

Afghanistan and Colombia, Conflict-Related Sexual Violence and Violence Against LGBT+ and Gender-Diverse Persons

This case deals with conflict-related sexual violence in Afghanistan and Colombia. It further discusses all forms of violence beyond the definition of sexual violence that distinctively affect LGBT+ and gender-diverse persons, who become targets of violence due to their sexual orientation and gender identity. Despite the fact that these individuals are subject to specific patterns of violence, the protection of LGBT+ and gender-diverse persons during armed conflicts has been said to be a “blind spot” of IHL.

Acknowledgements

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. UN, CONFLICT-RELATED SEXUAL VIOLENCE, REPORT OF THE SECRETARY-GENERAL

[Source: Report of the Secretary-General to the UN Security Council, S/2022/272, of 29 March 2022; available at <https://digitallibrary.un.org/record/3967573>]

Conflict related sexual violence Report of the Secretary-General

I. Introduction

1. The present report, which covers the period from January to December 2021, is submitted pursuant to Security Council resolution 2467 (2019), [...].

2. In 2021, continued recourse to military rather than diplomatic and political means led to displacement on a significant scale, exposing civilians to heightened levels of sexual violence. Rising inequality, increased militarization, reduced civic space and the illicit flow of small arms and light weapons also contributed, among other factors, to fuelling widespread and systematic conflict-related sexual violence, even in the midst of a global pandemic. A series of coups d'état, including in several countries that appear in the present report, were another worrying development. Terrorist groups and transnational criminal networks continued to destabilize some of the most fragile contexts, including through the use of sexual violence as a tactic. In some situations, gender-based hate speech and incitement to violence were evident in public discourse, including on digital platforms. Women peacebuilders and human rights defenders were often specifically targeted, including through sexual violence and harassment as a form of reprisal, in order to exclude them from public life. [...]

[...]

4. The term “conflict-related sexual violence”, as used in the present report, refers to rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage, and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict. This link may be evident in the profile of the perpetrator, who is often affiliated with a State or non-State armed group, including those designated as terrorist groups by the United Nations; the profile of the victim, who is frequently an actual or perceived member of a persecuted political, ethnic or religious minority, or targeted on the basis of actual or perceived sexual orientation or gender identity; a climate of impunity, which is generally associated with State collapse; cross-border consequences, such as displacement or trafficking; and/or violations of the provisions of a ceasefire agreement. The term also encompasses trafficking in persons for the purpose of sexual violence and/or exploitation, when committed in situations of conflict.

5. [...] National military and police forces that are listed [see annex] are required to adopt specific, time-bound commitments and action plans to address violations and are prohibited from participating in United Nations peace operations. Effective implementation of commitments, including the cessation of violations, is a key consideration for the delisting of parties. Non-State armed groups are also required to implement action plans to prevent and address sexual violence in compliance with international humanitarian law and relevant Security Council resolutions.

II. Sexual violence as a tactic of war and terrorism: patterns, trends and emerging concerns

10. Against the backdrop of ongoing political and security crises, compounded by trends of militarization and the proliferation of arms, sexual violence continued to be employed as a tactic of war, torture and terrorism. Civilians were disproportionately affected in settings in which actors pursued military interventions at the

expense of political processes, with the effect of dramatically curtailing the operating space for humanitarian workers and human rights monitors. Unconstitutional shifts of power in Afghanistan, [...] were followed by widespread insecurity, economic shocks and human rights violations, including the use of sexual violence in the lead-up to, during, and in the wake of these events, to subjugate and humiliate opposition groups and rival communities. In certain settings, the actors that seized power had been implicated in documented patterns of conflict-related sexual violence for several years, such as the Taliban in Afghanistan [...]. Shrinking civic space, coupled with misogynistic threats, were worrying trends observed in Afghanistan, [...] where sexual violence was perpetrated against political activists, including during demonstrations. [...]

11. Conflict-related sexual violence contributed to internal and cross-border displacement and eroded family networks, as documented in several settings, where family members were forced to witness rape. [...] In Afghanistan, the loss of livelihoods, in many cases owing to the Taliban takeover and ensuing inflation, caused many to resort to negative coping strategies, with reports indicating the sale or forced marriage of women and girls, including to Taliban fighters. [...]

[...]

13. [...] The majority of survivors continued to come from socioeconomically marginalized communities, including in remote and rural areas where State authority is weak, and were often targeted for their actual or perceived ethnic, religious or gender identity. Incidents of conflict-related sexual violence perpetrated against men and boys continued to be reported in almost all settings covered in the present report, primarily in detention settings. [...]

14. In almost all settings covered in the present report, impunity for crimes of conflict-related sexual violence remains the norm and the pace of justice remains painfully slow. [...]

[...]

III. Sexual violence in conflict-affected settings

Afghanistan 17. Escalating insecurity associated with the military offensive and subsequent takeover by the Taliban on 15 August 2021 led to mass displacement, heightened humanitarian needs and drastically restricted civic space. Despite declarations and assurances by the Taliban de facto authorities, reports indicate that women and girls were targeted as part of systematic and widespread gender-based violence, including conflict-related sexual violence, amid a strong push to limit their participation in public and political life. However, data remain difficult to obtain owing to structural gender inequality and the fear of reprisals linked with the prevailing climate of impunity.

18. The United Nations Assistance Mission in Afghanistan verified five incidents of conflict-related sexual violence affecting both girls and boys. These incidents were attributed to members of the Taliban and Afghan

security forces. In June, the Afghanistan Independent Human Rights Commission documented concerns about conflict-related sexual violence, particularly in areas under the control of the Taliban. After the takeover, the Taliban de facto authorities occupied the premises of the Commission, with its staff being unable to exercise their duties. In December 2021, the Taliban de facto authorities issued a decree prohibiting forced marriage. Nonetheless, reports of women and girls being sold and/or forced into marriage and sexual slavery by Taliban forces have emerged, including one instance in which the daughter of a former government official was handed over to the Taliban in exchange for the official's safety. A number of women human rights defenders, journalists and other professional women have been targeted with violence, ranging from kidnapping to assassination; for instance, in September 2021, a female police officer, who was eight months pregnant, was tortured and killed in Ghor Province. [...] Services remain severely limited owing to the fear of reprisals and movement restrictions. The United Nations continued to receive requests to refer survivors for assistance who had allegedly been held hostage, tortured or raped by Taliban forces. Those who continue to deliver protection services, including staff of women's shelters, are at risk of violence and reprisals. Impunity prevails for sexual violence crimes, with the closure of specialized courts for the prosecution of violence against women. The adjudication of many cases through informal justice mechanisms continues to exacerbate underreporting.

[...]

Colombia 24. Five years after the signing of the Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace between the Government of Colombia and the Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (FARC-EP), the agreement remains a global milestone in terms of integrating gender considerations in conflict resolution. Yet, the implementation of gender-specific provisions has lagged behind overall progress, while security and protection challenges persist, including conflict-related sexual violence. [...] In April 2021, the eruption of mass demonstrations led to allegations of killings and sexual violence by the national police. In 2021, the National Victims' Unit recorded 293 cases of conflict-related sexual violence. Of those, 238 were committed against women, 21 against girls, 18 against men and 4 against boys. Twelve victims identified as lesbian, gay, bisexual, transgender, queer and intersex persons. [...] In 2021, the United Nations verified reports that at least three girls were victims of sexual violence during their association with armed groups. A case of sexual slavery was documented concerning a woman who was kidnapped and brought to the camp of an armed group. Conflict-related sexual violence was also perpetrated against ex-combatants and their families, including two women and three girls, as reported by the United Nations. Owing to clashes between armed groups, forced displacement increased by 198 per cent compared with 2020, according to the humanitarian needs overview.

IV. Addressing crimes of sexual violence in post-conflict settings [...]

V. Other situations of concern [...]

VI. Recommendations

Annex

List of parties credibly suspected of committing or being responsible for patterns of rape or other forms of sexual violence in situations of armed conflict on the agenda of the Security Council

The following list does not purport to be comprehensive, but rather includes parties in relation to which credible information is available. It should be noted that the names of countries appear only to indicate the locations where parties are suspected of committing violations. [...]

B. UN, PROTECTION AGAINST VIOLENCE AND DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY, NOTE BY THE SECRETARY-GENERAL (FOOTNOTES OMITTED)

[Source: Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, UN Doc. A/75/235, adopted 27 July 2022; available at <https://digitallibrary.un.org/record/3985589?ln=en#record-files-collapse-header>]

Protection against violence and discrimination based on sexual orientation and gender identity Note by the Secretariat [...]

Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz [...]

I. Introduction

1. United Nations human rights agencies have gathered significant knowledge on violence and discrimination perpetrated worldwide by State and non-State actors based on actual or perceived sexual orientation and/or gender identity. The Independent Expert seeks to contribute to filling a gap in the evidence base concerning all gendered dimensions of armed conflict, their root causes and their consequences, and to strengthen United Nations strategies to tackle them. [...]

[...]

3. In the present report, armed conflict is understood in accordance with existing international humanitarian customary and treaty law: (a) An international armed conflict exists “when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation” [ICRC, How is the term ‘armed conflict’ defined in international humanitarian law?, p. 1], or in armed conflicts in

which “peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination (wars of national liberation)” [ibid., p. 2]; (b) A non-international armed conflict is defined as “protracted armed confrontations occurring between government armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State” [ibid., p. 5] party to the Conventions, which exist whenever an armed confrontation reaches “a minimum level of intensity and the parties involved in the conflict [...] show a minimum of organisation” [ibid., p. 5]. In relevant cases, it can also refer to the more restricted definition as enshrined in Additional Protocol II, which supplements common article 3 of the Geneva Conventions.

4. The Independent Expert uses the term gender-diverse to refer to persons whose gender identity is at odds with what is enforced as a norm. The widely used acronym LGBT (lesbian, gay, bisexual and trans) and terms such as queer, questioning and asexual, are all reflections of political and legal identities, and persons affected by violence and discrimination based on sexual orientation and gender identity often self-identify in ways that do not coincide with these. In relation to intersex persons, the Independent Expert follows a consistent policy not to extrapolate data and policy frameworks on LGBT persons to the intersex population without clear evidence and reasoning for supporting that inclusion. In all cases, the Expert endeavours to use inclusive nomenclature; when citing evidence, as a rule, he will nonetheless refer to that used at the source.

5. In the present report, the Independent Expert concludes that it is fundamental to advance in the recognition of all forms of gender-based violence that distinctively affect LGBT and gender-diverse persons during armed conflict, and that exceed the scope and definition of conflict-related sexual violence. The Expert has consistently stated that gender frameworks, and gender-based and intersectional approaches, provide a sharp lens for analysing violence and discrimination based on sexual orientation and gender identity, as “they enable the analysis of multiple asymmetries of power, deriving from the way in which sex is understood within society, including those that fuel violence and discrimination against women in all their diversity”. The Independent Expert concludes that, as in other areas, the implementation of inclusive definitions of gender is indispensable in order to make visible, analyse and address the consequences of conflict-related violence for all persons who depart from hegemonic assumptions related to gender and sexuality.

II. Definitional framework

6. International human rights law, international humanitarian law, international criminal law, refugee law, key policy frameworks such as the women and peace and security agenda, and the work of adjudicative international authorities have all contributed to creating a robust framework for visibility, documentation, analysis and accountability in relation to the gender-specific risks faced by women and girls during conflict situations and, to a limited extent, those faced by men and boys.

A. International humanitarian law 7. International humanitarian law, applicable in times of armed conflict and binding on State and non-State armed groups, prohibits discriminatory treatment based on sex or “any other

distinction founded on similar criteria". However, when contrasted with international human rights law and international criminal law, it seems to fall behind in recognizing the differentiated experiences that people endure in conflict based on gender and sexuality and thus in establishing boundaries for those partaking in hostilities. As the Secretary-General and scholars have pointed out, an updated interpretation of gender and sexuality, specifically as pertaining to LGBT and gender-diverse persons' experience during conflict has been identified as a "blind spot" of both customary and treaty international humanitarian law.

8. After the Second World War sexual violence gained a significant place in international humanitarian treaty law, and during both the Tokyo and Nuremberg trials wartime sexual violence was acknowledged as a war crime. In parallel, during the drafting process of the 1949 Geneva Conventions, rape was added as a prohibited conduct under the grave breaches section (art. 27) in the Geneva Convention relative to the protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention) during occupation. Subsequently, there have been two major contributions to the evolution of international humanitarian law in this regard: (a) Protocols I and II Additional to the Geneva Conventions of 1949, of 1977, which include express prohibitions on rape during both international armed conflicts and non-international armed conflicts; (b) The expansive interpretation of common article 3, including the aide- memoire issued by the International Committee of the Red Cross in 1992, in which it stated that "grave breaches enumerated in Article 147 of the Fourth Geneva Convention, especially the breach of wilfully causing great suffering or serious injury to body or health, "obviously covers not only rape, but also any other attack on a woman's dignity."

9. These principles have evolved within the jurisprudence of international humanitarian law, in particular under international criminal tribunals with the authority to adjudicate criminal responsibility for grave breaches of international humanitarian law as war crimes, a process of dialogue between international humanitarian law and international human rights law. Such dialogue has been fundamental for the interpretation of international human rights obligations by Human Rights Council special procedures: in 2005, after complaints raised by the United States of America with regard to the reporting process for killings committed in [...] Afghanistan, the Special Rapporteur on extrajudicial, summary or arbitrary executions described the two bodies of law as mutually complementary and inclusive. This response followed the clear precedent of rulings by the International Court of Justice, in which it clearly stated that the International Covenant on Civil and Political Rights is applicable in both peace and wartime.

10. On the basis of these principles, scholars have noted that the binary construct in international humanitarian law as either male or female, and the lack of explicit inclusion of sexual orientation and gender identity as protected grounds, lead to gaps in ensuring the full range of protection and redress for people who have experienced violations, including those directly based on their gender expressions and identities during armed conflict, and an awareness of the need for nuance in the implementation of gender frameworks has been built. For example, in 2016, the International Committee of the Red Cross noted the "growing acknowledgement that women, men, girls and boys are affected by armed conflict in different ways", and in

its 2020 commentary on the Geneva Convention relative to the Treatment of Prisoners of War, it interpreted some protections on grounds of “gender” and “sexual and gender minorities.”

11. Relevant to this framework is also the protection granted by the core principle of distinction, which grants the legitimate use of force against non-protected targets – parties taking active participation in hostilities – and, conversely, affords protection to non-combatants, i.e., civilians and persons hors de combat. Sexual orientation and gender identity should be irrelevant when determining the protected or unprotected nature of a given individual or group of individuals. The fact of being a civilian or hors de combat has nothing to do with sexual orientation and gender identity. In contrast, if a party to the conflict resorts to armed violence against an individual solely on the basis of their actual or perceived sexual orientation or their gender identity, such an act should be viewed as adverse distinction, which, under international humanitarian law, is a grave breach of international humanitarian law that might amount to a war crime depending on the nature of and motivation for the conduct and its connection – which might be direct or indirect – to the conflict. Therefore, even if those regarded as lawful targets are subjected to the use of force on the sole basis of their actual or perceived sexual orientation and gender identity, the act of force should be considered unlawful and thus a breach of international humanitarian law.

B. International human rights law 12. Fundamental human rights obligations continue to apply in humanitarian settings, including during armed conflict, and international and regional human rights bodies and tribunals have recognized a core of rights which cannot be derogated from, as well as the strict conditions for the imposition of limitations on others under states of exception. Those conditions include an absolute prohibition of discrimination, pursuant to which human persons are protected from violence and discrimination based on their real or perceived sexual orientation and gender identity.

13. In the 1990s, complementary developments gave rise to demands for a systematic and effective response to gender-based violence in the Vienna Declaration and Programme of Action, the recognition of armed conflict as a salient source of vulnerability for women in the Declaration on the Elimination of Violence against Women and the acknowledgement that grave violations of the human rights of women occur in times of armed conflict in the Global Framework of the Beijing Platform for Action. These developments on the global stage were mirrored by simultaneous developments within the Inter-American, European and African systems for the protection of human rights.

14. Based on this body of law, international and regional human rights bodies, tribunals and procedures have observed the status of gender as a source of distinct exposure to the risk of human rights violations, and that the acknowledgment and visibility of stereotypes, power asymmetries and inequality that lie at the foundation of violence and discrimination are a fundamental component of the formula for addressing and eradicating them. Key among the relevant standards is the recognition by the Committee on the Elimination of Discrimination against Women that gender-based violence is violence “directed against a woman because she is a woman or that affects women disproportionately,” and that it includes “the right to equal protection

according to humanitarian norms in time of international or internal armed conflict.”

15. In addition to the general obligation to approach human rights in conflict situations under a comprehensive gender focus, these sources have established that: (a) Women and girls experience armed conflict differently from men, and the reason that they do so is gender, i.e., the social roles they fulfil before, during and even after conflict; (b) Armed conflict exacerbates gender and sexuality norms in a given society, which in turn leads to specific forms of violence, including but not restricted to sexual violence; (c) Maintaining peace and security is crucial to keep women and children safe from those forms of gender-specific violence in conflict; (d) States should take measures to both prevent and provide proper redress to victims of gender-based violence, inside and outside of conflict.

16. Given the connection between the preconceptions, stereotypes and power asymmetries that are at the core of the most advanced understanding of gender, and the root causes of conflict-related violence based on sexual orientation and gender identity, the Independent Expert concludes that these patterns and the related human rights standards are applicable, *mutatis mutandis*, to LGBT and gender-diverse persons.

C. International criminal law 17. A set of forward-thinking standards has been adopted under international criminal law to respond to the myriad forms of conflict-related gender-based violence. Following the international human rights obligations set out above, the Independent Expert considers that such standards apply fully to the prosecution and punishment of international crimes perpetrated against LGBT and gender-diverse persons in the context of armed conflicts worldwide.

18. The International Criminal Tribunal for the former Yugoslavia has acknowledged that persons can be victims of sexual violence irrespective of gender, and that the sexual mutilation of a man constituted “torture or inhuman treatment”, “wilfully causing great suffering or serious injury to body or health” – both grave breaches under the Geneva Conventions of 1949. The tribunal also held that forcing men to have sex with others (men or women) was sexual assault, which contributed to a finding of the crime against humanity of persecution, and in *Furundžija* it asserted that forcing a man to watch someone else be sexually assaulted caused severe physical and mental suffering and public humiliation constitutive of torture.

19. Despite extensive evidence of widespread and systematic rape of women and men, the Office of the Prosecutor characterized sexual violence against men and boys as torture, as an outrage against personal dignity or as an inhuman act, but not as rape as a crime against humanity. A similar observation could be made in relation to the Tribunal’s definition of rape as the direct and masculinized action of forced penetration by a male perpetrator on a female victim, primarily with a male sex organ, a definition that failed to capture one of the central ways in which perpetrators in the Bosnian war harmed victims: by forcing them to penetrate each other.

20. The Rome Statute of the International Criminal Court acknowledged the social construction of gender, and the accompanying roles, behaviours, activities and attributes assigned to women and men and to girls

and boys “within the context of society.” As in the case of international humanitarian law, international criminal law is complementary to international human rights law: article 21 (3) of the Rome Statute, for example, requires the Court to interpret its provisions in the light of international human rights law.

21. In its 2014 “Policy paper on sexual and gender-based crimes”, the Office of the Prosecutor reaffirmed that gender must be interpreted as socially and culturally constructed, therefore including sexual orientation and gender identity. As noted by the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), “the inclusion of gender persecution as a crime against humanity in the Rome Statute, which governs the International Criminal Court, provides a pathway forward for the international community to meaningfully challenge gender- based violence, including violence targeting people on the basis of their sexual orientation or gender identity, and ensure that these crimes are a part of the historical record.”

[...]

23. [...] [I]n the context of the recent consultations on gender-based persecution, the Independent Expert and other special procedures mandate holders presented recommendations to the Office of the Prosecutor. The recommendations were formulated in the awareness that disproportionate exposure to risk is experienced, and often exacerbated, in armed conflict and situations in which international criminal law is applicable, and with the objective that the new policy go beyond the binary mould to recognize the identity and rights of gender-diverse persons.

[...]

D. Refugee law

[...]

E. Peace and security agendas and frameworks

[...]

28. [...] After an Arria- formula meeting in 2015 [...] the Secretary-General noted that extremist groups were systematically targeting individuals “for physical and sexual violence on the basis of their actual or perceived sexual orientation,” and that the “the risks facing lesbian, gay, bisexual, transgender and intersex minorities [had] been a blind spot in the monitoring of civilian protection.” In his report on women and peace and security, he disclosed his concern “about continued threats and attacks against, and the persecution of, those who do not conform to gender norms [and] those perceived to be lesbian, gay, bisexual, transgender and intersex.” [...]

[...]

1. Toward inclusive and expansive definitional frameworks 33. The standards and policies identified above have not been consistently accepted as being applicable to both the understanding of the situation and the provision of international protection to LGBT and gender-diverse persons enduring the consequences of armed conflict worldwide, and they tend to implement a narrow understanding of gender understood in terms of sex, using the expressions “women” and “gender” interchangeably. [...]

34. As a result, there is very little evidence on the needs of LGBT and gender- diverse persons, communities and populations in conflict, with an obvious consequence for planning, allocation of resources and data gathering for monitoring and evaluation. As expressed in one submission, for example, “despite the health and social burden associated with conflict-related sexual violence, virtually no evidence exists on how medical, mental health and psychological support interventions work for men, boys, and LGBTIQ survivors of conflict-related sexual violence.”

35. Some of these dynamics result from the conscious erasure and negation of sexual orientation and gender identity as applicable frameworks under international human rights law, as abundantly documented by the Independent Expert. In the particular case of armed conflict, negation results in a reliance on the idea that conflict-related sexual violence is exclusively perpetrated by male combatants, and exclusively against heterosexual and cisgender female civilians – and, exceptionally, male enemies. It therefore “lacks an understanding of all the social and political implications of gendered power dynamics beyond those understood between men and women,” disregards the lived experience of LGBT and gender-diverse persons and communities in relation to and beyond sexual violence and has the effect that these experiences continue to be “deliberately rejected and systematically ignored by law enforcement agencies, judicial systems, politicians, and conservative religious factions”.

[...]

III. Conflict-related violence against lesbian, gay, bisexual and trans and gender-diverse persons

37. Conflict-related violence based on sexual orientation and gender identity can be structural in its nature, and some acts are connected to larger social discriminatory patterns as a result of criminalization and/or exclusionary social norms, all of which are used strategically and tactically by conflict actors: for example, with the Taliban’s takeover of Afghanistan in August 2021 and its determination to rule according to a particular interpretation of Sharia, the Independent Expert noted that the safety of LGBT and gender-diverse people in Afghanistan became considerably more precarious. [...]

38. A majority of submissions exhorted the Independent Expert to recognize the fine line between intentional and structural dynamics that promote “the obviation of LGBT people’s vulnerability during war.” By enforcing

the gendered binary and social practices that hammer in place cisheteronormative structures, fundamentalist forces compel LGBT gender-diverse people to hide their identities and suppress their desires and personhood, or face assault, rape, torture, imprisonment and/or death, or forced displacement. This instrumental nature of the relationship between conflict-related sexual orientation and gender identity-based violence and patterns of social exclusion was brilliantly captured by the Commission for the Clarification of Truth, Coexistence and Non-Repetition of Colombia in its report issued in July 2022:

[e]ach group, with a particular pattern, persecuted LGBTIQ+ people because of their sexual orientations and non-normative gender identities and expressions, to consolidate population control in the territories, by imposing or reaffirming a moral, social, political, economic and military order that it considered “correct,” and to obtain or maintain legitimacy before the citizens who saw them as “undesirable,” in order to win the war.

39. The destructive legacy of war is not limited only to structural or institutional damage. Acts of conflict-related sexual orientation and gender identity-based violence and conflict-related gender-based violence are explicit and tactical: in the Bosnian war (1992–1995), converging with ethnonational rhetoric, perpetrators made men perform homosexual acts on each other, or expunged phallic and reproductive attributes through genital mutilation so that the victims were no longer cognizable as what is expected of “a man”. Parties to the non-international armed conflict in Colombia saw violence against LGBT and gender-diverse persons as a military opportunity to gain a foothold and legitimacy on the basis of shared prejudice against them. [...]

40. The strategic and tactical use of sexual orientation and gender identity to galvanize popular support is clear in the commonplace use of homophobic and transphobic messages in nationalist propaganda in conflicts across the globe, [...]. In Colombia, violence against LGBT and gender-diverse persons differed depending on factors such as the type of group, the overall goals in each territory, the relationship with other armed groups and the social perception against these populations. A comparative study between two regions with a significant Revolutionary Armed Forces of Colombia-People's Army (FARC-EP) presence showed that, where they had a more disputed and illegal-economy-dependent presence, they tended to have recourse to more brutal and terrorizing forms of violence, including gang-conflict-related sexual violence against trans women and gay men. In contrast, in places where they had a historic and more ideologically rooted presence, their repertoires sought to correct what they deemed to be foreign deviance.

41. In combination with and because of these factors, LGBT and gender-diverse persons are often in well-founded fear of persecution in the context of armed conflicts, and they are often marginalized or excluded from many established evacuation and emergency response services and processes. A clear example is that of trans and gender-diverse people whose legal identity documents do not correspond to their gender or physical presentation, who face severe difficulties in evacuating from civilian enclaves through humanitarian corridors, securing medical exemptions from gender-determined compulsory military service, being admitted at border crossings as refugees and accessing safe housing with adequate sanitation facilities, gender-sensitive medical care and reproductive rights services. These barriers increase the likelihood of some

people being forced to seek irregular routes to safety, with the attendant risks of trafficking, exploitation and abuse.

[...]

A. Weaponization of prejudice

[...]

B. Sexual and gender-based violence 46. Violence endured by women and girls, especially that of a sexual nature, is centrally associated with the gendered dimensions of war. In its recent report, the Commission for the Clarification of Truth, Coexistence and Non-Repetition of Colombia includes hundreds of testimonies from lesbian, bisexual and trans women and trans men that have in common the constant reference to their sexual orientation and gender identity and the reference to “catalogues” of violence: forced displacement was preceded by threats, sexual violence, torture and non-sexual slavery, or forced nudity, rape and torture were enabled through arbitrary detentions.

47. The importance of recognizing conflict-related sexual orientation and gender identity-based violence as a specific manifestation of conflict-related gender-based violence is made clear by the exacerbation of certain forms of violence that are inextricably linked to the social mores regarding sexual orientation, such as conversion practices and, in particular, rape heinously called “corrective.” In addition, for lesbian and bisexual women, the coerced motherhood that frequently results from the rape lies at the intersection of gender stereotypes that call into question their ability to exercise motherhood because of their sexual orientation; and, for trans men, a possible obstacle to bodily transformation that may be important in a process of identity construction. In patriarchal and conservative societies and communities, these mechanisms become in themselves opportunities for violence.

[...]

49. Even in the light of its connection with robust frameworks such as the women and peace and security agenda, the evidence bases for conflict-related sexual orientation and gender identity-based violence against lesbian, bisexual and trans women are thin; and they are virtually non-existent in the case of gay and bisexual men, trans men and other gender-diverse persons. There is however sufficient evidence to suggest that, as a rule, their sexual orientation and/or gender identity is at the origin of heinous violations to their rights in the context of armed conflict. Although the real figures likely will never be known, it is estimated that roughly 20,000 to 50,000 women were sexually assaulted during the Bosnian War. While anecdotal evidence suggests a similar incidence among men, pervasive homophobia may have been a significant impediment to coming forward. [...]

C. Damage

[...]

D. Perpetrators and victims and accountability

[...]

IV. Transition, truth and peace Participation of lesbian, gay, bisexual and trans and gender-diverse persons

[...]

V. Conclusions and recommendations

[...]

Discussion

I. Classification of the situations and applicable law

1. (*Document A, paras 17 and 18; Document B, para. 3*)

1. How would you classify the situation in Afghanistan after the takeover by the Taliban on 15 August 2021? Is there an armed conflict? If yes, who are the Parties to the conflict?
2. Which rules of IHL apply to the case at hand in Afghanistan?

2. (*Document A, para. 25; Document B, para. 3*)

1. How would you classify the situation in Colombia after the conclusion of the 2006 Peace Agreement between the FARC-EP and the Colombian Government (See ICRC Casebook, Colombia Peace Agreement)? How would you classify a situation in which there are clashes between armed groups? Is there an armed conflict? If yes, who are the Parties to the conflict?
2. Which rules of IHL apply to the case at hand in Colombia?

II. Conflict-related sexual violence

3.

1. What protection does IHL provide against rape and other forms of sexual violence? Does IHL expressly prohibit rape and other forms of sexual violence in IACs? In NIACs? GC I-IV, Common Art. 3; GC IV, Art. 27; P I, Arts 75(2), 76 and 77; P II, Art. 4(2)(a) and (e); CIHL, Rules 90, 91, 93, 134 and 135)
2. (*Document B, para. 8*) Is rape explicitly mentioned or implied among the grave breaches in the Fourth Geneva Convention (GC IV, Art. 147)? Does GC IV, Art. 27 only apply during occupation?
3. (*Document B, para. 19*) Does treaty and customary IHL define rape as a “*masculinized action of forced*

penetration by a male perpetrator on a female victim”? How is rape defined under IHL? (CIHL, Rule 93)

4.
 1. (*Document A, paras 4, 13, 17, 18 and 24; Document B, paras 37 and 47*) What are the criteria that determine whether there is a sufficient nexus for an act of sexual violence to fall under the scope of IHL? Are these factors cumulative or alternative? Does the definition given at para. 4 of Document A correspond to the usual required nexus for an act committed during an armed conflict to be covered by IHL? Assuming there is a NIAC in both Colombia and Afghanistan, are all victims of rape or other sexual violence protected by IHL?
 2. (*Document B, para. 5*) What are some specific examples of gender-based violence that distinctively affect LGBT+ and gender-diverse persons during armed conflicts, and that exceed the scope and definition of conflict-related sexual violence? Should these forms of violence be included in IHL? If so, how?
 3. (*Document A, para. 24*) Does IHL continue to provide protection against sexual violence following the conclusion of a Peace Agreement?
 4. Does it matter if the violator is a State actor, a member of an organized non-State armed group, a member of a private military and security company, a peacekeeper or a civilian?
 5. Does it matter if the victim is a woman, a girl, a man, a boy or a gender-diverse person? A LGBT+ person? Does it make a difference if the victim is a human rights defender, a journalist or an ex-combatant?
5. (*Document A, para. 10; Document B, para. 19*) Can rape or other forms of sexual violence in itself amount to torture under IHL? If yes, under which circumstances? (GCI-IV, Art. 3; GC I, Art. 12; GC II, Art. 13; GC III, Art. 14; GC IV, Art. 27; P I, Art. 75(2); P II, Art. 4(2)(a) and (e); CIHL, Rules 90 and 93)
6. How does IHL protect victims of sexual violence in need of medical care? (GC I-IV, Common Art. 3; GC I, Art. 12; GC II, Art. 12; P I, Art. 10(2); P II, Art. 7(2); CIHL, Rule 110)

III. The protection of LGBT+ and gender-diverse persons during armed conflicts

7. Are LGBT+ and gender-diverse persons specially protected persons under IHL, similar to women, children or old people? If not, why do you think IHL does not provide such a special protection? (CIHL, Rules 88, 134, 135 and 138)
8. (*Document B, paras 7-16*) Assuming there is a NIAC in both Colombia and Afghanistan, how are LGBT+ and gender-diverse persons protected against violations based on their sexual orientation or gender identity by IHL? (GC I-IV, Common Art. 3; P II, Arts 2, 4 and 5(3))?
9. (*Document B, para. 10*) Does there exist a gap in ensuring protection of LGBT+ and gender-diverse persons during armed conflicts? If there exists a gap in protection, how could IHL fill this gap and how could this be done in the implementation of IHL? (See: The Yogyakarta principles, principles and recommendation

on the application of IHRL in relation to sexual orientation and gender identity)

10. (*Document B, paras 7, 10 and 35*) Do you agree that an updated interpretation of gender and sexual orientation can be considered as a “*blind spot*” of IHL? Would you consider that sexual orientation or gender identity could be deduced from the prohibited grounds of adverse distinction of “sex” or “any other similar criteria”? (VCLT, Art. 31(1); GC I-IV, Common Art. 3; GC I, Art 12(2); GC II, Art 12(2); GC III, Art 16; GC IV, Arts 13, 27; P I, Art 75(1); P II, Art 2(1))

11. (*Document B, paras 10 and 33*) Do you agree that it is problematic to use gender and women interchangeably? Would you consider that IHL is a binary construct (male-female)? Should IHL be more inclusive regarding LGBT+ and gender-diverse persons?

12.

1. (*Document B, paras 7-16*) How do IHL and IHRL interplay regarding the protection of LGBT+ and gender-diverse persons during an armed conflict?
2. (*Document B, paras 7-23*) In your opinion, is the protection of LGBT+ and gender diverse persons during armed conflict less given under IHL, as compared to IHRL and international criminal law (ICL)?

13. (*Document B, paras 10 and 11*)

1. Can you identify (an) IHL rule(s), either under treaty law or as customary rule(s), that support(s) the following statement of the UN Independent Expert: *“[I]f a party to the conflict resorts to armed violence against an individual solely on the basis of their actual or perceived sexual orientation or their gender identity, such an act should be viewed as adverse distinction, which, under international humanitarian law, is a grave breach of international humanitarian law that might amount to a war crime depending on the nature of and motivation for the conduct and its connection – which might be direct or indirect – to the conflict. Therefore, even if those regarded as lawful targets are subjected to the use of force on the sole basis of their actual or perceived sexual orientation and gender identity, the act of force should be considered unlawful and thus a breach of international humanitarian law.”*?
2. Does the prohibition of adverse distinction also apply in the conduct of hostilities against legitimate targets of attacks? If yes, how could this occur?

14. How does IHL protect LGBT+ and gender-diverse persons when they are detained, in terms of their treatment and protection from torture, sexual violence, and unnecessary medical procedures? Would you consider that LGBT+ and gender-diverse persons should have special protection while detained? (GC III, Art. 13; GC IV, Arts 27, 32, 37; P I, Arts 11, 75; P II, Art. 5; CIHL, Rules 87, 88, 89, 90, 91 and 93)

15. (*Document B, para. 15*) Do parties to a conflict have obligations to prevent violence based on sexual orientation and gender identity during an armed conflict?

16. (*Document B, paras 28, 33-35, 47 and 49*) Do you think that the lack of visibility and recognition of

LGBT+ and gender-diverse persons in armed conflict is primarily a sociological and political issue, considering that the law may theoretically provide them with sufficient indirect protections?

IV. Criminal repression

17. (*Document B, para. 17*) Can ICL go further than IHL when it comes to war crimes? On crimes against humanity? How can ICL influence IHL? Does interpreting ICL necessarily imply an interpretation of IHL?

18.

1. Does sexual violence and rape always amount to a war crime? (GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 147; P I, Art. 11, 85; CIHL, Rule 156; ICC Statute, Art. 8(2)(b)(xxii) and (e)(vi))
2. (*Document A, para. 18*) According to the UN report of the Secretary-General, women and girls are subjected to being sold, forced into marriage, and/or become victims of sexual slavery by Taliban forces. Could all these acts be considered as war crimes? What conditions must be fulfilled to give rise to individual criminal responsibility for war crimes in Afghanistan, assuming there is a NIAC? (ICTY, *The Prosecutor v. Tadic*: Appeals Chamber, Jurisdiction, para 94; ICC Statute, Art. 8(2)(b)(xxii) and (e)(vi); CIHL, Rule 156)
3. (*Document B, paras 17-23*) What are the applicable “standards” for prosecuting and punishing crimes committed against individuals who identify as LGBT+ or gender-diverse during times of armed conflicts?

19. Does IHL impose an obligation on States to investigate allegations of rape and other forms of sexual violence committed in IACs? In NIACs? (GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; P I, Art. 85; CIHL, Rules 93 and 158)

20. (*Document A, para. 5*) Are organized non-State armed groups and States equally obliged to combat sexual violence? (CIHL, Rule 158)

21. (*Document A, paras 2 and 10*) Can sexual violence be seen as a weapon and/or method of warfare? What would be the advantages and disadvantages of referring to it as a means of warfare, rather than a systematic violation of IHL and a war crime? (CIHL, Rules 156, 158 and 159)

22. (*Document A, para. 5*) How effective do you think listing national military, police forces and non-State armed groups is as an enforcement mechanism to ensure their adoption of time-bound commitments and action plans aimed at addressing sexual violence?