, UN Doc. A/CONF.32/41, 22 April–13 May 1698, p. 18.

140 Noam Lubell and Nancie Prud'homme, "Impact of Human Rights Law", in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict*, Routledge, London and New York, 2016, p. 2; see also Louise Doswald-Beck and Sylvian Vité, "International Humanitarian Law and Human Rights Law", *International Review of the Red Cross*, Vol. 33, No. 293, 1993, p. 94.

141 L. Doswald-Beck and S. Vité, above note 140, p. 94.

142 International Covenant on Civil and Political Rights, I-14668 UNTS 999, 16 December 1966 (entered into force 23 March 1976) (ICCPR), Preamble, Arts 6, 7, 9, 10; Common Art. 3(1)(a), 3(1)(c); AP II, Arts 4, 5; M. Sassòli, above note 39, p. 425.

143 Protocol Additional (I) to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 57; ICRC Customary Law Study, above note 32, Rule 1, p. 3; R. Kolb and R. Hyde, above note 83, pp. 46–47.

144 ICCPR, above note 142, Preamble.

145 Nuclear Weapons Advisory Opinion, above note 108, para. 25.

146 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports 2004* (Wall Advisory Opinion), para. 106.

147 M. Sassòli, above note 39, p. 426. Also see, for example, Anthony E. Cassimatis, "International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law", *International and Comparative Law Quarterly*, Vol. 56, No. 3, 2007.

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distinction.[148] In this regard, the International Law Commission's study on fragmentation of international law held that the operation of IHL as *lex specialis* during armed conflict does not abolish IHRL during time of war.[149] Moreover, some scholars argue that IHL does not always constitute *lex specialis* during armed conflict simply because it applies to and was specifically designed for those situations, but rather that IHL constitutes *lex specialis* on certain issues during armed conflict, while IHRL is *lex specialis* on others.[150] Scholarly opinion thus suggests that a case-by-case determination should be made as to the applicable law governing a certain norm, and that in a conflict between the two potential applicable rules, the one with the larger "common-contact surface area" applies.[151]

In addition, seeing that Article 31(3)(c) of the VCLT provides for the consideration of "relevant rules of international law applicable in the relations between the parties" when interpreting a certain norm, what is described to be imbedded in this method of interpretation is the principle of complementarity.[152] Therefore, on the basis of the principle of complementarity, a norm of IHL can be interpreted in light of IHRL and vice versa, since these branches of international law both concern the preservation of human dignity and humane treatment and are therefore mutually reinforcing.[153] Consequently, considering the qualification of sexual orientation and gender identity as "any other similar criteria" upon which adverse distinction is prohibited, which concerns primarily the non-discriminatory application of the protective guarantees of common Article 3 on the basis of sexual orientation and gender identity, the principle of non-discrimination in terms of IHRL instruments must be engaged.

LGBTQI recognition under IHRL

At the outset it must be mentioned that treaties under IHRL, the same as with common Article 3, contain no explicit recognition of sexual orientation and gender identity as prohibited grounds of distinction. What is significant about the principle of non-distinction under IHRL, however, is the instruments and interpretive tools adopted in order to give effect to such recognition.[154] Although these instruments and interpretive tools mainly consist of resolutions and other "soft-law" instruments of the political organs of the United Nations (UN) and other regional human rights law mechanisms, and are thus not binding on States

148 ICRC Commentary on GC III, above note 19, para. 104: "In the event of a real conflict between the respective norms, resort must be had to a principle of conflict resolution such as *lex specialis derogat legi generali*, by which a more specific legal norm takes precedence over a more general one." See also International Law Commission (ILC), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006, p. 35, para. 57.

149 ILC, above note 148, p. 57, para. 104.

150 M. Sassòli, above note 39, p. 438.

151 *Ibid.*

152 Cordula Droege, "The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict", *Israel Law Review*, Vol. 40, No. 2, 2007, p. 337.

153 *Ibid.*; for a discussion on the principle of "systemic integration", see ILC, above note 148, p. 206, para. 410.

154 HRC Res. 17/19, "Human Rights, Sexual Orientation and Gender Identity", UN Doc. A/HRC/RES/17/19, 14 July 2011; see also UN Human Rights, above note 54; Yogyakarta Principles, above note 71.

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per se, they nevertheless consist of normative values that serve as influential guidelines for States in their conduct.[155]

The first instrument to engage for the purposes of the qualification of sexual orientation and gender identity as "any other similar criteria" is the ICCPR, which, as discussed above, applies concurrently with IHL during armed conflict.[156] Article 2 of the ICCPR establishes for States Parties the obligation of non-distinction in the application of the rights contained in the Covenant.[157] Although the UN Human Rights Committee in its General Comment No. 18 on non-discrimination makes no reference to sexual orientation or gender identity upon which distinction is prohibited, the Committee holds that the term "discrimination" as used in the ICCPR should be understood to imply any distinction based on any grounds which has the effect of nullifying or impairing the recognition, enjoyment or exercise by all persons of all rights and freedoms contained in the Covenant.[158]

During 2011, the Human Rights Council adopted Resolution 17/19, entitled "Human Rights, Sexual Orientation and Gender Identity", expressing grave concern at acts of violence and discrimination against LGBTQI individuals and recalling the universal application of the rights enshrined in the Universal Declaration of Human Rights and other human rights treaties.[159] Furthermore, the UN Office of the High Commissioner for Human Rights, in the second edition of its publication *Born Free and Equal*, has reinforced the obligation of non-discrimination under Article 2 of the ICCPR as including non-discrimination on the basis of sexual orientation, gender identity and sex characteristics.[160] Other human rights treaties, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Elimination of All Forms of Discrimination against Women, similarly set out the obligation of non-discrimination to include discrimination based on sexual orientation and gender identity.[161]

In the context of the protection of LGBTQI detainees against SGBV, Article 10 of the ICCPR imposes the obligation upon States to treat all persons deprived of their liberty with humanity and with respect for human dignity.[162] In

155 John Dugard, *International Law: A South African Perspective*, 4th ed., Juta, Cape Town, 2011, pp. 30–34; for a general discussion on the hard/soft law dichotomy in international law, see Arnold N. Pronto, "Understanding the Hard/Soft Distinction in International Law", *Vanderbilt Journal of Transnational Law*, Vol. 48, No. 941, 2015, p. 953

156 ICCPR, above note 142.

157 *Ibid.*, Art. 2.

158 Human Rights Committee, CCPR General Comment No. 18, "Non-Discrimination", 10 November 1989, p. 2, para. 7; See also Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, 31 March 1994, para. 8.7, in which the Committee held that reference to "sex" in Articles 2 and 26 of the ICCPR also includes sexual orientation.

159 HRC Res. 17/19, above note 154.

160 UN Human Rights, above note 54, p. 52.

161 Committee against Torture, General Comment No. 2, "Implementation of Article 2 by States Parties", UN Doc. CAT/C/GC/2, 24 January 2008, p. 6, para. 21; Committee on the Elimination of Discrimination Against Women, "General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women", UN Doc. CEDAW/C/GC/28, 16 December 2010, p. 4, para. 18.

162 ICCPR, above note 142, Art. 10.

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General Comment No. 21 on Article 10, the Human Rights Committee held that Article 10 imposes a positive obligation upon States towards persons who are particularly vulnerable due to their status as "persons deprived of their liberty".[163] It is furthermore held that for "persons deprived of their liberty", the sanction on torture and other cruel, inhumane or degrading treatment or punishment is emphasized.[164] This emphasis placed on the prohibition of torture and cruel, inhumane or degrading treatment or punishment has been held to include the prohibition of SGBV perpetrated against LGBTQI detainees.[165] From a regional perspective, in 2014 the African Commission on Human and Peoples' Rights (ACHPR) adopted Resolution 275, condemning human rights violations including "corrective rape" and torture, as well as arbitrary arrests and detention committed by both State and non-State actors throughout the African region against persons based on their sexual orientation and gender identity, and furthermore reinforcing the obligation of States under the African Charter to respect the right to be free from torture and other cruel, inhumane and degrading treatment or punishment.[166]

Judicial practice of human rights treaty bodies has similarly upheld sexual orientation and gender identity as prohibited grounds of distinction. In *Toonen v. Australia*, the UN Human Rights Committee found the reference to "sex" under Articles 2 and 26 of the ICCPR to include "sexual orientation".[167] Moreover, in the case of *Identoba and Others v. Georgia*, the European Court of Human Rights (ECtHR) held that the prohibition of discrimination under Article 14 of the European Convention on Human Rights also covers discrimination based on sexual orientation and gender identity.[168] In a more recent landmark decision, the Inter-American Court of Human Rights (IACtHR), in *Azul Rojas Marín et al. v. Peru*, held that Article 1(1) of the American Convention on Human Rights, which prohibits the discriminatory application of the rights contained in the Convention, also prohibits discrimination on the basis of sexual orientation, gender identity or gender expression.[169] The IACtHR went one step further and held that rape constitutes torture when the purpose behind the rape is to discriminate on the basis of sexual orientation or gender identity.[170]

In conclusion, and considering the ICJ's approach in the Wall Advisory Opinion that certain rights concern matters of both IHRL and IHL,[171] looking towards IHRL as an interpretive tool in qualifying sexual orientation and gender

163 Human Rights Committee, General Comment No. 21, "Article 10 (Humane Treatment of Persons Deprived of Their Liberty)", UN Doc. HRI/GEN/1/Rev.9 (Vol. 1), 10 April 1992, para. 3.
164 *Ibid.*; see also ICCPR, above note 142, Art. 7.
165 UN Human Rights, above note 54, p. 29.
166 ACHPR Res. 275(LV), "Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity", 28 April–12 May 2014.
167 Human Rights Committee, *Toonen*, above note 158.
168 ECtHR, *Identoba and Others v. Georgia*, Appl. No. 73235/12, Judgment, 12 May 2015, para. 96.
169 IACtHR, *Azul Rojas Marín et al. v. Peru*, Series C, No. 402, Preliminary Objections, Merits, Reparations and Costs, Judgment, 12 March 2020, para. 90.
170 *Ibid.*, paras. 160–167.
171 Wall Advisory Opinion, above note 146.

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identity as "any other similar criteria" seems accurate. In this regard, accepting that IHRL may be directly applied to certain situations during armed conflict where IHL falls silent (such as the omission of sexual orientation and gender identity as prohibited grounds of adverse distinction under common Article 3), subjecting LGBTQI detainees to SGBV, or any other adverse distinction during NIAC, constitutes a violation of States' obligation to afford humane treatment under both IHRL and IHL. Lastly, it is argued that the protection of persons based on their sexual orientation or gender identity does not require the establishment of new or special rights for LGBTQI persons, but rather the enforcement of existing rights, particularly the universally applicable guarantee of non-discrimination.[172]

Conclusion

As discussed, discrimination and violence directed at LGBTQI individuals during armed conflict are widespread.[173] Used as a tactic of terror and social control,[174] SGBV during armed conflict has been described as the most effective weapon for terrorizing and changing the very demographics of the community it impacts.[175] As SGBV is prevalent in the context of detention,[176] State and armed non-State actors are reminded of their obligation to provide LGBTQI individuals under their control with "humane treatment" as the fundamental guarantee of common Article 3. As mentioned above, the protection of persons based on their sexual orientation or gender identity does not require the establishment of new rights, but rather the enforcement of existing rights.[177] Moving forward, in giving effect to sexual orientation and gender identity as "any other similar criteria", sexual orientation and gender identity must be addressed as specific grounds for discrimination and violence.[178] Although significant progress is being made in terms of IHRL, affording recognition to these grounds under IHL is what will ultimately qualify them as "any other similar criteria" upon which adverse distinction is prohibited, thus helping to achieve the realization of non-adverse treatment of LGBTQI detainees during NIAC.

172 UN Human Rights, above note 54, p. 3; see also UN Human Rights, "The United Nations Speaks Out: Tackling Discrimination on Grounds of Sexual Orientation and Gender Identity", 2011, available at: https://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTBrochure.aspx.

173 UN Security Council, above note 6; UN Human Rights, above note 3; UN Security Council, above note 7; UN Security Council, above note 8, p. 2, para. 6; UN Human Rights, above note 9.

174 UN Security Council, 2015, above note 7, para. 6; UN Security Council, 2021, above note 7, p. 7.

175 UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, *Annual Report of the Team of Experts on the Rule of Law/Sexual Violence in Conflict*, 2017, available at: www.un.org/sexualviolenceinconflict/wp-content/uploads/report/team-of-experts-annual-report-2017/TOE-ANNUAL-REPORT-2017.pdf.

176 UN Human Rights, above note 7; UN Security Council, 2015, above note 7, paras 6, 20, 30, 61; UN General Assembly, above note 8; UN Human Rights, above note 9.

177 UN Human Rights, "The United Nations Speaks Out", above note 172.

178 UN Human Rights, above note 54, p. 89.

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