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## **LGBTQ+ People & Disasters**

# A Queer Human Rights-Based Critique of Vulnerability

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## Summary

Climate change and hazard events pose an existential threat to human rights. Hazard events were traditionally viewed as ‘natural disasters’ which were beyond our control and the people caught up in them were unfortunate victims to the unstoppable force of nature. Disasters are not natural; we can choose to prevent them and assist vulnerable populations. This recognition has led to the development of a significant body of research into vulnerability which acknowledges that certain groups are more vulnerable to disasters due to a range of social factors such as poverty, gender, age, disabled persons etc. (‘mainstream vulnerability analysis’).

This thesis identifies a general failure in mainstream vulnerability analysis to recognise diverse LGBTQ+ populations and the systemic discrimination which often exacerbates their vulnerability in a disaster. Queer theory is used to address the limitations of mainstream vulnerability analysis. Firstly, it challenges the construction of a male-female gender binary which privileges gender conforming persons and fails to identify diverse LGBTQ+ populations. Further, it addresses the importance of incorporating queer narratives to ensure visibility of LGBTQ+ experiences and the systemic discrimination faced in disaster contexts. Finally, it highlights the need to incorporate intersectional and multidimensional understandings of vulnerability to address systems of heteronormative subordination which privileges heterosexuality as the norm and excludes LGBTQ+ experiences. The limitations of mainstream vulnerability analysis are reflected in disaster risk reduction policy, planning and implementation. LGBTQ+ populations are rarely considered in disaster risk reduction with gender segregated emergency accommodation and sanitation facilities, an inability to access basic healthcare, and harassment by authorities the norm in many States. These narratives pose a significant challenge to the universal protection and promotion of basic dignity and rights in disasters. International human rights law has taken an increasingly active role in addressing vulnerability in disaster contexts. This thesis explores the role of the Council of Europe, the United Nations, and the Yogyakarta Principles in addressing vulnerable LGBTQ+ populations. In practice, international human rights law tends to reflect and reinforce the limitations of mainstream vulnerability analysis by failing to recognise the diversity of LGBTQ+ experiences and the power of systemic heteronormative subordination in denying basic rights. These critiques provide an opportunity in this thesis to reimagine the role of human rights in addressing vulnerability, to construct a queer human rights-based approach capable of addressing the limitations of mainstream vulnerability analysis.

Ultimately, this thesis promotes the basic tenets of international human rights law in mainstream vulnerability analysis. Universality, equality, and non-discrimination should apply to all people, at all times, and in all places.

**Keywords:** mainstream vulnerability analysis, disaster risk reduction, LGBTQ+, sexual and gender diversity, queer theory, queer legal theory, heteronormativity, subordination.

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## Abbreviations

CEDAW	Committee on the Elimination of Discrimination against Women
ECHR	European Convention on Human Rights ECtHR European Court of Human Rights
ECtHR	European Court of Human Rights
GR	General Recommendation
IASC	Inter-Agency Standing Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
NGO	Non-Governmental Organisation
IHRL	International Human Rights Law
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
IPCC	Intergovernmental Panel on Climate Change
LGBTQ+*	Lesbian, Gay, Bisexual, Transgender, Queer and an inclusive representation of all other identities (e.g. non-binary, asexual)
LGBTQIA+**	Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual and an inclusive representation of all other identities
NGO	Non-governmental organisation
OHCHR	Office of the United Nations High Commissioner for Human Rights
SFDRR	Sendai Framework for Disaster Risk Reduction 2015-2030 A/RES/69/283
SOGI	Sexual Orientation and Gender Identity
UN	United Nations
UDHR	Universal Declaration of Human Rights 1948 (RES 217 A(III))
UNFE	United Nations Free and Equal
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council

\*The main abbreviation used in this thesis

\*\*Only used when quoting directly from sources which use this abbreviation

# 1 Introduction

“Disasters are not natural. We – humanity and society – create them and we can choose to prevent them.”<sup>1</sup>

## 1.1 Background

With each passing year the impact of climate change and related disasters are becoming more acutely felt and hazards are arising with increasing frequency and intensity. Central to mitigating the impact of hazards is an inclusive and effective framework for disaster risk reduction (DRR). The Sendai Framework for Disaster Risk Reduction 2015-2030 (SFDRR) was adopted at the Third UN World Conference in Sendai, Japan and articulates the need for improved understandings of **all** dimensions vulnerability, and as a guiding principle the need to protect **all** human rights.<sup>2</sup> In a report on human rights and climate change, the UN Human Rights Council (UNHRC) observes the relationship between vulnerability and human rights -

“Adverse effects of climate change are felt most acutely by those segments of the population that are already in vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous or minority status”<sup>3</sup>

Understanding and addressing vulnerable LGBTQ+ populations is key to ensuring a human right-based approaches in DRR. There is an expansive body of disaster literature which determines how vulnerability is reproduced in a disaster. This thesis uses the *Blaikie et al.* definition of vulnerability as the basis for ‘mainstream vulnerability analysis’ -

“An explanation of disasters requires us to trace the connections that link the impact of a hazard on people with a series of social factors and processes that generate vulnerability.”<sup>4</sup>

There is a broad consensus in mainstream vulnerability literature that promotes this social understanding of vulnerability in hazard events.<sup>5</sup> Generally, certain groups are viewed as more

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<sup>1</sup> Ilan Kelman, *Disaster by Choice: How Our Actions Turn Natural Hazards into Catastrophes* (New product, Oxford University Press 2020), Preface.

<sup>2</sup> Sendai Framework for Disaster Risk Reduction 2015-2030 A/RES/69/283, Guiding Principle 19(c).

<sup>3</sup> UN Human Rights Council, ‘Human Rights and Climate Change’ (2019) UN Doc A/HRC/RES/41/21 3.

<sup>4</sup> Piers Blaikie and others, *At Risk: Natural Hazards, People’s Vulnerability and Disasters*. (2. ed., Routledge 2004) 52.

<sup>5</sup> See the following snapshot of literature which reflects this social understanding of vulnerability: Anthony Oliver-Smith and others, ‘The Social Construction of Disaster Risk: Seeking Root Causes’

vulnerable than others – a large portion of the literature is dedicated to understanding the impacts of hazards on children, the elderly, and women.<sup>6</sup> Although everyone is to varying degrees vulnerable to a hazard event, some individuals are more vulnerable than others.<sup>7</sup> *Kadetz and Mock* denote a tendency towards a one-size-fits-all vulnerability analysis which essentialises along a sex-based male-female binary which fails to address the “specific needs of those who do not fit the heteronormative ideal”.<sup>8</sup> The problem identified is not essentialism per se but rather its failure to recognise diverse experiences of LGBTQ+ populations and to challenge heteronormativity as a system of subordination which exacerbates their vulnerability. In a report on ‘LGBTQIA+ People in Disasters’, *Seglah and Blanchard* observe “the LGBTQIA+ community being discriminated against and not receiving the appropriate aid and assistance” during hazard events.<sup>9</sup> This discrimination leads to notable human rights concerns (e.g. harassment in m-f gender segregated shelters and exclusion from basic healthcare).<sup>10</sup> This thesis uses queer theory to critique the essentialism of mainstream vulnerability analysis which exposes the “manner in which heterosexuality has, silently but saliently, maintained itself as a hidden yet powerfully privileged norm; and an implicit, if not explicit, questioning of the goals of formal equality.”<sup>11</sup> A failure to address heteronormative subordination in mainstream vulnerability analysis is a failure to protect the basic rights of LGBTQ+ populations in a hazard event. These limitations are broadly reflected in international human rights law (IHRL) which preserves “heteronormative scripts of gender and sexuality to normalize existing hierarchies of power” with queer theory seeking to “interrogate the normative framework that naturalizes and privileges heterosexuality and its binary regime of gender”.<sup>12</sup> This thesis aims to construct a (queer) human rights-based approach to address the limitations of mainstream vulnerability analysis and advocate for more inclusive DRR policy, planning and implementation.

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(2017) 22 *International Journal of Disaster Risk Reduction* 469; A Nuno Martins and others (eds), , *Enhancing Disaster Preparedness : from humanitarian architecture to community resilience* (Elsevier 2021); W Neil Adger, ‘Vulnerability’ (2006) 16 *Global Environmental Change* 268; Kelman, *Disaster by Choice* (n 1); Paul Kadetz and Nancy B Mock, ‘Problematizing Vulnerability’, *Creating Katrina, Rebuilding Resilience* (Elsevier 2018); Roshani Palliyaguru, Dilanthi Amaratunga and David Baldry, ‘Constructing a Holistic Approach to Disaster Risk Reduction: The Significance of Focusing on Vulnerability Reduction’ (2014) 38 *Disasters* 45.”

<sup>6</sup> See: Blaikie and others (n 4) 340 “a defined group of the poorest households (taking account of relevant definitions of poverty in that context, and data availability); women, particularly women-headed households and those from poor households; children and youth; the elderly and disabled; the poorest and most marginalised of minority groups.”

<sup>7</sup> Kelman, *Disaster by Choice* (n 1) 44.

<sup>8</sup> Kadetz and Mock (n 5) 218-220.

<sup>9</sup> Holly Seglah and Kevin Blanchard, ‘LGBTQIA+ People and Disasters’ [2021] DRR Dynamics <<https://irp.cdn-website.com/cde3424c/files/uploaded/LGBTQIA%2B%20report-3.pdf>> accessed 11 February 2021 3.

<sup>10</sup> *ibid* 3.

<sup>11</sup> Laurie Rose Kepros, ‘Queer Theory: Weed or Seed in the Garden of Legal Theory’ (1999) 9 *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 279, 283-284.

<sup>12</sup> Dianne Otto, ‘Queerly Troubling International Law’s Vision of “Peace”’ (2022) 116 *AJIL Unbound* 22, 24.

## 1.2 Research Objectives

There are two objectives in this thesis:

- (i) To explore how mainstream vulnerability analysis and IHRL interact and are complicit in entrenching a system of heteronormativity in disaster risk reduction.
- (ii) To present a queer human rights-based approach to address the limitations of mainstream vulnerability analysis that reflects the human rights concerns of LGBTQ+ individuals in disaster risk reduction.

## 1.3 Research Question

How does the integration of a queer human rights-based approach address the limitations of mainstream vulnerability analysis?

## 1.4 Methodology and Methods

This thesis uses queer theory as a theoretical framework to construct a cross-disciplinary critique of mainstream vulnerability analysis and international human rights law. There is a notable conflict between queer theory and the law. Queer theory is radical and exposes the normalizing rhetoric of power, criticising international law which is viewed as underpinned by gendered and heteronormative analytical tropes.<sup>13</sup> Consequently, queer legal theory is deployed as an antinormative critique of the foundations of law which rely on heteronormativity as an organising principle.<sup>14</sup> The theoretical framework of queer analysis operates as a tool to critique both legal and social structures. *Otto* explores this relationship –

“As a theoretical impulse, queer legal analysis is driven by the need to reveal and understand how law works to sustain structures of domination. But queer is also a political movement that seeks to address lived realities in the present, which requires working with and through the received framework of international law at the same time as contesting it.”<sup>15</sup>

In this thesis, a queer framework addresses IHRL through the social and political reality of mainstream vulnerability analysis which preserves structures of domination that exacerbates human rights concerns. ‘Queer theory’ and ‘queer legal theory’ are deployed throughout this thesis as a sociolegal framework to address mainstream vulnerability analysis and IHRL. In *Valdes* seminal work on queer legal theory, he observes the law must be pushed outside of heteronormative boundaries which promote

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<sup>13</sup> *ibid.*

<sup>14</sup> *ibid* 23.

<sup>15</sup> *ibid* 26.



conflationary practices which seek to equalise the experience of people's sex, gender and sexual orientation in order to homogenise human experience.<sup>16</sup> Queer legal theory analyses queer identity categories and connects this understanding to social structures which operate (hetero)dominant background norms.<sup>17</sup> Further, it focuses on sexual minorities to transcend multiple fields of identity, experience and knowledge as well as broadly examining the institutionalised devaluation and subordination of sexual minorities.<sup>18</sup> The following methods of queer theory/queer legal theory are used to address both the limitations of mainstream vulnerability analysis and IHRL:

- (i) Challenging the gender binary. Many people in the LGBTQ+ community fall outside of the male-female gender binary. Queer theory denaturalises sex and gender prior to regulatory discourses (e.g., mainstream vulnerability analysis and IHRL) to promote an understanding beyond biology to understand the effects of performative and reiterative gender norms (legal, social, symbolic).<sup>19</sup> Some people identify outside of the gender binary, it is your internal sense of self and can be expressed in a number of ways (e.g. clothing, behaviour and pronouns).<sup>20</sup> Non-binary people don't fit traditional m-f narratives, known for their diversity they may identify as both male and female or neither male nor female with a fluidity of gender present for many people.<sup>21</sup> This method exposes the root causes of LGBTQ+ vulnerability which are grounded in heteronormativity. Heteronormativity is rarely mentioned in mainstream vulnerability literature despite being a norm which normalises inequality, poverty, exploitation, and violence.<sup>22</sup> Understanding the norms which lie beneath gender helps uncover the general trend of subordination of LGBTQ+ communities – this method is used expansively beyond both binary and non-binary identities to systemically challenge heteronormativity. Challenging the gender binary constructs a critique of binary driven essentialist frameworks within mainstream vulnerability analysis and international human rights law.

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<sup>16</sup> See: Francisco Valdes, 'Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society' (1995) 83 *California Law Review* 1, 12-16.

<sup>17</sup> Carl F Stychin, *Law's Desire: Sexuality and the Limits of Justice*. (Routledge 1995) 154.

<sup>18</sup> *ibid* 9.

<sup>19</sup> Dianne Otto, 'Queering Gender [Identity] in International Law' (2015) 33 *Nordic Journal of Human Rights* 299, 300-301.

<sup>20</sup> See the following resources for a more detailed discussion on non-binary identities: 'Non-Binary Inclusion' *LGBT Foundation* <<https://lgbt.foundation/who-we-help/trans-people/non-binary>> accessed 24 May 2022; '10 Ways to Step up as an Ally to Non-Binary People' *Stonewall UK* <<https://www.stonewall.org.uk/about-us/news/10-ways-step-ally-non-binary-people>> accessed 24 May 2022; Damian A Gonzalez-Salzburg and Maroula Perisanidi, 'Belonging beyond the Binary: From Byzantine Eunuchs and Indian Hijras to Gender-fluid and Non-binary Identities' (2021) 48 *Journal of Law and Society* 669.

<sup>21</sup> *ibid*.

<sup>22</sup> Otto, 'Queerly Troubling International Law's Vision of "Peace"' (n 12) 22.

- (ii) Using Narratives. Human rights should be understood relative to the experience of the rights holder. There is a need to compile and employ narratives to ensure the story of LGBTQ+ persons are told, to challenge prejudices and focus policymakers.<sup>23</sup> Deploying narratives highlights the consequences of the gender binary, exposing the reality of sex/gender inequality and discrimination. Exposing human rights frameworks to this reality poses a serious challenge to the law to construct an alternative framework which looks past essentialism and the gender binary which perpetuate systemic discrimination.
- (iii) Intersectionality and multidimensionality. IHRL and mainstream vulnerability analysis both attempt to identify vulnerable groups but often fail to understand the systems of oppression which have impacts beyond strict identity categories that often fail to recognise sexual and gender diversity. Intersectionality destabilizes traditional attempts to treat oppressed classes as monolithic groups and presents a challenge to scholars to analyse subordination by determining how it is affected by systems of domination.<sup>24</sup> Multidimensionality recognises the complexity of systems of domination and social identity categories around which power and disempowerment are distributed.<sup>25</sup> These methods operationalise the theoretical critiques of “challenging the gender binary” and the practical critiques which arise from “using narratives” to directly address the limitations of mainstream vulnerability analysis and IHRL. In doing so, they provide clarity in the approach that should be taken to construct a queer human rights-based approach of the limitations of mainstream vulnerability analysis.

These methods will disrupt the heteronormative underpinnings of mainstream vulnerability analysis and IHRL. This disruption will lead to the development of a queer human rights-based approach to address the limitations of mainstream vulnerability analysis.

## **1.5 Structure of the Thesis**

The second chapter will examine the international framework for DRR – using the Sendai Framework for Disaster Risk Reduction (“SFDRR”) 2015-2030 as a starting point to highlight the importance of understanding the vulnerability of individuals and communities during a disaster.<sup>26</sup> The relationship between human rights and vulnerability in the law will be briefly examined to emphasise the important interdependent and connected nature of these two frameworks. The chapter will proceed with a detailed

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<sup>23</sup> Valdes (n 16) 366.

<sup>24</sup> Darren Lenard Hutchinson, ‘Identity Crisis: Intersectionality, Multidimensionality, and the Development of an Adequate Theory of Subordination’ (2001) 6 Michigan Journal of Race & Law 285.

<sup>25</sup> *ibid* 307-310.

<sup>26</sup> Sendai Framework for Disaster Risk Reduction 2015-2030 A/RES/69/283.

account of how vulnerability analysis has evolved from a hazard paradigm which predominantly focused on the natural aspect of disasters to a social paradigm ('mainstream vulnerability analysis') which as a priority seeks to understand the social vulnerability and discrimination faced by individuals and groups. There will be an account of the shortcomings of mainstream vulnerability analysis – highlighting the identity driven focus which problematically tends to exclude those of diverse sexual orientation and gender identity. In turn, this leads to a series of queer critiques of mainstream vulnerability analysis. Firstly, examining how it promotes a gender binary which homogenises the experience of broad groups (e.g. women) and ignores the gender diversity and the systems of heterosexuality across society which are replicated in disaster policy. This leads to a discussion of queer narratives in disasters – using two case studies to highlight the discrimination and inequality faced by LGBTQ+ people. This highlights the importance of more inclusive approaches to challenge systemic discrimination and promote basic rights. Finally, assessing vulnerability through the lens of intersectionality and multidimensionality challenges the subordinating power of heterosexuality and promotes the inclusion of diverse LGBTQ+ identities – it challenges mainstream vulnerability analysis to better grapple with systemic discrimination to promote a more inclusive process of DRR.

The third chapter examines the role of IHRL in the development of LGBTQ+ rights, rights-based approaches to DRR, and how IHRL operationalises LGBTQ+ rights within DRR. The first section examines the jurisprudence of the European Court of Human Rights (ECtHR). The first sub-section notes an uneven development of LGBTQ+ rights with conservative and heteronormative approaches to the right to family life juxtaposed with more liberal interpretations of LGBTQ+ families. The ECtHR has developed a hierarchy of rights with LGBTQ+ individuals excluded from the full protections afforded to their heterosexual counterparts. The second sub-section examines the small body of jurisprudence related to DRR. Whilst the ECtHR has recognised that there are positive obligations incumbent on the State in DRR it chooses not to inform policy decisions citing (amongst other factors) the margin of appreciation. Importantly, when the State has fulfilled its procedural duties, the Court is not concerned with how the State substantively fulfils these obligations. The final sub-section engages in a thought experiment – imaging a hypothetical case to tie together the ECtHR's jurisprudence on LGBTQ+ rights and DRR. This thought experiment uncovers how LGBTQ+ people are viewed within a system of heteronormativity which tends to subordinate LGBTQ+ individuals of the full protection of rights contained in the ECtHR, leaving them vulnerable to heteronormative policymaking within DRR. The second section examines the role of the UN in protecting and promoting the rights of LGBTQ+ persons in a disaster. The first sub-section observes the UN has taken positive steps to recognise the rights of LGBTQ+ individuals – expanding the principle of non-discrimination to a broad range of scenarios to protect LGBTQ+ persons and build a 'law of social inclusion.'<sup>27</sup> The second subsection

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<sup>27</sup> See: UN Human Rights Council, 'The Law of Inclusion' (2021) UN Doc A/HRC/47/27 para 3  
"Only by acknowledging the stereotypes, power asymmetries, inequality and fundamental violence

analyses the development of human rights-based approaches to DRR. Ultimately, DRR has developed in the UN to preserve a gender binary which essentialises experiences and lived realities to exclude LGBTQ+ individuals. The final subsection examines the operationalisation of LGBTQ+ rights in DRR in the Sphere Handbook and the IASC Guidelines.<sup>28</sup> Whilst LGBTQ+ individuals are recognised in operational guidelines; the focus remains on a gender binary which address heteronormative positioning in DRR. Ultimately, the UN recognises LGBTQ+ persons as rights holders but fails to engage with the systemic subordination which leads to discrimination and a lack of effective human rights protection. The final section discusses the Yogyakarta Principles as an important legal instrument which is directly related to LGBTQ+ rights holders.<sup>29</sup> The Principles make significant advances in promoting a more inclusive understanding of sexual orientation and gender identity in IHRL. Ultimately they fail to holistically engage with the diversity of sexual orientation and gender identity and are reliant on the heteronormative underpinnings of IHRL. This both preserves and legitimises heteronormative systems of subordination which defer to a gender binary to exclude LGBTQ+ rights from mainstream vulnerability analysis and DRR.

The final chapter gathers the critiques of the previous two chapters to construct a queer human rights-based approach to address the limitations of mainstream vulnerability analysis. The first subsection notes two critiques emerging across mainstream vulnerability analysis and IHRL. Firstly, there is a need in IHRL to better recognise sexual and gender diversity – departing from essentialist and identity driven politics which promotes heteronormativity and a gender dualism. Recognising the diversity of LGBTQ+ experience led to calls for deeper legal reform to engage systematically with the experiences in disasters. Consequently, IHRL must challenge systems of subordination. The law is challenged to assess the complex systems of power rooted in society which exacerbate LGBTQ+ vulnerability. The subsequent sub-sections apply this two-step process to the case studies discussed in chapter 2 (Uganda and Nepal). In recognising sexual and gender diversity, and challenging systems of subordination it is possible to reorientate IHRL towards a queer human rights-based approach to address the limitations of mainstream vulnerability analysis and promote inclusive DRR.

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that lies at the foundation of this system does the State comply with its obligation to address the violence and discrimination that it fuels, with its harrowing impact on women and girls in every corner of the world, including lesbian, bisexual and trans women; on gay, bisexual and trans persons; on other gender-diverse persons; and on intersex persons.”

<sup>28</sup> Sphere Project, *Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response* (2018); Inter-Agency Standing Committee, *Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action: Reducing Risk, Promoting Resilience and Aiding Recovery* (2015).

<sup>29</sup> The Yogyakarta Principles (2007) Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, and The Yogyakarta Principles Plus 10 (2017).

## 1.6 Delimitations

In mainstream vulnerability analysis there is a significant body of research which deals with more practical and technical aspects of DRR.<sup>30</sup> Whilst there are interesting gender-based considerations which may be of relevance to LGBTQ+ rights, it is outside of the scope of this thesis which engages in an interdisciplinary approach between mainstream vulnerability analysis and IHRL.

Secondly, a limited number of methods have been selected within queer theory/queer legal theory to criticise mainstream vulnerability analysis and IHRL. This limitation is necessary to ensure concise reasoning and analysis. Further, mainstream vulnerability analysis and IHRL suffer from similar deficiencies in incorporating LGBTQ+ individuals into their respective frameworks. Both frameworks are identity driven and fail to appropriately challenge systems of subordination. Challenging the gender binary and using narratives observes the failure in recognising the diversity of sexual and gender minorities. Intersectionality and multidimensionality challenge the social, political, and legal systems which subordinate diverse LGBTQ+ communities. In no way does this thesis deny the usefulness of other methods within queer theory/queer legal theory but simply found these three methods provided the most analytical clarity in constructing a cross-disciplinary critique.

Thirdly, this thesis cannot purport to speak for all human rights frameworks everywhere. It may be the case that other human rights frameworks have more progressive or regressive approaches to LGBTQ+ persons in DRR. In the interests of maintaining a succinct analysis the Council of Europe, the UN and the Yogyakarta Principles have been selected to paint the broadest picture of IHRL and its interaction with the LGBTQ+ community in DRR.

Finally, this thesis will not attempt to theorise a new model of vulnerability analysis to better protect LGBTQ+ individuals. Whilst an enticing prospect, it would be impossible to theorise an appropriately comprehensive model that would do justice to LGBTQ+ communities in assessing their vulnerability. Instead, this thesis exposes the heteronormativity of IHRL and identifies the tools needed to reorientate human rights towards a queer human rights-based approach which addresses the limitations of mainstream vulnerability analysis.

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<sup>30</sup> See for example: Nivedita Haran, 'Innovative Use of Technology (GIS) for Disaster Risk Reduction: A Case Study' in Akbaruddin Ahmad, Ananda Babu Srungarapati and Bupinder Zutshi (eds), *Disaster Risk Reduction: Community Resilience and Responses* (1st ed. 2019, Springer Singapore : Imprint: Palgrave Macmillan 2019); Kyoji Sassa, Paolo Canuti and International Consortium on Landslides (eds), *Landslides: Disaster Risk Reduction* (Springer 2009); Rajib Shaw, Takako Izumi and Koichi Shiwaku, *Science and Technology in Disaster Risk Reduction in Asia* (Elsevier 2018).

## 2 Understanding Vulnerability in Disaster Risk Reduction

The need to understand people’s vulnerability in disasters is becoming increasingly urgent. The IPCC issued a stark warning of observed increases in the frequency and intensity of climate and weather extremes with climate change through exposure and vulnerability generating impacts and risks.<sup>31</sup> This chapter focuses on the development of mainstream vulnerability analysis in disasters which as previously established is broadly defined across the literature as a combination of social vulnerabilities to a hazard.<sup>32</sup> The SFDRR is the departing point for understanding vulnerability in DRR -

“Priority 1: Understanding disaster risk

Policies and practices for disaster risk management should be based on an **understanding of disaster risk in all its dimensions of vulnerability**, capacity, exposure of persons and assets, hazard characteristics and the environment. Such knowledge can be leveraged for the purpose of pre-disaster risk assessment, for prevention and mitigation and for the development and implementation of appropriate preparedness and effective response to disasters.”<sup>33</sup>

Admittedly, understanding all the dimensions of vulnerability is a difficult task. *Kelman* observes a “myriad of influences, people, groups and organisations” leading to an “exceptional struggle in trying to be comprehensive about vulnerability.”<sup>34</sup> This chapter cannot sort through all these challenges, but it aims to expose the tendency to ignore LGBTQ+ experiences in mainstream vulnerability analysis. *Seglah and Blanchard* observe a lack of understanding of the specific challenges and vulnerabilities faced by LGBTQ+ communities (e.g. gender-segregated shelters, toilets and sanitation; and a failure to have health needs met due to confidentiality problems and fear of homophobia/stigma).<sup>35</sup> This lack of understanding is underpinned by a deference to a gender binary in disaster research. *Rushton et al.* observe –

“Stories and narratives of SGM individuals are omitted or ignored in disaster [...] This exclusion contributes to minority groups’ vulnerability and lack of voice, but also ignores their resilient capacities, strengths, and contributions in the wider community.

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<sup>31</sup> Intergovernmental Panel on Climate Change, ‘Climate Change 2022 - Impacts, Adaptation and Vulnerability - Summary for Policymakers’ Working Group II to the Sixth Assessment 8.

<sup>32</sup> See: Blaikie and others (n 4) 55.

<sup>33</sup> Sendai Framework for Disaster Risk Reduction 2015-2030 A/RES/69/283.

<sup>34</sup> Kelman, *Disaster by Choice* (n 1) 44.

<sup>35</sup> Seglah and Blanchard (n 9) 4.

Complying with the gender binary, therefore, excludes non-binary minority genders from disaster discourse.”<sup>36</sup>

This chapter exposes the failures of mainstream vulnerability analysis in recognising and addressing the marginalisation of LGBTQ+ individuals in disasters. The first subsection provides a background of the hazard paradigm which was previously the dominant model to assess the social impact of disasters. Effectively, this model ignored the causality of hazards events to social vulnerability and placed greater importance on engineering and technological solutions. The second sub-section examines the development of the social paradigm. The social paradigm has become the dominant model to assess social factors which leave people exposed and vulnerable to a disaster. Whilst this model is broadly more inclusive and sensitive to the causality between hazard events and exacerbated levels of vulnerability there remains notable gaps in recognising LGBTQ+ vulnerability. The third sub-section applies the methods of queer theory to critique mainstream vulnerability analysis. A queer lens exposes heterosexuality as the basic model for all dominant systems of social relations.<sup>37</sup> Queer theory deconstructs this order to critique mainstream vulnerability analysis. Firstly, there is an examination of the gender binary which uncovers the deference to homogenous understandings of group vulnerability and in particular the vulnerability of women. This method exposes a conflation of sex and gender in disaster research, which fails to recognise and engage with the experiences of people with diverse sexual orientations and gender identities.<sup>38</sup> Secondly, queer narratives are used to demonstrate the consequences of this deference to a gender binary. The case studies of Uganda and Nepal are examined to highlight the marginalisation of the LGBTQ+ community in DRR. Finally, incorporating intersectionality and multidimensionality into DRR builds an understand of the complex systemic factors which contribute to vulnerability.<sup>39</sup> These methods expose the limitations to mainstream vulnerability analysis to understand the sexual and gender diversity of the LGBTQ+ community and to challenge systems of subordination. In failing to recognise the experiences of LGTBQ+ individuals and holistically challenge this discrimination in disasters mainstream vulnerability analysis fails to protect their basic dignity and rights. To reiterate, the SFDRR observes as a guiding principle the need to incorporate “all human rights”.<sup>40</sup> Incorporating human rights and vulnerability into DRR calls for a cross-disciplinary critique. *Masferrer and García-Sánchez* observe the interrelated nature of human rights and vulnerability in the law –

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<sup>36</sup> Ashleigh Rushton and others, ‘Beyond Binary: (Re)Defining “Gender” for 21st Century Disaster Risk Reduction Research, Policy, and Practice’ (2019) 16 *International Journal of Environmental Research and Public Health* 3984, 3993.

<sup>37</sup> Dianne Otto, ‘Taking a Break from Normal: Thinking Queer in the Context of International Law’ (2007) 101 *American Society of International Law Proceedings* 119, 120.

<sup>38</sup> See: Valdes (n 16) 12-13.

<sup>39</sup> See discussion in: Hutchinson (n 24).

<sup>40</sup> Sendai Framework for Disaster Risk Reduction 2015-2030 A/RES/69/283, Guiding Principle 19(c).

“The legal system aims to ensure respect for the basic rights of individuals, not because they are intelligent or particularly skilled or talented, but just because of their human condition or, in other words, because of their natural dignity. All individuals are vulnerable, but some individuals are more vulnerable than others. If laws did not recognize and respect the natural dignity of all individuals in equal terms, these would be gravely damaged, particularly the most vulnerable ones.”<sup>41</sup>

Mainstream vulnerability analysis sets a goal of being relevant to all but in practice this is impossible, and the gaps of an overly formalist approach are filled in with biases and interests.<sup>42</sup> This critique is an important step towards building a queer human rights-based approach to address the heteronormative biases and interests which have taken hold within mainstream vulnerability analysis and IHRL.

## 2.1 The Hazard Paradigm

Hazards are synonymous in the public imagination with causing disasters. The occurrence and volatility of hazard events has notably increased over time. The *National Centers for Environmental Information* has noted 310 ‘disaster events’ in the US (e.g., droughts, floods, and heatwaves) from 1980-2021 with the total cost of these events exceeding \$2.155 trillion.<sup>43</sup> Notably, in this timeframe there have been 7.4 events on average each year but the period from 2017-2021 has witnessed 17.2 events per year.<sup>44</sup> The warning signs are clear, the latest IPCC report observed with high confidence:

“Human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate vulnerability.”<sup>45</sup>

Whilst these impacts have been observed for quite time some there has been an evolution in the perception and evaluation of these events. *Kelman* observes that “whilst much of a hazard is shaped by humans – as much as, or more than, by nature; this does not stop us cursing nature’s malevolence when

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<sup>41</sup> Aniceto Masferrer, Emilio García-Sánchez, ‘Vulnerability and Human Dignity in the Age of Rights’ in Aniceto Masferrer and Emilio García-Sánchez (eds), *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives*, vol 55 (Springer International Publishing 2016) 5.

<sup>42</sup> Kelman, *Disaster by Choice* (n 1) 44-45.

<sup>43</sup> Adam B Smith, ‘U.S. Billion-Dollar Weather and Climate Disasters, 1980 - Present (NCEI Accession 0209268)’ <<https://www.ncei.noaa.gov/archive/accession/0209268>> accessed 6 April 2022.

<sup>44</sup> *ibid.*

<sup>45</sup> Intergovernmental Panel on Climate Change (n 31) 8.



a flood inundates shops, or a wildfire razes a school.”<sup>46</sup> The focus on naturalness can be traced to the hazard paradigm. The hazard paradigm was the dominant model for viewing the social impact of disasters until the 1960s - disasters were acts of God and purely geophysical hazards.<sup>47</sup> *C.J. Pereira Di Salvo* and *Leigh Raymond* offer a definition of the hazard paradigm -

“The hazard paradigm is based on a fundamental ecological view ‘that ecosystems and organisms – and society too – are extraordinarily complex and dynamic systems in which innumerable parts are connected in webs of interdependency, multiple causality, and feedback loops, all of which change over time. This worldview suggests that human beings ought to be aware of the limitations of science as an epistemic tool for managing our interactions with nature.”<sup>48</sup>

Essentially, the hazard paradigm views ‘natural disasters’ as requiring a response first and foremost grounded in technological solutions. It emphasizes a study of “natural process which trigger disasters and offers solutions to reduce the impacts on exposed people, assets and critical infrastructures.”<sup>49</sup> Although focused primarily on natural processes, the hazard paradigm does not entirely ignore social factors but instead relegates them to a position of dependency.<sup>50</sup> *Hilhorst* observes the consequences of this dependency:

“It is a technocratic paradigm dominated by geologists, seismologists, meteorologists and other scientists who can monitor and predict the hazards, while social scientists are brought in to explain people’s behaviour in response to risk and disaster and develop early warning mechanisms and disaster preparedness schemes.”<sup>51</sup>

The hazard paradigm remains an important framework for scientists and is focused on technological responses. However, it is inadequate in the assessment of social factors which exacerbate vulnerability. Critically, there is nothing in the hazard paradigm to suggest that governance or social factors would

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<sup>46</sup> Kelman, *Disaster by Choice* (n 1) 40.

<sup>47</sup> Siambabala Bernard Manyena, ‘Disaster and Development Paradigms: Too Close for Comfort?’ (2012) 30 *Development Policy Review* 327.

<sup>48</sup> CJ Pereira Di Salvo and Leigh Raymond, ‘Defining the Precautionary Principle: An Empirical Analysis of Elite Discourse’ (2010) 19 *Environmental Politics* 86, 90.

<sup>49</sup> Giuliano Di Baldassarre and others, ‘An Integrative Research Framework to Unravel the Interplay of Natural Hazards and Vulnerabilities’ (2018) 6 *Earth’s Future* 305.

<sup>50</sup> Kenneth Hewitt, *Interpretations of Calamity from the Viewpoint of Human Ecology* (Allen and Unwin 1986) 5.

<sup>51</sup> Dorothea Hilhorst, ‘Unlocking Disaster Paradigms: An Actor-Oriented Focus on Disaster Response (Abstract Submitted for Session 3 of the Disaster Research and Social Crisis Network Panels of the 6th European Sociological Conference, 23-26 September, Murcia, Spain, 2003)’ <[https://www.researchgate.net/publication/254033796\\_Unlocking\\_disaster\\_paradigms\\_An\\_actor-oriented\\_focus\\_on\\_disaster\\_response](https://www.researchgate.net/publication/254033796_Unlocking_disaster_paradigms_An_actor-oriented_focus_on_disaster_response)> accessed 6 April 2022.

play a causal role in ‘natural disasters.’<sup>52</sup> The hazard paradigm ensures a process of formal disaster risk governance, perpetuating a centralised, hierarchal, command-and-control approach which fails to take account of local realities and non-formal influences.<sup>53</sup> The result of this is a process is plagued by a lack of knowledge and flexibility in its response, failing to engage with local resources and contextual learning.<sup>54</sup> *Gaillard* observes the perception of disasters has evolved from the 1970s with a move toward viewing them through a social paradigm –

“It was designed to push back against the idea that disasters are the consequence of extraordinary hazards that overwhelm people and societies. It encouraged us instead to consider disasters within the context of everyday life and how power and resources are shared within society—that is, to appraise vulnerability to disaster as a cultural, economic, political, and social construct.”<sup>55</sup>

There has been a radical shift in how disasters are perceived, to place greater analytical focus on the social factors which exacerbate vulnerability in hazard events. The social paradigm recognises the construction of power within society and aims to engage with local resources and contextual learning. However, recognising the social dimensions entails making choices. *Kelman* observes that “giving an overview for anyone, anything, or any collective leaves gaps which individuals and groups fill in according to their own biases and interests”. The following section examines the social paradigm to uncover these biases and interests to understand how LGBTQ+ individuals are perceived within mainstream vulnerability analysis.

## 2.2 The Social Paradigm

The social paradigm invites a consideration of the causal effects of social factors which may exacerbate individual or group vulnerability in a disaster. *Scott* summarises three elements which are central to the social paradigm of ‘natural’ disasters:

- (i) The social paradigm sees ‘natural’ disasters as a consequence of the interaction of natural hazards and social vulnerability,
- (ii) It recognises that within this social context, certain individuals may be more vulnerable than others on account of pre-existing patterns of discrimination,

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<sup>52</sup> Matthew Scott, ‘Refugee Status Determination in the Context of “Natural” Disasters and Climate Change: A Human Rights-Based Approach’ (Lund University 2018) 124.

<sup>53</sup> Patrizia Isabelle Duda, Ilan Kelman and Navonel Glick, ‘Informal Disaster Governance’ (2020) 8 *Politics and Governance* 375.

<sup>54</sup> *ibid* 375.

<sup>55</sup> JC Gaillard, ‘Disaster Studies inside Out.’ (2019) 43 *Disasters* S7, S8.

- (iii) It understands that ‘natural’ disasters are processes within which individual and societal vulnerability exposure to natural events is historically contingent and changes over time.<sup>56</sup>

In their influential work, *Blaikie et al.* stress the need to evaluate social vulnerability with at least the same degree of importance which is devoted to understanding and addressing natural hazards.<sup>57</sup> In doing so, they observe that the social paradigm of disasters relates to the relationship of three elements: disaster risk, hazard and vulnerability - articulated as an equation:  $R = H \times V$ .<sup>58</sup> The equation refers to a combination of varying degrees of social vulnerability (V) to an environmental hazard (H) which exacerbate the risk (R).<sup>59</sup> The Pressure and Release (PAR) model breaks down vulnerability into root causes, dynamic pressures, and unsafe conditions; this model is neatly formulated in the below figure:

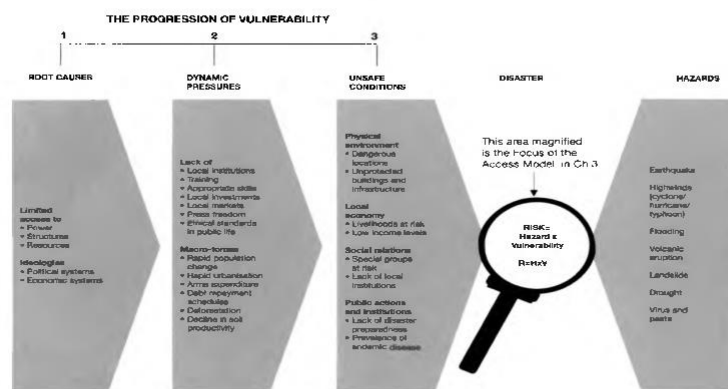


Figure 2.1 Pressure and Release (PAR) model: the progression of vulnerability

Copyright © 2005, Taylor & Francis Group, All rights reserved.

Blaikie, Piers, et al. At Risk: Natural Hazards, People's Vulnerability and Disasters, Taylor & Francis Group, 2002. ProQuest Ebook Central, <http://ebookcentral.proquest.com/lib/psu/detail.action?docId=182221>. Created from jku on 2021-05-11 05:45:05.

- (i) root causes

<sup>56</sup> Scott (n 52) 127.

<sup>57</sup> Blaikie and others (n 4) 49.

<sup>58</sup> These elements are reflected across a broad range of literature in disaster risk reduction. See for example *ibid*; Angelo Jonas Imperiale and Frank Vanclay, ‘Barriers to Enhancing Disaster Risk Reduction and Community Resilience: Evidence from the L’Aquila Disaster’ (2020) 8 *Politics and Governance* 232; Oliver-Smith and others (n 5).

<sup>59</sup> Blaikie and others (n 4) 49.

Root causes are widespread and general processes within society (economic, demographic and political processes which affect the allocation and distribution of resources, among different groups of people) which are spatially distant (arising in a distant centre of economic or political power), temporally distant (in past history), and distant in the sense of being bound by cultural assumptions, ideology, beliefs and social relations that in the actual lived experience of the people concerned they are ‘invisible’ and taken for granted.<sup>60</sup> *Scott* elaborated on these processes viewing them in practical terms as inviting an appreciation of the social underpinnings which ensure people do not simply end up living in places exposed to natural hazards.<sup>61</sup> Root causes are distant only in the sense of how deeply rooted and intangible they seem, they are not distant in exacerbating vulnerability and are particularly relevant to LGBTQ+ vulnerability.

(ii) dynamic pressures

Dynamic pressures are processes and activities that ‘translate’ the effects of root causes and are contemporary/immediate manifestations with a strong spatial/temporal sense (e.g., rapid urbanisation, epidemic disease) of underlying socioeconomic and political patterns. There is a tendency toward writing about these pressures indiscriminately, without examining social and historical factors in the local area which may be channelling the root causes of vulnerability.<sup>62</sup>

(iii) unsafe conditions

Unsafe conditions relate to the specific forms of which vulnerability is expressed in time and space in conjunction with a hazard (e.g., living in hazardous locations, dangerous livelihoods), this allows for a micro-mapping of unsafe conditions which affect households differentially and groups across households (women, children, persons with disabilities etc.).<sup>63</sup> Examples of unsafe conditions include being unable to afford safe buildings and a lack of effective state protection.<sup>64</sup>

In recognising the impact of these factors, it becomes notably important to identify who is vulnerable in a hazard event. The SFDRR sets as a guiding principle the need for an “all-of-society” approach in DRR, grounded in the principles of inclusion, accessibility, and non-discrimination.<sup>65</sup> It is necessary to understand how the PAR model and mainstream vulnerability analysis address an all-of-society approach within DRR. In making these decisions, the social paradigm tends to identify

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<sup>60</sup> *ibid* 52.

<sup>61</sup> *Scott* (n 52) 135.

<sup>62</sup> *Blaikie and others* (n 4) 54.

<sup>63</sup> *ibid* 55.

<sup>64</sup> *ibid* 55.

<sup>65</sup> Sendai Framework for Disaster Risk Reduction 2015-2030 A/RES/69/283, Guiding Principle 19(d).

vulnerable groups. *Blaikie et al.* note that “vulnerability can be assessed reasonably precisely for a specific group of people living and working at a specific time and place.”<sup>66</sup> They determine five groups which may experience exacerbated levels of vulnerability to a hazard:

- (i) A defined group of the poorest households,
- (ii) Women, particularly women-headed households,
- (iii) Children and youth,
- (iv) The elderly and disabled,
- (v) The poorest and most marginalised of minority groups.<sup>67</sup>

Notably, *Blaikie et al.* observe the limitations of this approach, reasoning that there are “uncertainties and gaps in knowledge concerning how vulnerability is demonstrably and casually linked to the underlying causes or pressures” which leads to “policy makers and decision takers, addressing immediate pressures and unsafe conditions while neglecting both the social causes of vulnerability as well as the more distant root causes.”<sup>68</sup> Regardless of these limitations, this approach is broadly reflected across disaster literature and has developed a system which has unwittingly preserved a gender binary and broadly ignores the social factors of LGBTQ+ vulnerability. *Buckle* notes that vulnerability is often viewed according to groups of individuals, in particular “the elderly, the very young, the disabled and people who speak a language other than the dominant language.”<sup>69</sup> *Kuran et al.* observes “the identification of vulnerable groups, such as the elderly, children and the mentally and/or physically impaired, in the case of hazards or when a crisis unfolds, is an issue that any crisis and disaster risk management should address.”<sup>70</sup> *Kadetz and Mock* critique the problematic attribution of vulnerability which compares disasters between men and women, avoiding an in-depth analysis of the socio-structural inequalities (economic, political, legal occupational, familial, ideological, cultural) which underly gender differences.<sup>71</sup> These examples denote a tendency in mainstream vulnerability analysis to either use lists of vulnerable groups or to more generally assess vulnerability according to differences along a gender binary. This leads to notable problems in DRR, and how it operates to mitigate discrimination and the denial of rights. *Barbelet and Wake* note:

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<sup>66</sup> Blaikie and others (n 4) 60.

<sup>67</sup> *ibid* 340.

<sup>68</sup> *ibid* 61.

<sup>69</sup> P Buckle, G Mars and RS Smale, ‘New Approaches to Assessing Vulnerability and Resilience’ (2000) 15 *Australian Journal of Emergency Management* 8.

<sup>70</sup> Christian Henrik Alexander Kuran and others, ‘Vulnerability and Vulnerable Groups from an Intersectionality Perspective’ (2020) 50 *International Journal of Disaster Risk Reduction* 101826.

<sup>71</sup> *Kadetz and Mock* (n 5) 217.

“Vulnerability is a lens to inform targeting and programming decisions in crisis response. While a critical concept, how vulnerability has been operationalised in humanitarian action can be problematic when it is used in a static manner and fails to recognise that different people are affected differently at different moments in time by crises. It is problematic when it attributes vulnerability according to identities rather than as a consequence of actions and decisions that lead to social exclusion, systematic denial of rights and discrimination. It is problematic when it is not grounded in rights and legal frameworks.”<sup>72</sup>

This static operation of mainstream vulnerability analysis is evidenced by the SFDRR which observes that “women and their participation are critical to effectively managing disaster risk and designing, resourcing and implementing gender-sensitive DRR policies, plans and programmes.”<sup>73</sup> *Seglah and Blanchard* observe the overtly essentialised m-f dichotomy of the SFDRR, noting that “those identifying as transgender, non-binary, or gender fluid were not explicitly mentioned within the Framework and as a result, there is currently no UN-led effort to specifically understand how sexual and gender minorities are impacted by disasters.”<sup>74</sup> It is important at this juncture to note (once again) that giving an overview for anyone, anything or any collective leaves gaps which are filled in according to biases and interests.<sup>75</sup> The problem as is not essentialism per se, but the tendency to over-essentialise at the expense of deeper analysis which understands the “connections in society that cause vulnerability.”<sup>76</sup> *Valdes* observes the conflation of sex and gender which holds that every person’s sex is also their gender is prevalent across many societies and historically accepted as a truism and allocates hierarchical gender roles.<sup>77</sup> *Rushton et al.* observe that there is limited literature on LGBTQ+ vulnerability, with sex and gender often used interchangeably, LGB persons are excluded from most of the literature and transgender persons barely exist in vulnerability literature.<sup>78</sup> Mainstream vulnerability analysis relies too heavily on essentialism at the expense of a deeper analysis of the root causes of vulnerability. *Otto* observes that “heteronormative scripts of gender and sexuality work to normalise existing hierarchies of power.”<sup>79</sup> In failing to engage with the gender binary and omitting LGBTQ+ individuals from the literature mainstream vulnerability analysis inadvertently preserves heteronormativity as a root cause of LGBTQ+ vulnerability. In preserving this heteronormativity, *D. Dominey-Howes et al.* and *Jagose* observe the powerful role assumed by heterosexuality in DRR -

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<sup>72</sup> Veronique Barbelet and Caitlin Wake, ‘Inclusion and Exclusion in Humanitarian Action: The State of Play, HGP Working Paper, ODI November 2020’ <<https://odi.org/en/publications/inclusion-and-exclusion-in-humanitarian-action-the-state-of-play/>> accessed 29 March 2022.

<sup>73</sup> Sendai Framework for Disaster Risk Reduction 2015-2030 A/RES/69/283.

<sup>74</sup> *Seglah and Blanchard* (n 9).

<sup>75</sup> *Kelman, Disaster by Choice* (n 1) 44-45.

<sup>76</sup> *Blaikie and others* (n 4) 62.

<sup>77</sup> *Valdes* (n 16) 12-13.

<sup>78</sup> *Rushton and others* (n 36) 3991.

<sup>79</sup> *Otto*, ‘Queerly Troubling International Law’s Vision of “Peace”’ (n 12) 24.

“Scholarship and policies related to natural disaster management can operate more inclusively by acknowledging the importance of socially constructed notions of sexual and gender identities in their current practice [...] ‘heterosexuality is too often represented as unremarkable’ and as the normative position of which other sexual identities are seen as derivative. The work of queer theory disrupts this imagining and, within the context of disaster management policies, can highlight the usually unremarked role of sexual and gender identities in defining how natural disasters are experienced.”<sup>80</sup>

The exclusion of LGBTQ+ individuals from vulnerability literature ignores the deep socio-structural inequalities which are often exacerbated in a disaster. LGBTQ+ communities face unique challenges with heteronormative societies perpetuating routine discrimination and violence which is often heightened in a disaster.<sup>81</sup> There is a pressing need to understand the systems of subordination which exacerbate LGBTQ+ vulnerability. The following section uses queer theory to address the limitations of essentialist and gender binary driven approaches of mainstream vulnerability analysis. This critique begins to construct a framework which addresses systemic discrimination and promotes basic rights of LGBTQ+ individuals in DRR.

### **2.3 Queer Critiques of Mainstream Vulnerability Analysis**

In a report on violence and discrimination on the basis of sexual orientation and gender identity (SOGI) the UN Independent Expert on SOGI observes that LGBTQ+ and gender non-conforming person experience intersecting factors that have an impact on their vulnerability.<sup>82</sup> Queer theory can assist with identifying these unique challenges. The SFDRR observes a need to understand vulnerability in all its dimensions, to achieve this it is important:

“(j) To strengthen technical and scientific capacity to capitalize on and *consolidate existing knowledge* and to develop and apply *methodologies* and models to assess disaster risks, vulnerabilities and exposure to all hazards.”<sup>83</sup>

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<sup>80</sup> Dale Dominey-Howes, Andrew Gorman-Murray and Scott McKinnon, ‘Queering Disasters: On the Need to Account for LGBTI Experiences in Natural Disaster Contexts’ (2014) 21 *Gender, Place & Culture* 905, 906.

<sup>81</sup> See: Andrew Gorman-Murray, Scott McKinnon and Dale Dominey-Howes, ‘Queer Domicide: LGBT Displacement and Home Loss in Natural Disaster Impact, Response, and Recovery’ (2014) 11 *Home Cultures* 237.

<sup>82</sup> UN Human Rights Council, ‘Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity’ (2018) UN Doc A/HRC/38/43, Note by the Secretariat.

<sup>83</sup> Sendai Framework for Disaster Risk Reduction 2015-2030 A/RES/69/283, Priority 1: Understanding disaster risk 24(j).

Queer theory has developed a framework to consolidate knowledge and incorporate new methodologies which can be applied to DRR. *Kepros* observes the main goal of queer theory:

“Queer theory focuses on the manner in which heterosexuality has, silently but saliently, maintained itself as a hidden yet powerfully privileged norm [...] Queer theory embraces anyone who identifies as “Queer” and consequently evades definition of its ever-evolving membership [...] Queer theory embraces indeterminacy, making it broadly inclusive across the lines that have traditionally defined gender and sexuality.”<sup>84</sup>

This section seeks to pierce through the essentialism which has plagued mainstream vulnerability analysis and develop a systemic approach to address LGBTQ+ vulnerability.

### 2.3.1 Challenging the Gender Binary

There has been strong advocacy by proponents of the vulnerability paradigm to incorporate gender into DRR – underlying a need to consider the specific vulnerabilities of women.<sup>85</sup> We see clear evidence of this in the PAR model, as discussed *Blaikie et al.* defines ‘women and women headed households’ as an homogenous vulnerable group.<sup>86</sup> Other examples include the call by *Buckle* to re-define community and vulnerability by making reference to gender in disasters by referring to men and women as exhibiting different levels of vulnerability in a climate related disaster.<sup>87</sup> The use of the term women typically invokes traditional understandings of a male/female binary (that is assigned male or female at birth). Preserving the binary leads to a system of heteronormativity which fails to understand the complex factors which impact the vulnerability of LGBTQ+ individuals. *Kepros* surmised the problem of strict adherence to this binary:

“The tidy binary “heterosexual/homosexual” also inaccurately describes the multiplicity of individual sexual behaviours. The hierarchy of heterosexual over homosexual presupposes a fixed sexual identity. The binary provides no label for the fluid experience of a “bisexual” nor a term for a “heterosexual” man who engages in a “homosexual” act.”<sup>88</sup>

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<sup>84</sup> *Kepros* (n 11) 284-291.

<sup>85</sup> JC Gaillard and others, ‘Beyond Men and Women: A Critical Perspective on Gender and Disaster’ (2017) 41 *Disasters* 429, 431.

<sup>86</sup> *Blaikie* and others (n 4) 340.

<sup>87</sup> Philip Buckle, ‘Re-Defining Community and Vulnerability in the Context of Emergency Management’ (1999) 13(4) *The Australian Journal of Emergency Management* 23.

<sup>88</sup> *Kepros* (n 11) 286.



The deference to a binary assessment of vulnerability leads to discriminatory DRR policies which fail to recognise persons which sit out of a binary definition.<sup>89</sup> *Kelman* notes the tendency of this binary perspective in mainstream vulnerability analysis to conflate the understanding of ‘sex’ and ‘gender’:

“‘Sex’ and ‘gender’ are not interchangeable, since they depict characteristics which are different and the male-female binary division is not how many people regard or live their gender. For now, gender-differentiated vulnerability generally means comparing girls/women and boys/men, so the phrase is used here, even though ‘sex-based vulnerability’ would be more correct.”<sup>90</sup>

In *Valdes* work on queer theory, they note the need to address the conflation of sex and gender as a central concept in society’s sex/gender system – the conflation of sex and gender is a key element, holding that ever persons sex is also a person’s gender.<sup>91</sup> Conflating sex and gender denies the experience of those with diverse gender identities and their experiences in society. *Kadetz and Mock* observe that the risk and vulnerabilities of disasters are distributed to reflect social divisions which exist in society; addressing gendered vulnerability is important in ensuring prevention and intervention, as well as pathways to recovery.<sup>92</sup> Ultimately, scholarship and policies related to natural disasters would operate more inclusively by acknowledging the importance of socially constructed notions of sexual and gender identities.<sup>93</sup> In failing to address the complex social relations which exacerbate the vulnerability of those of diverse sexual and gender diversity mainstream vulnerability analysis fails to protect and promote universal human rights. The UNHRC observes that LGBTQ+ individuals have the same rights and needs of heterosexual persons and encounter distinct protection risks because of their sexual orientation, gender identity, gender expression and/or sex characteristics (SOGIESC) do not conform to prevailing sociocultural norms.<sup>94</sup> The complexity of social, historical, political and legal processes which exacerbate LGBTQ+ vulnerability are not examined by mainstream DRR which offer mere tokenistic mentions within long lists of marginalised groups with little or no detailed policy or practice guidance for addressing rights, needs or strengths of sexual and gender minorities.<sup>95</sup> There is a

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<sup>89</sup> Gorman-Murray, McKinnon and Dominey-Howes (n 81) 250.

<sup>90</sup> Ilan Kelman, ‘Disaster Vulnerability by Demographics?’ (2020) 4 *The Journal of Population and Sustainability* 17, 22.

<sup>91</sup> *Valdes* (n 16) 12.

<sup>92</sup> *Kadetz and Mock* (n 5) 217.

<sup>93</sup> Dominey-Howes, Gorman-Murray and McKinnon (n 80) 906.

<sup>94</sup> UN High Commissioner for Refugees, ‘Need to Know Guidance: Working with Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ+) Persons in Forced Displacement’ <<https://www.refworld.org/pdfid/4e6073972.pdf>> accessed 4 March 2022 4.

<sup>95</sup> Emily Dwyer and Lana Wolf, ‘Down By The River: Addressing The Rights, Needs And Strengths Of Fijan Sexual And Gender Minorities In Disaster Risk Reduction And Humanitarian Response’ [2018] *Edge Effect* <[www.edgeeffect.org/wp-content/uploads/2018/02/Down-By-The-River\\_Web.pdf](http://www.edgeeffect.org/wp-content/uploads/2018/02/Down-By-The-River_Web.pdf)> accessed 11 February 2022 9.

need to challenge essentialist thinking of gender and how social constructs are used as methods to reinforce “appropriate” behaviours for women and men which in turn ensures multiple forms of oppression such as sexism, homophobia, and racism.<sup>96</sup> Gender has been conceived consistently along a sex-based male/female binary in its interaction with cultural and political forces that shape the roles of men and women in society – effectively fostering a system of heterosexuality in DRR.<sup>97</sup> An examination of queer narratives in disasters uncovers the exacerbated vulnerability of LGBTQ+ individuals and the serious human rights concerns that arise from perpetuating heteronormativity as an organising principle which maintains a gender binary within mainstream vulnerability analysis.

### 2.3.2 Incorporating Queer Narratives

An inclusive human rights-based approach of DRR must incorporate LGBTQ+ narratives which uncovers systems of discrimination and the denial of basic rights. In building this understanding, *Valdes* highlights the importance airing queer narratives in building new approaches in legal scholarships.<sup>98</sup> The marginalisation of LGBTQ+ people is broadly heightened during disasters and existing inequalities are magnified, however there remains limited academic or policy research in DRR which pays attention to the vulnerabilities, needs, and contributions of the LGBTQ+ community in disasters.<sup>99</sup> LGBTQ+ people are only considered in DRR by six countries globally and of those six, only two have policies led by central government departments.<sup>100</sup> *Blaikie et al.* emphasize that the root causes of vulnerability include a limited access to power.<sup>101</sup> It follows that building an inclusive and human rights-based approach to DRR it is necessary to understand the social, political and legal power which has exerted itself on LGBTQ+ individuals. ILGA observes that LGBTQ+ people are criminalised by 69 countries globally with their rights systemically denied by heteronormative social, political, and legal entities.<sup>102</sup> The marginalisation and the lack of visibility leads to serious human rights concerns in disasters. To an extent, the below examples essentialise the experience of LGBTQ+ communities in disasters, this is done to clearly highlight the power of heteronormativity in perpetuating systemic discrimination. However, intersectionality and multidimensionality are used in the following section to balance against this essentialism to ensure there is a “challenge to essentialist thinking of gender and how social contrasts are used to reinforce “appropriate” behaviours for women and men and multiple forms of

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<sup>96</sup> Rushton and others (n 36) 3986.

<sup>97</sup> Gaillard and others (n 85) 431-431.

<sup>98</sup> Valdes (n 16) 366.

<sup>99</sup> Benigno Balgos, JC Gaillard and Kristinne Sanz, ‘The Waria of Indonesia in Disaster Risk Reduction: The Case of the 2010 Mt Merapi Eruption in Indonesia’ (2012) 20 *Gender & Development* 337, 338.

<sup>100</sup> Seglah and Blanchard (n 9) 6.

<sup>101</sup> Blaikie and others (n 4) 51.

<sup>102</sup> Lucas Ramon Mendos and others, ‘State-Sponsored Homophobia 2020: Global Legislation Overview Update’ (ILGA World 2020) 13.

oppression such as homophobia.”<sup>103</sup> The following will engage in a storytelling of the COVID-19 pandemic in Uganda and the 2015 earthquakes in Nepal to emphasise how systems of power exacerbate LGBTQ+ vulnerability in a disaster.

### Uganda: COVID-19

There is broad acceptance that pandemics are hazards events which should be addressed through DRR policies and planning. The UN Office for DRR published recommendations following the International Conference on the Implementation of the Health Aspect of the SFDRR, observing a need to –

“1. Promote systematic integration of health into national and sub-national disaster risk reduction policies and plans and the inclusion of emergency and disaster risk management programmes in national and sub-national health strategies.

Key actions include:

[...]

o Strengthen the integration of biological hazards, including epidemics, pandemics, and diseases at the human-animal-ecosystem interface, into all-hazards multi- sectoral disaster risk management”<sup>104</sup>

Further, *Kelman* observes the COVID-19 pandemic “conforms to the baseline conclusions of disaster anthropology and is a combination of hazard and vulnerability with responses to the hazard exposing as many vulnerability problems as the original hazard.”<sup>105</sup>

Uganda has a poor record for LGBTQ+ rights with many vulnerability problems arising during the pandemic for the LGBTQ+ population. LGBTQ+ discrimination is deeply rooted in sociolegal structures in Uganda. The ILGA report on State-Sponsored Homophobia observes that LGBTQ+ individuals are criminalised with a maximum sentence of life imprisonment for having “carnal knowledge” against the order of nature.<sup>106</sup> The report records the following statement from the Minister of Health in 2017:

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<sup>103</sup> Rushton and others (n 36) 3987.

<sup>104</sup> UN Office for Disaster Risk Reduction, ‘Bangkok Principles for the Implementation of the Health Aspects of the Sendai Framework for Disaster Risk Reduction 2015-2030’ (2016).

<sup>105</sup> Ilan Kelman, ‘COVID-19: What Is the Disaster?’ (2020) 28 *Social Anthropology* 296.

<sup>106</sup> Lucas Ramon Mendos, ‘State-Sponsored Homophobia 2019’ (ILGA World 2019) 383.

“Homosexuality remains an illegally activity, according to our laws and, therefore [...] we cannot be seen doing the opposite [...] the Global Fund money is supposed to help in the fight against malaria and other diseases not buying lubricants for homosexuals.”<sup>107</sup>

The systemic legal, political, and social discrimination faced by the LGBTQ+ population has been further exacerbated by the State’s emergency response to the pandemic. In Uganda, emergency powers were used in response to the COVID-19 public health emergency. *Imperiale et al.* observes a well-informed critique of the use of emergency powers is necessary to understanding the vulnerability of affected communities, particularly as emergency powers typically do not involve consultation with the local community.<sup>108</sup> In Uganda, there was not merely a failure to consult the LGBTQ+ community but these emergency powers were used to further exacerbate their vulnerability. Sexual Minorities Uganda reports that emergency lockdown laws were being used to arrest LGBTQ+ individuals living in communal homes under the guise of public health concerns -

“The raid followed complaints to police about the shelter from neighbours, and the lockdown-related charges were brought only when it was clear that there was no other justification for holding the detainees. “The arrests were initially around homophobia and transphobia because neighbours reported them and so the security forces came and raided them. These people were at home, and they all know each other,” Mugisha said. “Now they are putting them in prison where they will be more at risk.”<sup>109</sup>

In an interview with the Guardian, Ronald Ssenyonga (a 21-year-old LGBTQ+ Ugandan) was asked about his arrest during the raids of LGBTQ+ communal homes. Their testimony reflects how authorities have used COVID-19 to further entrench outright homophobia in society under the guise of public health measures –

“They tied us like slaves and marched us through a trading centre full of homophobic people. Some people slapped us. Others hit us with stones or whatever they could find. They shouted and condemned us.”<sup>110</sup>

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<sup>107</sup> *ibid* 384.

<sup>108</sup> Imperiale and Vanclay (n 58).

<sup>109</sup> Jason Burke, ‘Ugandan Police Accused of Abusing Lockdown Laws after LGBT Arrests’ *The Guardian* (1 April 2020) <<https://www.theguardian.com/world/2020/apr/01/ugandan-police-accused-of-abusing-lockdown-laws-after-lgbt-arrests>> accessed 11 February 2022.

<sup>110</sup> Patience Akumu, ‘Nowhere to Go’: The Young LGBT+ Ugandans “Outed” during Lockdown’ *The Guardian, Global Development* (Kampala) <<https://www.theguardian.com/global-development/2020/nov/23/nowhere-to-go-the-young-lgbt-ugandans-outed-during-lockdown>> accessed 23 February 2022.

The use of emergency powers reflects deeply held homophobic power dynamics in society and the law which manifest in the denial of basic rights for the LGBTQ+ community. At Uganda's 3<sup>rd</sup> UPR in January 2016, the UN country team noted that "lesbian, gay, bisexual, transgender, queer and intersex persons were subjected to human rights violations and abuses and continued to face stigmatization, discrimination and fear of arrest."<sup>111</sup> The use of LGBTQ+ narratives demands a more inclusive understanding of vulnerability to address this discrimination – to deconstruct essentialism which reproduces binaries, ignoring complex and intersecting systems of power that shape identities and sexualities in myriad contexts.<sup>112</sup> Uganda actively promotes systems of intolerance and homophobia. This example is illustrative of the extremes of homophobia which manifests as a not-so-distant root cause of vulnerability to deny basic rights for LGBTQ+ individuals in disasters. As previously established, vulnerability and human rights are deeply connected with both seeking to address a promote the basic dignity and rights for all.<sup>113</sup> Promoting this basic dignity entails an engagement with the systems of subordination identified by airing LGBTQ+ narratives in legal scholarship. The UN Intendent Expert on Sexual Orientation and Gender Identity published a report on the 'Law of Inclusion', observing –

“The notion that there is a gender norm, from which identities and expressions vary or depart, is based on a series of preconceptions that must be challenged if all humankind is to enjoy human rights [...] Only by acknowledging the stereotypes, power asymmetries, inequality and fundamental violence that lies at the foundation of this system does the State comply with its obligation to address the violence and discrimination that it fuels, with its harrowing impact on women and girls in every corner of the world, including lesbian, bisexual and trans women; on gay, bisexual and trans persons; on other gender-diverse persons; and on intersex persons.”<sup>114</sup>

Mainstream vulnerability analysis should work towards a 'Law of Inclusion' which promotes a framework for all must address the influences of heteronormativity to construct a framework which addresses the stereotypes and power asymmetries which deny basic rights. Of course, constructing a queer human rights-based approach will not immediately persuade States which actively criminalises and discriminate against their LGBTQ+ population to change their approach to DRR. However,

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<sup>111</sup> UN Human Rights Council, 'Compilation on Uganda - Report of the Office of the United Nations High Commissioner for Human Rights' (2022) Working Group on the Universal Periodic Review A/HRC/WG.6/40/UGA/2.

<sup>112</sup> Laura Karaian, 'The troubled relationship of Feminist and Queer Legal theory to strategic essentialism: theory/Praxis, Queer Porn, and Canadian anti-discrimination Law' in Martha Fineman, Jack E Jackson and Adam P Romero (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate 2009) 389.

<sup>113</sup> See: Masferrer and García-Sánchez (n 41) 5.

<sup>114</sup> UN Human Rights Council, 'The Law of Inclusion' (n 27) para 3.

recognising the impact of COVID-19 on the LGBTQ+ community in Uganda is a powerful narrative which uncovers the undeniable injustice of heteronormativity to help guide the actions of decisionmakers to respond to lived realities.<sup>115</sup> Incorporating the voices of LGBTQ+ individuals into mainstream vulnerability analysis would lead to an appreciation of the power of heteronormativity, stressing the importance of challenging these systems in disaster literature. This approach can have more realisable impacts on the DRR strategy of countries which are more receptive to their LGBTQ+ populations. The following case study of Nepal is one such example.

### Nepal: Gorkha Earthquakes

The Gorkha earthquakes occurred in April 2015 and had a maximum magnitude of 7.6; around 9,000 were killed, over 100,000 were injured, over 500,000 houses were destroyed and around 269,000 houses were damaged.<sup>116</sup> Notably, Nepal is a country which unlike Uganda does not criminalise its LGBTQ+ population but has codified non-discrimination based on gender into its constitution, as well as recognising a third gender in citizenship documents.<sup>117</sup> However, inclusion in the legal system does not ensure against a process of inclusion in DRR. Understanding exclusion entails a deeper consideration of social processes. In their work on ‘Social Exclusion’, *Khan et al.* observe –

“Social exclusion is a process. It can involve the systematic denial of entitlements to resources and services, and the denial of the right to participate on equal terms in social relationships in economic, social, cultural, or political arenas.

[...]

#### ***Power relations***

A social exclusion analysis focuses on who is being excluded and who is doing the excluding, and why.”<sup>118</sup>

In building a human rights-based approach of the limitations of mainstream vulnerability analysis it is crucial to look past one-dimensional formal equality to grapple with the social exclusion and power relations which exclude LGBTQ+ populations from DRR. The Blue Diamond Society is an NGO in

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<sup>115</sup> Valdes (n 16) 366.

<sup>116</sup> ‘Nepal: Gorkha Earthquake 2015’ *United Nations Office for Disaster Risk Reduction* (Geneva) <<https://www.preventionweb.net/collections/nepal-gorkha-earthquake-2015>> accessed 23 February 2022.

<sup>117</sup> Angel L Martinez Cantera, ‘Nepal’s “Third Gender”’ *Al Jazeera* (12 March 2014)

<<https://www.aljazeera.com/features/2014/3/12/nepals-third-gender>> accessed 17 May 2022.

<sup>118</sup> Seema Khan, Emilie Combaz and Erika McAslan, ‘Social Exclusion: Topic Guide’ (GSDRC - University of Birmingham 2015) 27-28.

Nepal which made the following observations of the social problems facing LGBTQ+ populations following the earthquake -

“Around 300 trans women / metis in Kathmandu survive through sex work. They now have no way of earning money. Many LGBTI members from kavre, Gorkha, Dhading, Nuwakot, Kathmandu, Makwanpur, Bhaktapur, Jhapa, Saptari and several other districts have lost their homes. Relief camps are there but only for general population, segregated facilities into binary genders, excluding THIRD gender. Even accessing toilets are a big issue for TG.”<sup>119</sup>

The failure to secure stable work and the operation of relief camps with a gender binary division excludes LGBTQ+ communities from DRR. The International Commission of Jurists Response to a Questionnaire on Cultural rights and Public Spaces observed the following observations of the operation of a gender binary in exacerbating the vulnerability of LGBTQ+ populations:

“Discrimination, a lack of accessibility and general inadequacy, all contribute to insufficient enjoyment of public spaces by LGBTQ persons, including particularly as regards public toilets, public transport and places of worship. Many such places and/or facilities in them are constructed and administered on a male- female gender binary, which restricts the ability of LGBTQ persons who do not identify or express squarely on either end of this binary participation in cultural life.”<sup>120</sup>

In focusing on these narratives in Nepal it helps combat prejudices and stereotypes by focusing decisionmakers on the everyday realities of sex/gender inequality and discrimination.<sup>121</sup> Incorporating the social exclusion of LGTBQ+ populations into mainstream vulnerability analysis are a powerful and potentially transformative tool. Ensuring the visibility of LGBTQ+ narratives to highlight the impact of social exclusion is key to addressing their needs in DRR. Narratives uncover systems of social, legal

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<sup>119</sup> Asia Pacific Transgender Network, ‘Blue Diamond Society Updates and Appeal for Help: The Aftermath for the Recent Devastating Earthquake That Hit Nepal Hard Affecting Homes of LGBTI People.’ (7 October 2017) <<https://weareaptn.org/2017/10/07/blue-diamond-society-updates-and-appeal-for-help-the-aftermath-for-the-recent-devastating-earthquake-that-hit-nepal-hard-affecting-homes-of-lgbti-people/>> accessed 3 May 2022.

<sup>120</sup> International Commission of Jurists, ‘International Commission of Jurists’ Response to the Questionnaire on Cultural Rights and Public Spaces by the UN Special Rapporteur in the Field of Cultural Rights in View of Her Forthcoming Report to the General Assembly on How Actors from across the Cultural Ecosystem Access and Use Public Spaces, Identify the Challenges They Face and the Strategies They Develop to Overcome Them, and Analyse the Impact This Has on Their Cultural Right’ (ICJ 2019) <[https://www.ohchr.org/Documents/Issues/CulturalRights/Call/49\\_ICJ\\_India.pdf](https://www.ohchr.org/Documents/Issues/CulturalRights/Call/49_ICJ_India.pdf)> accessed 11 February 2021.

<sup>121</sup> Valdes (n 16) 366.

and political power, identifiable as root causes of vulnerability.<sup>122</sup> In Nepal, the power of heteronormativity and the operation of a gender binary is apparent in DRR with serious human rights concerns (e.g. right to adequate housing protected under Article 11 of the ICESCR and right to work protected under Article 6 of the ICESCR) arising due to social exclusion.<sup>123</sup> In identifying the systemic discrimination and power relations it is critical not to over-essentialise LGBTQ+ experience. *Kadetz and Mock* note a tendency in mainstream vulnerability analysis to essentialise “social categories which do not provide the necessary information needed for targeting disaster vulnerability”, leading to a “neglect the specific needs of those whose lives do not fit the heteronormative ideal.”<sup>124</sup> In reality, “individuals have multi-dimensional identities that intersect with multi-dimensional forms of othering and power relations in aggregated ways.”<sup>125</sup> A focus on specific needs entails a deeper analysis of how vulnerability is generated in a hazard event. Understanding the operation of a gender binary and uncovering the narratives of LGBTQ+ populations in disasters needs to be complemented by a deeper analysis of the systems of heteronormativity. Intersectionality and multidimensionality provide the necessary tools to examine systemic discrimination beyond identities, to ensure LGBTQ+ does not become a stagnant social category which does not warrant an examination of systems of power and differential vulnerabilities.

### **2.3.3 Deploying Intersectionality and Multidimensionality**

Intersectional and multidimensional scholarship uncovers systems of heteronormative power which broadly operate to further entrench and exacerbate the vulnerability of LGBTQ+ individuals. *Hutchinson* observes that intersectionality scholarship destabilises traditional attempts to treat oppressed classes as monolithic groups; in doing so it presents a considerable challenge to the idea that scholars can provide a solution to one form of subordination, without analysing how it is affected and shaped by other systems of domination.<sup>126</sup> Consequently, failure to examine intersectionality reproduces an equality theory which centres around the lives of *relatively* privileged individuals; a successful incorporation considers the forms of subordination – ensuring those who suffer from multiple forms of domination are at the centre of critique.<sup>127</sup> Many of the challenges in vulnerability and disaster literature can be broken down to the appropriateness of the level of analysis and the disaggregation of dependence

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<sup>122</sup> See: Blaikie and others (n 4) 52.

<sup>123</sup> See: International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1976, entered into force 3 January 1976) (resolution 2200A (XXI)).

<sup>124</sup> Kadetz and Mock (n 5) 220.

<sup>125</sup> *ibid* 222.

<sup>126</sup> Hutchinson (n 24) 308.

<sup>127</sup> *ibid*.



on multiple and universalized social determinants of vulnerability.<sup>128</sup> In turn, this leads to essentialised categories such a male/female binary with social heterogeneity and inequality often obscured or oversimplified.<sup>129</sup> The tendency to essentialise in mainstream vulnerability analysis along a binary division ignores the complex systems of domination which exacerbate LGBTQ+ vulnerability. This is complemented by multidimensional scholarship which arises out of intersectionality theory and recognises the inherent complexity of systems of oppression and the social identity categories around which social power and disempowerment are distributed.<sup>130</sup> *Valdes* elaborated on the importance of multidimensional analysis, observing:

“Multidimensionality is an antisubordination critique of law and society [...] all outgroups that forms of identity hierarchy impinge on the social and legal interests of their members: biases based on race/ethnicity, sex/gender, sexual orientation, and other identity [...] it tends to promote awareness of patterns as well as particularities in social relations by studying in an interconnected way the specifics of subordination.”<sup>131</sup>

Intersectionality and multidimensionality should be used to address the limitations of mainstream vulnerability analysis which fails to address the complex subordination of LGBTQ+ individuals. *Galliard* notes emerging scholarships in vulnerability literature which considers intersectional perspective of sexual and gender minorities “where vulnerabilities are differentiate by race, ethnicity, age, socioeconomic means and cultural context.”<sup>132</sup> However, this research is still emerging and is not reflected across all vulnerability literature. *Kadetz and Mock* note a continued deference to one-dimensional essentialist approaches which fails to understand the complexities of systemic subordination -

“The complexity of subjectivities is often disregarded in disaster research with a shorthand of gender stereotyping in which women are reduced to nurturers and being female equals vulnerability.”<sup>133</sup>

In recognising the broad tendency to ignore complex subjectivities, *Butler* calls for a reorientation which determines the impacts of the ‘equality’ theory to understand the “elaborate

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<sup>128</sup> Kadetz and Mock (n 10) 218.

<sup>129</sup> *ibid* 219.

<sup>130</sup> Hutchinson (n 24) 309.

<sup>131</sup> Francisco Valdes, ‘Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors’ (1998) 75 *Denver University Law Review* 1409, 1415.

<sup>132</sup> JC Gaillard, Andrew Gorman-Murray and Maureen Fordham, ‘Sexual and Gender Minorities in Disaster’ (2017) 24 *Gender, Place & Culture* 18, 21.

<sup>133</sup> Kadetz and Mock (n 10) 218.

predicates of color, sexuality, ethnicity, class and able-bodiedness invariably close with an embarrassed ‘etc.’ at the end of the list [ . . . ] these positions strive to encompass a situated subject but invariably fail to be complete.”<sup>134</sup> The tendency towards a binary essentialism in mainstream vulnerability analysis upholds this heteronormativity and ignores the systems of domination which lead to the exclusion of LGBTQ+ individuals from DRR. The SFDRR sets as a guiding principle the need to ensure an “all-of-society” engagement in DRR, grounded in the principles of inclusion, accessibility, and non-discrimination.<sup>135</sup> In engaging with an all-of-society approach there is a need to look past the gender binary which essentialises experience and fails to grapple with systemic domination. In practice, it remains the case broadly in society and the law that mixed racial, gender and sexual orientation discrimination often concedes to the heterosexist.<sup>136</sup> Firstly, mainstream vulnerability analysis needs a better understanding of intersecting social identity categories (e.g., trans women of colour). *Kadetz and Mock* observe intersectionality as a method to look past essentialised groups to call for more “complex understandings.”<sup>137</sup> Mainstream vulnerability analysis needs to understand the patterns of social relations and their interconnectedness with systems of power – previous attempts at binary framings or identity-led politics cannot encompass the range of factors which exacerbate LGBTQ+ vulnerability. In fact, there is an implicit acceptance within mainstream vulnerability analysis that it cannot begin to fathom the complexity. *Blaikie et al.* articulates this acceptance of complexity inherent to the root causes of vulnerability –

“The most distant of these are root causes which are an interrelated set of widespread and general processes within a society and the world economy. They are ‘distant’ in one, two or all of the following senses: spatially distant (arising in a distant centre of economic or political power), temporally distant (in past history), and finally, distant in the sense of being so profoundly bound up with cultural assumptions, ideology, beliefs and social relations in the actual lived existence of the people concerned that they are ‘invisible’ and ‘taken for granted’.”<sup>138</sup>

For many LGBTQ+ individuals these root causes are neither invisible nor taken for granted – understanding and dealing with them is critical to their inclusion in DRR. *Gaillard* observes that recognising gender minorities’ identities as well as their hazard-related vulnerabilities must reflect on complex cultural, historical, political and social constructs in order to be sensitive to local perspectives.<sup>139</sup> In promoting this awareness, the Oxfam report on Fijian Sexual and Gender Minorities

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<sup>134</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 143.

<sup>135</sup> Sendai Framework for Disaster Risk Reduction 2015-2030 A/RES/69/283.

<sup>136</sup> Hutchinson (n 24) 313.

<sup>137</sup> Kadetz and Mock (n 5) 222.

<sup>138</sup> Blaikie and others (n 4) 52.

<sup>139</sup> Gaillard and others (n 85) 441-442.

in Disaster Risk Reduction observed the discrimination and marginalisation faced by sexual and gender minorities have serious impacts on their vulnerability in a disaster:

- verbal bullying and violence at schools lead to high rates of absenteeism which impact options for further education and potentially limiting job prospects,
- stereotypes about sexual and gender minorities only suitable for jobs in beauty, design arts, carer, and community work – further limiting employment opportunities,
- family pressure to undertake domestic and child-caring duties rather than external employment,
- discrimination finding and maintaining employment regardless of the official law prohibiting discrimination.<sup>140</sup>

An intersectional and multidimensional approach challenges mainstream vulnerability analysis to engage with this complexity – to recognise the impacts of bullying, stereotypes, family pressure and discrimination to understand how this operate a dominant background norm of heterosexuality. *Valdes* nuanced approach elaborates on the interconnectivity of subordination and the need to develop more complex, rather than essentialist, responses to oppression.<sup>141</sup> Similarly, *Arriola* examines the interactions between the various hierarchies which impact LGBTQ+ vulnerability.<sup>142</sup> In rejecting the idea of arbitrarily separating out categories to address discrimination, they understand discrimination as a problem that arises when multiple traits and the stereotypes constructed around them converge in a specific harmful act.<sup>143</sup> In this framework, traditional categories are springboards to explore the historical relationships between certain social groups, as well as an individual's experience within each of these groups.<sup>144</sup> Using traditional categories in this manner could be transformative to DRR and rebalance the practical need to identify vulnerable groups whilst ensuring a constant call for deeper sociolegal analysis of the systems of domination. Essentialism is not the problem per-se but it needs to form only part of the framework of mainstream vulnerability analysis and must consistently lead to deeper systemic analysis to practically address the basic rights of LGBTQ+ individuals. Multidimensionality acknowledges that “to be “queer” can hold multiple meanings and can be experienced quite differently from person to person.”<sup>145</sup> It is incumbent that these experiences are reflected in a human rights-based approach to vulnerability analysis. If vulnerability analysis is to be

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<sup>140</sup> Dwyer and Wolf (n 95) 22.

<sup>141</sup> Valdes (n 141) 1415.

<sup>142</sup> Elvia R Arriola, ‘Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory’ [1994] *Berkeley Journal of Gender, Law & Justice*.

<sup>143</sup> *ibid* 141.

<sup>144</sup> *ibid* 141.

<sup>145</sup> Catherine A Lugg, ‘Sissies, Faggots, Lezzies, and Dykes: Gender, Sexual Orientation, and a New Politics of Education?’ (2003) 39 *Educational Administration Quarterly* 95, 104.

relevant to “all members of society” then it must look past identity and provide a framework which recognises and challenges heteronormative systems of subordination.

## 2.4 Concluding Remarks

Defining vulnerability is not an easy task – it is a concept which is relevant to all but more pertinent to others. This chapter did not attempt to connect everyone and everything but assessing mainstream vulnerability analysis through queer theory uncovers serious failings in recognising diverse LGBTQ+ communities and the marginalisation perpetuated by systems of heteronormative subordination.

There has been a welcome evolution from the ‘hazard paradigm’ to the ‘social paradigm’ in understanding vulnerability in disasters. The ‘hazard paradigm’ failed to engage with any causal analysis of the complex sociolegal factors which influence vulnerability – which is concerning for LGBTQ+ individuals which diverge from the heterosexist social norms and are subject to intense and sustained violations of basic rights in many States. The ‘social paradigm’ better engages with the historical, legal, social, and political power which exacerbates the vulnerability of certain groups in society. The PAR model outlines a well-established framework of vulnerability which engages root causes, dynamic pressures, and unsafe conditions in constructing an understanding of who may be vulnerable in a disaster.<sup>146</sup> However, a deeper analysis of the ‘social paradigm’ uncovers serious deficiencies in its assessment of LGBTQ+ vulnerability. It is apparent that most of the literature is focused on essentialist approaches which attempts to neatly define certain groups who face exacerbated levels of vulnerability, notably deferring to a gender binary in constructing vulnerable groups. LGBTQ+ people are very rarely considered in these lists, at best their inclusion is only indicated by a somewhat embarrassing ‘etc.’.

Queer theory provides a set of methods which aims to recognise LGBTQ+ diversity and to challenge systems of domination which preserve heteronormativity as the norm. The deference to essentialism within mainstream vulnerability analysis revolves around a gender binary which assumes heterosexuality within the social, cultural, and legal order. This deference problematically leads to a conflation of sex and gender – whereby biological sex (assigned male or female at birth) is equated to the social experience of gender.<sup>147</sup> This conflation denies the experience of diverse gender identities in vulnerability analysis and uniquely exacerbates the vulnerability of LGBTQ+ individuals. Mainstream vulnerability analysis is often insistent on the impact of systems of power as a root cause of vulnerability but its focus on essentialised experience revolving around a gender binary which excludes an analysis of heteronormativity. This leads to an analysis of queer narratives within disasters to understand the importance of incorporating LGBTQ+ lived realities to challenge discrimination. Narratives expose

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<sup>146</sup> See: Blaikie and others (n 4) 51.

<sup>147</sup> Valdes (n 16) 12-113.

heteronormative systems of social, legal, and political order.<sup>148</sup> Finally, intersectional, and multidimensional perspectives offer deeper critiques and challenge the gender binary focused essentialism of vulnerability analysis. These perspectives note the importance of identifying patterns of discrimination which transcend homogenous identity categories. Further, they call for a socio-structural analysis of what lies behind individual vulnerability – how powerful systems are constructed to subordinate LGTBQ+ individuals. To reiterate, the problems is not essentialism per say, it is practically difficult not to identify vulnerable groups and this has merits in ensuring a framework which can practically inform DRR. Instead, the problem is one-dimensional essentialism in mainstream vulnerability analysis which does not call for deeper analysis of the systemic subordination which entrenches the vulnerability of the group.

As discussed in the introduction to the social paradigm (‘mainstream vulnerability analysis’), *Scott* remarks that it is incumbent to “recognise within social context, certain individuals may be more vulnerable than others”.<sup>149</sup> The following chapter will explore whether IHRL pursues a more inclusive agenda which reflects the goals of queer theory to recognise and challenge the social context which exacerbates LGTBQ+ vulnerability.

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<sup>148</sup> See: Akumu (n 110); Asia Pacific Transgender Network (n 119).

<sup>149</sup> *Scott* (n 52) 127.

### 3 Queering Human Rights-Based Approaches of Vulnerability

In IHRL, States have an obligation to respect, protect, fulfil and promote all human rights without discrimination. The UDHR proclaims that “human beings are born free and equal” and that “everyone is entitled to all the rights and freedoms set forth in the declaration”.<sup>150</sup> Climate related disasters pose a significant challenge to this universality, impacting directly and indirectly, a wide range of internationally protected human rights. The SFDRR notes the need to address human rights as a guiding principle:

“Managing the risk of disasters is aimed at protecting persons and their property, health, livelihoods and productive assets, as well as cultural and environmental assets, while *promoting and protecting all human rights*”.<sup>151</sup>

In 2009, the ICJ published a Sexual Orientation and Gender Identity Casebook which identifies universality, equality, and non-discrimination as cornerstones of IHRL.<sup>152</sup> Disasters pose an existential threat to these principles and LGBTQ+ individuals find themselves particularly exposed to human rights violations. To reiterate, vulnerability and human rights are interrelated with some individuals more vulnerable than others, there is a need for the law to respect and protect the natural dignity of all individuals, particularly the most vulnerable.<sup>153</sup> Mainstream vulnerability analysis is demonstrably flawed due to gaps in which individuals and groups fill in according to their biases.<sup>154</sup> These biases further entrench the vulnerability of LGBTQ+ communities by preserving systems of heteronormative power. This chapter cannot close these gaps, but it can examine the interaction of human rights with vulnerability – to analyse whether an IHRL approach to mainstream vulnerability analysis has transformative potential to ensure LGBTQ+ inclusion in DRR.

This chapter examines the role of dominant international human rights systems – discerning how they interact with LGBTQ+ rights. In doing so, one examines whether legal discourse is grounded in heteronormativity or if a human rights-based approach offers an alternative to challenge the normal, dominant, and hegemonic. The first section examines the role of the European Court on Human Rights (‘ECtHR’). There will be a detailed examination of the jurisprudence pertaining to LGBTQ+ persons – looking particularly at the distinction between private and family under Article 8 of the European

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<sup>150</sup> UDHR preamble.

<sup>151</sup> Sendai Framework for Disaster Risk Reduction 2015-2030 A/RES/69/283.

<sup>152</sup> Alli Jernow and others, *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook* (International Commission of Jurists) <<https://www.icj.org/wp-content/uploads/2012/05/Sexual-orientation-gender-identity-and-Justice-report-2011.pdf>> accessed 19 May 2022 47.

<sup>153</sup> Masferrer and García-Sánchez (n 41) 5.

<sup>154</sup> Kelman, *Disaster by Choice* (n 1) 44.

Convention on Human Rights ('ECHR'). Further, this section examines the role of the Court in DRR. The role of the ECtHR remains rather limited; however, it has established important principles which point to a degree of judicial restraint in this area of the law. Finally, a hypothetical case will be posed to the reader – based on a real disaster in Italy but with a fictional claim of an LGBTQ+ couple. The applicants bring a claim until Article 14 (non-discrimination) in conjunction with Article 8 (right to a private and family life) of the Convention. This thought experiment will tie together LGBTQ+ and disaster risk jurisprudence to uncover the effect of a queer human rights-based approach in DRR. The second section will examine the role of the UN. It opens by noting the important advances of LGBTQ+ rights, with positive developments in the jurisprudence of the UN Human Rights Committee, the appointment of a UN Independent SOGI Expert in 2016 and the UN Free and Equal Campaign to strengthen the human rights framework for LGBTQ+ individuals.<sup>155</sup> This is followed by an analysis of DRR, which recognises LGBTQ+ persons but ultimately fails in the needed systemic engagement to challenge heteronormativity in disasters. By constructing LGBTQ+ individuals and their vulnerability around a gender binary there is a failure to substantively inform non-discrimination around the unique experiences of LGBTQ+ communities to protect and promote basic rights. Finally, the operational context of DRR is examined by assessing the Sphere Handbook 2018 and the IASC Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action.<sup>156</sup> The final section turns to the Yogyakarta Principles as an important document which reflects the basic rights of LGBTQ+ people. Whilst there are positive developments in the Principles, it ultimately defers to a heteronormative framework of IHRL by failing to critically engage with the social contexts which constrain LGBTQ+ rights.

### 3.1 The European Court of Human Rights

The ECHR reaffirms a profound belief in the fundamental freedoms which are the foundation of justice and peace in the world, reinforcing a need for collective enforcement of certain rights of the UDHR.<sup>157</sup> An enforcement of rights entails engaging with the fundamental principles of universality, equality, and non-discrimination in IHRL. The following analysis will examine how the ECtHR informs on LGBTQ+ rights and DRR to analyse whether these core principles are upheld and LGBTQ+ rights are protected in disasters.

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<sup>155</sup> See: *Toonen v Australia* (1994) CPR/C/50/D/488/1992, UN Human Rights Committee (HRC); *Young v Australia* (2003) CCPR/C/78/D/941/2000, UN Human Rights Committee (HRC); UN Human Rights Council, 'Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity' (2016) UN Doc A/HRC/RES/32/2; UN Human Rights Office of the High Commissioner, 'UN Free & Equal Campaign - Stand up for Equal Rights & Fair Treatment for Lesbian, Gay, Bi, Trans & Intersex People Everywhere...' <<https://www.unfe.org>> accessed 7 May 2022.

<sup>156</sup> Sphere Project (n 28); Inter-Agency Standing Committee (n 28).

<sup>157</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR) 1950.

### 3.1.1 LGBTQ+ Jurisprudence

*Seglah* and *Blanchard* observe that LGBTQ+ households as a group are ‘hyper-marginalised’ in disaster risk policy, planning and implementation; they face exclusion from certain forms of aid provision due to narrow and heteronormative assumptions which constructs family unity.<sup>158</sup> If one is to assess the impact of LGBTQ+ rights obligations on DRR policy, planning, and implementation it becomes necessary to define the meaning of family. The right to respect for “private and family life” is protected under Article 8 of the ECHR. Private life under Article 8 comprises the right to establish and develop relationships with other humans in the emotional field; giving the broadness of the phrase, early judgements show “private life” to be interpreted to recognise same-sex relationships but defining same-sex couples under “family life” has proved challenging.<sup>159</sup> This distinction is important as the ‘family’ holds an important place in society, and the construction of the family in law helps inform us about the extent of engagement of IHRL within DRR. *Johnson* emphasizes that by confining the protection of a same-sex relationship to the private sphere, there is “limited consideration of the social, structural and institutional processes through which social exclusion and discrimination are maintained on the grounds of sexual orientation.”<sup>160</sup> This subsection will explore how the ECtHR has developed the notion of LGBTQ+ family life and what this means for the protection of LGBTQ+ families in the public sphere of DRR.

The Court has developed an uneven engagement with LGBTQ+ rights - conservative, heteronormative interpretations of the family are placed alongside more liberal approaches which have expanded beyond the heteronormative nuclear family life. *Gonzalez-Salzberg* observes that the Court has played a key role in the social construction of the family within the European human rights framework.<sup>161</sup> *Cahn* explains the crucial role of the law in developing the social construction of families:

“By defining who can marry who, assigning parenthood and identifying the father and mother, establishing parental rights, legal protections of the privacy of family relationships develops a structure to allocate decision making with respect to the parent, child and State.”<sup>162</sup>

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<sup>158</sup> *Seglah* and *Blanchard* (n 9) 9.

<sup>159</sup> Sarah Lucy Cooper, ‘Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights’ Jurisprudence on LGBT Rights’ (2011) 12 *German Law Journal* 1746, 1756.

<sup>160</sup> Paul Johnson, ‘An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights’ (2010) 10 *Human Rights Law Review* 67, 78.

<sup>161</sup> Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (Hart Publishing 2018) 95.

<sup>162</sup> Naomi Cahn, ‘The New Kinship’ (2012) 100 *Georgetown Law Journal* 367, 381.



This has led to a hierarchy of relationships within the ECHR - at the top are the traditional heterosexual married couples, moving through parenting of non-married couples down to more removed family relationships at the bottom of the hierarchy.<sup>163</sup> The approach ensures the law is complicit in its support of societal processes which set up people, groups within society, and communities so that they are harmed by environmental activity and nature becomes hazardous.<sup>164</sup> This is set against a backdrop of mainstream vulnerability analysis which in recent years has focused on the social processes through the lens of the 'family' to include multiple perspective into DRR.<sup>165</sup> This leads to a questioning regarding the role of human rights and whether they can be used as a framework to inform the inclusion for LGBTQ+ families within a human rights-based approach in DRR. The first port of call in building this picture is an assessment of how the Court has developed its jurisprudence in response to LGBTQ+ rights.

Traditionally, the ECtHR defines family life according to heterosexual (male-female) marriage. In *Mata Estevez v. Spain* the Court reiterated a long-standing principle that long-term homosexual relationships between two men do not fall within the scope of Article 8 of the Convention.<sup>166</sup> The Court highlighted the importance of the distinction between private and family life – whilst the applicant's emotional and sexual life fell within the meaning of Article 8(1) it could (even if there was a *discriminatory interference* with the applicant's private life in refusing to grant a survivor's pension after his partners death) be viewed as a justified interference under Article 8(2) as domestic law pursued the legitimate aim of protecting the family based on marriage.<sup>167</sup> *Simpson v. the United Kingdom* concerns the tenancy rights of a lesbian surviving partner.<sup>168</sup> Here, the Commission expressly states that:

“The family (to which the relationship of heterosexual unmarried couples living together as husband and wife can be assimilated) merits special protection in society and it see no reason why a High Contracting Party should not afford particular assistance to families [...] Commission therefore accepts the difference in treatment between the applicant and somebody in the same position whose partner had been of the opposite sex can be objectively and reasonably justified.”<sup>169</sup>

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<sup>163</sup> Bernadette Rainey, *Jacobs, White & Ovey: The European Convention on Human Rights* (Oxford University Press 2017) 373.

<sup>164</sup> Kelman, 'Disaster Vulnerability by Demographics?' (n 95) 18.

<sup>165</sup> Buckle, Mars and Smale (n 69) 10.

<sup>166</sup> *Mata Estevez v Spain* 2001-VI Eur. Ct. H. R. 10 May 2001 4.

<sup>167</sup> *ibid* 4.

<sup>168</sup> *Simpson v the United Kingdom* DR 47 Eur. Comm'n H. R 14 May 1986.

<sup>169</sup> *ibid* para 7.

*Mata-Estevez* and *Simpson* both illustrate a narrow, heteronormative approach to the definition of “family life”. Indeed, it serves to reiterate that a failure to consider the family life (public identity) of LGBTQ+ persons hinders human rights law from engaging with the sociolegal institutional processes which impact their vulnerability.<sup>170</sup> *Blaikie et al.* reminds us of the importance of this engagement in mainstream vulnerability analysis – viewing the root causes of vulnerability as a function of economic, social, and political structures; and also legal definitions and enforcement of rights, gender relations and other elements of the ideological order.<sup>171</sup> In maintaining the definition of LGBTQ+ people in the private sphere, the Court reinforces a systemic approach to human rights which excludes LGBTQ+ people and supports a legal order which maintains heteronormativity. Ergo, it becomes necessary to understand the evolution of jurisprudence of family life and whether human rights have ‘caught up’ to ensure the systemic engagement needed to build a universal human rights-based approach for mainstream vulnerability analysis.

For the ECtHR to successfully inform on LGBTQ+ rights in mainstream vulnerability analysis it would have to recognise the public identity of LGBTQ+ individuals. Recognising public identity would require States to take actions not merely “to respect homosexual individuals, but also for them to take actions to ensure that others respect LGBT rights.”<sup>172</sup> It is well established that the Court’s protection of homosexuality is grounded in its conception as a private matter. In *Dudgeon v the United Kingdom*, the ECtHR found that legislation criminalising same-sex sexual activity in Northern Ireland was unacceptable under the Convention as “offences are committed whether the act takes place in public or in private, whatever the age or relationship of the participants involved, and whether or not the participants are consenting”.<sup>173</sup> The ECtHR conceived the criminalisation of homosexual acts as the criminalisation of homosexuality as a private identity.<sup>174</sup> *Johnson* stresses that a consequence of this reasoning is homosexuals gain access to privacy rights when they keep their sexual acts hidden from public which is problematic as it maintains the exclusion of expressions of homosexuality, in effect laying foundations for structures of oppression.<sup>175</sup> *Johnson* highlights that in developing the public identity can help ensure protection against discrimination for LGBTQ+ people -

“Respect is granted to the right to establish and develop relationships with other human beings, this would only be granted to a certain degree [...] often the decision by public authorities about the degree to which private and public rights should meet (or, more precisely, not meet) that

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<sup>170</sup> *Johnson* (n 160) 77.

<sup>171</sup> *Blaikie and others* (n 4) 52.

<sup>172</sup> *Gonzalez-Salzberg* (n 161) 71.

<sup>173</sup> *Dudgeon v the United Kingdom*, Series A no 45 22 October 1981, para 39.

<sup>174</sup> See discussion: *Gonzalez-Salzberg* (n 166) 63-65.

<sup>175</sup> *Johnson* (n 160) 80.

form the basis on which contracting states continue to discriminate against non-heterosexuals in related to a number of civil arrangements.”<sup>176</sup>

The wording of this statement is important – it suggests there is a sliding scale between a private and public identity under Article 8 of the Convention. This scale can have impacts on the ability of the ECtHR to ensure systemic engagement with discriminatory practices. In *Bayev and others v Russia*, the ECtHR found that Russia’s legislative ban on the promotion of homosexuality was contrary to Article 10 (freedom of expression) in conjunction with Article 14 (non-discrimination).<sup>177</sup> The Court went on to reason that the recognition of the public identity of homosexuality leads to a requirement that States not only respect homosexual individuals but that they take actions to ensure respect for LGBTQ+ rights.<sup>178</sup> The recognition of LGBTQ+ persons as possessing public identity shatters the notion of ‘privacy’ being used as a tool to assert the “right” to dissociate from LGBTQ+ minorities in a bid to protect the privacy of the majority and push against reforms towards equality.<sup>179</sup> In *Schalk*, the public identity of LGBTQ+ persons was recognised in ensuring their incorporation into a protected right to family life -

“93. The Court notes that since 2001, when the decision in *Mata Estevez* was given, a rapid *evolution of social attitudes* towards same-sex couples has taken place in many member States. 94. [...] the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, *falls within the notion of “family life”*, just as the relationship of a different-sex couple in the same situation would.”<sup>180</sup>

On initial inspection one would welcome this development. It appears the ECtHR has granted LGBTQ+ people the right to a family life and the consequent public identity necessary to challenges the structures of subordination which heavily impact on the rights of LGBTQ+ people in a disaster. Alas, the ECtHR decided there was no interference with the applicants right to a family life in this case –

“States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples. Nevertheless, the applicants appear to argue that if a State chooses to provide same-sex couples with an

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<sup>176</sup> *ibid* 79.

<sup>177</sup> *Bayev and Others v Russia* Apps Nos 67667/09, 44092/12 and 56717/12, 20 June 2017 paras 84 and 92.

<sup>178</sup> *Gonzalez-Salzberg* (n 161) 71.

<sup>179</sup> *Valdes* (n 16) 370.

<sup>180</sup> *Schalk and Kopf v Austria* App No 30141/04 24 June 2010 paras 93-94.

alternative means of recognition, it is obliged to confer a status on them which – though carrying a different name – corresponds to marriage in each and every respect. The Court is not convinced by that argument. It considers on the contrary that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition.”<sup>181</sup>

The dissenting opinion highlighted the inconsistencies of this reasoning –

“Having identified a “relevantly similar situation” (see paragraph 99 of the judgment), and emphasised that “differences based on sexual orientation require particularly serious reasons by way of justification” (see paragraph 97), the Court should have found a violation of Article 14 of the Convention taken in conjunction with Article 8 because the respondent Government did not advance any argument to justify the difference of treatment, relying in this connection mainly on their margin of appreciation (see paragraph 80).”<sup>182</sup>

Indeed, whilst the ECtHR has recognised the public identity of same-sex couples, this is very limited and there are significant gaps in the social rights of non-heterosexuals. In reaching this decision the ECtHR has promoted a hierarchy of rights – a separate but equal policy around LGBTQ+ family life which preserves the heteronormative interpretations of marriage. This separate but equal policy deployed by the Court ensures the preservation of heteronormative power. In determining the impact of the preservation of heteronormative power on mainstream vulnerability analysis it first serves to describe the jurisprudence of the Court in DRR before engaging in a hypothetical case which combines the jurisprudence.

### **3.1.2 Disaster Risk Reduction Jurisprudence**

The right to life is a central right across many human rights frameworks, the UDHR recognises that “everyone has the right to life, liberty and security of person”, the ICCPR states that “every human has the inherent right to life”, and the ECHR ensures “no one shall be deprived of life intentionally.”<sup>183</sup> Climate related disasters, indisputably, pose an existential threat to this fundamental right with the IPCC reporting with high confidence in its latest report that “climate change and related extreme events will significantly increase ill-health and premature deaths”.<sup>184</sup> The engagement of the human rights

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<sup>181</sup> *ibid* para 108.

<sup>182</sup> *ibid* dissenting opinion, para 8.

<sup>183</sup> UDHR; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>184</sup> Intergovernmental Panel on Climate Change (n 31).

frameworks with DRR is being informed by a growing body of human rights jurisprudence – an examination of the caselaw of the ECtHR as one of the most authoritative sources of human rights allows us to grasp the degree of engagement with DRR policies and practices.

In *Budayeva and Others v Russia*, the ECtHR examined several deaths of applicants' relatives after serious mudslides in the Caucasus region as well the applicants exposure to life-threatening risk due to a policy and planning which led to an absence of mudslide defences.<sup>185</sup> The applicant “complained that authorities had failed to comply with their positive obligations to take appropriate measures to mitigate the risks to their lives against the natural hazards”.<sup>186</sup> The ECtHR notes that these positive obligations entail taking procedural steps to safeguard lives within their jurisdiction – including an obligation to adopt regulatory measures, to adequately inform the public about an impending hazard, and to ensure a judicial enquiry on the occasion of deaths.<sup>187</sup> The ECtHR affirms that the choice of particular practical measures in these disasters is largely open to the State to decide upon, with the ECtHR granting a wide margin of appreciation to ensure an impossible or disproportionate burden is not imposed on the authorities.<sup>188</sup> The ECtHR went on to defer to the operational choices which the State must make in terms of priorities and resources; this is particularly emphasized in relation to natural disasters, which were viewed as beyond human control and do not call for the same extent of State involvement as dangerous activities of man-made nature.<sup>189</sup> In *Öneryildiz v Turkey*, the ECtHR examined a methane explosion at a household-refuse tip which was adjacent to ‘slum’ areas in the Ümraniye District, the explosion resulted in thirty-nine deaths with the applicants submitting the actions of the State resulted in the deaths of their relatives, consequently violating Article 2 of the Convention.<sup>190</sup> The reasoning of the Court was similar to *Budayeva*, noting that it was “not its task to substitute for the views of local authorities its own view of the best policy to adopt in dealing with social, economic and urban problems” and not wanting to impose a “disproportionate burden”, resulting in “wide margin of appreciation” afforded to State to make these policy decisions.<sup>191</sup>

The ECtHR has made clear that if a State has fulfilled its procedural duties, it has discretion in deciding how to balance environmental protection against other societal interests.<sup>192</sup> Indeed, if the Court is willing to deploy the margin of appreciation to some of the most fundamental rights in the ECHR (e.g. the right to life) then one must consider the broader ramifications and what this says about the role of a human rights framework in DRR, and indeed the consequences for LGBTQ+ persons. We see a

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<sup>185</sup> *Budayeva and Others v Russia* (2014) 59 EHRR 2.

<sup>186</sup> *ibid* para 116.

<sup>187</sup> *ibid* paras 128-131.

<sup>188</sup> *ibid* para 175.

<sup>189</sup> *ibid* para 135.

<sup>190</sup> *Öneryildiz v Turkey* (2004) 41 EHRR 20.

<sup>191</sup> *ibid* para 107.

<sup>192</sup> John Knox, ‘Environmental Disasters and Human Rights’ in Jacqueline Peel, David Fisher and Stanford University (eds), *The Role of International Environmental Law in Disaster Risk Reduction* (Brill Nijhoff 2016) 7.

clear deference to the State as the key duty-bearer with the Court indicating its role is largely subsidiary in securing rights – articles 1 and 13 of the ECHR making it clear the primary responsibility of securing rights and freedoms lies with the State. The judicial output of the ECtHR promises universal standards for the protection and promotion of human rights, but this is compromised by the margin of appreciation and is based on the notion that societies are entitled to flexibility in resolving inherent conflicts between individual rights and national interests/moral conventions.<sup>193</sup> The moral relativism of the margin of appreciation poses a serious challenge to the universality of human rights, which can undermine the very authority of human rights bodies. *Benvenisti* argues that the margin of appreciation has been expanded beyond its initial borders of national security concerns, leading to inappropriate conclusions in balancing minority interests with a margin of appreciation used to assist the majorities in burdening politically powerless minorities.<sup>194</sup> We see in the previous section that LGBTQ+ people are vulnerable minorities within the human rights framework who are subjected to the heteronormative disbursement of power yet there is little in the Court’s reasoning on DRR to mitigate the effects of this systemic discrimination. To illustrate the effects of heteronormativity on LGBTQ+ individuals in disaster risk jurisprudence the following section will pose a hypothetical case to determine how the Court may formulate its reasoning.

### **3.1.3 X v Italy: A Queer Thought Experiment**

To illustrate the effects of heteronormativity on LGBTQ+ individuals in DRR jurisprudence it is necessary to engage with a queer imagining of the caselaw of the Court. The first section will first present a fictional case which poses a case of discrimination against a same-sex couple in a disaster. The facts will tie together jurisprudence of the ECtHR of LGBTQ+ rights and in DRR. The second section will analyse the effect of this approach – determining a clear the inability of the Court to engage with dominant systems of subordination to meet the challenges posed by queer theory. This will determine that a human rights-based approach of the ECtHR is incapable of the systemic approach necessary to protection marginalised queer communities in a disaster.

#### X v Italy: Judgement

##### FACTS

In Sicily a wildfire broke out 7 June 2020. The region of Motta Sant’Anastasia was severely impacted, and 12 houses were destroyed. The applicants are a same-sex male couple who are in a civil partnership, their house was destroyed in the fire. In the aftermath of the crisis, the other 11 households with married

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<sup>193</sup> Eyal Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’ (1999) 31 *New York University Journal of International Law and Politics* 843, 844.

<sup>194</sup> *ibid* 847.

couples qualified for the “State Emergency Relief Fund”. Italy funds this through a special taxation regime set up in 2012 to respond to the increasing number of wildfires that were destroying households. Married couples are automatically enrolled in the scheme through a special tax regime, they contribute 1.3% of their gross income and in the event they lose their primary residence in a disaster the State will cover 100% of rebuilding costs. Further, anyone over the age of 18 years may voluntarily decide to pay this tax, with household rebuilding costs covered in its entirety if two adults in any given household are contributing to this tax regime or one adult in a single member household.

Italy has not legalised same-sex marriage. Civil partnerships were legalised on 20 May 2016 and the applicants entered a civil partnership on 15 November 2016. The applicants were not voluntarily contributing to the tax regime and did not qualify for the emergency relief fund. Consequently, they have not been able to rebuild their house and have since left their left their jobs in Sicily, moving to Milan in search of employment that would facilitate their financing of the rebuild. The applicants have written to the local authority stating they were not made aware of the tax regime and the application process was complicated for people looking to voluntarily enrol.

#### ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

The applicants complained under Article 14 taken in conjunction with Article 8 of the Convention that they were discriminated against on account of their sexual orientation, since they were denied the right to marry and were not automatically enrolled in the “Emergency Tax Relief Fund”.

#### COURT ASSESSMENT

The Court is unlikely to give its view on how to deal with social problems relating to disasters -

“The Court acknowledges that it is not its task to substitute for the views of the local authorities its own view of the best policy to adopt in dealing with the **social**, economic and urban problems [...] authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources [...] this results from the wide margin of appreciation States enjoy, as the Court has previously held, in **difficult social and technical spheres** such as the one in issue in the instant case.”<sup>195</sup>

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<sup>195</sup> *Öneryildiz v. Turkey* (n 190) para 107.

The Court is likely to acknowledge there is no European consensus on same-sex marriage – in the Council of Europe a minority of States (sixteen) have legalised equal marriage. The subsequent rights attached to marriage would therefore not be applicable to those in other relationships.

“Having noted the rapidly developing European consensus which had emerged in the previous decade, but that there was not yet a majority of States providing for legal recognition of same-sex couples [...] question to be one of evolving rights with no established consensus, where States enjoyed a margin of appreciation in the timing of the introduction of legislative changes.”<sup>196</sup>

The State maintains a margin of appreciation regarding the exact status they confer on those in civil partnerships. The Court grants flexibility to the States in distinctions between those in a marriage and those in a civil partnership. A difference in taxation policy would likely fall within this margin – particularly as same sex couples are not restricted from accessing this tax regime.

“The applicants appear to argue that if a State chooses to provide same-sex couples with an alternative means of recognition, it is obliged to confer a status on them which – though carrying a different name – corresponds to marriage in each and every respect. The Court is not convinced by that argument. It considers on the contrary that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition. [...] the Court does not see any indication that the respondent State exceeded its margin of appreciation in its choice of rights and obligations conferred by registered partnership.”<sup>197</sup>

## DECISION

No violation of Article 14 in conjunction with Article 8 of the Convention.

### X v Italy: Analysis

A hands-off approach by the ECtHR regarding substantive policy choices, European consensus, and a margin of appreciation. These tools have been well developed by the ECtHR and appear consistently across its caselaw. They reflect the living instrument doctrine, which the ECtHR observed in *Tyrer v the United Kingdom* as the Convention which must be interpreted in light of present-day conditions, the ECtHR cannot but be influenced by the developments and commonly accepted standards of member

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<sup>196</sup> *Oliari and Others v Italy* Apps Nos 18766/11 and 36030/11, 21 July 2015 para 163.

<sup>197</sup> *Schalk and Kopf v. Austria* (n 180) para 108.



States.<sup>198</sup> The consequence of this is the ECtHR refrains from dictating the concrete measures needed to accommodate minorities, the majoritarian reasoning of the ECtHR diminishes the effective rights dimension of minorities' substantive citizenship.<sup>199</sup> Whilst the scenario posed above may be particularly niche it makes an important broader point - *Romero* observes that queer legal theory exposes the conflict between "queer" and the "law" – in doing so it reflects dominant societal rules and norms.<sup>200</sup> The ECtHR reflects this heteronormative dominance by permitting the differently treatment of those in relevantly similar situations.<sup>201</sup> The ECtHR does not question the systems which underly this dominance and which lead to what *Seglah* and *Blanchard* view as a hyper-marginalisation of LGBTQ+ persons and families.<sup>202</sup>

The ECtHR is reliant on consensus analysis which uses the margins of appreciation as a device to legitimise its moral view, instead of engaging with the proportionality of the difference of treatment for those in a relevantly similar situation.<sup>203</sup> This leads to continued appreciation for heteronormativity in society – and indeed in DRR (as discussed in the previous chapter). In that way, the "law supports the heteronormative discourses in our culture and our society that elevate and protect heterosexual social arrangements even as they cause hardship to the living outside those boundaries."<sup>204</sup> If the ECtHR is to effectively inform on vulnerability it would need to ensure the most marginalised in society are accounted for and protected from the influence of dominant subordination. There is little the ECtHR can do to counter to challenge dominant systems such as heteronormativity. If a human rights-based approach were to effectively inform on LGBTQ+ rights in a disaster it would perhaps need to consider legal protection, *in spite* of present-day conditions.

### 3.2 The United Nations

*John Knox*, the former UN Special Rapporteur on human rights and climate change made the following observations on communities vulnerable to environmental disasters –

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<sup>198</sup> *Tyrer v the United Kingdom* App No 5856/72, 25 April 1978 para 32.

<sup>199</sup> Kristin Henrard, 'Integration Reasoning at the ECtHR: Challenging the Boundaries of Minorities' Citizenship' (2020) 38 *Netherlands Quarterly of Human Rights* 55.

<sup>200</sup> Adam P. Romero, 'Methodological Descriptions: "Feminist" and "Queer" Legal Theories' in Fineman, Jackson and Romero (n 112) 191.

<sup>201</sup> See: *Schalk and Kopf v. Austria* (n 180) para 8 dissenting opinion "Having identified a "relevantly similar situation" (see paragraph 99 of the judgment), and emphasised that "differences based on sexual orientation require particularly serious reasons by way of justification" (see paragraph 97), the Court should have found a violation of Article 14 of the Convention taken in conjunction with Article 8 because the respondent Government did not advance any argument to justify the difference of treatment, relying in this connection mainly on their margin of appreciation (see paragraph 80). However, in the absence of any cogent reasons offered by the respondent Government to justify the difference of treatment, there should be no room to apply the margin of appreciation."

<sup>202</sup> *Seglah and Blanchard* (n 9) 9.

<sup>203</sup> *Johnson* (n 160) 75.

<sup>204</sup> Anna-Maria Marshall, Mary Bernstein and Scott Barclay, *Queer Mobilizations: LGBT Activists Confront the Law* (New York University Press 2009) 14.

“Applying human rights rhetoric to climate change may draw attention to its effects on particular communities, convince those not yet directly affected that it threatens environmental disaster on an unprecedented scale and makes individuals and States more willing to combat it.”<sup>205</sup>

The implication is that human rights can play a key role in drawing attention to marginalised and vulnerable communities. This chapter will explore how the UN draws attention to vulnerable LGBTQ+ communities, and whether its human rights rhetoric can address sexual and gender diversity within the LGBTQ+ community, and challenge systems of heteronormative subordination to inform inclusive DRR. The first subsection focuses on the development of LGBTQ+ rights within the UN. This subsection opens by analysing the jurisprudence of the UN Human Rights Committee and the significant advances made for basic rights for LGBTQ+ communities. There has also been significant work to recognise the sexual and gender diversity of LGBTQ+ communities by using more inclusive language (beyond binary same-sex couples) and developing dialogue and intersectionality to ensure deeper legal analysis of the vulnerabilities and challenges facing LGBTQ+ communities. The UN has made grand statements on LGBTQ+ rights in recent years but this warrants deeper analysis to understand how these rights are protected and promoted in DRR. The second subsection analyses how the UN has developed human rights-based DRR – constructing an understanding on how LGBTQ+ persons are integrated into this framework. There are significant deficiencies in the UN’s approach to LGBTQ+ rights in DRR. There are clear instances of gender stereotyping, binary understandings which ignore sexual and gender diversity, and a failure to address systemic heteronormative subordination through an intersectional and multidimensional lens. The final section examines how the UN informs humanitarian responses within DRR and how LGBTQ+ individuals are incorporated into this framework. The IASC Guidelines and Sphere Standards are key frameworks which seek to promote universal human rights in DRR policy, planning and implementation.<sup>206</sup> Whilst these frameworks make notable mentions of LGBTQ+ rights a deeper analysis uncovers a lack of substantive engagement. There is a failure to challenge essentialism with a notable deference to a gender binary that fails to address the systemic subordination of LGBTQ+ communities.

### **3.2.1 LGBTQ+ Rights**

In recent years, the UN has taken several affirmative steps to recognise the basic rights of LGBTQ+ individuals. The UN Human Rights Committee is a body of independent experts that monitors the implementation of the ICCPR and has made significant contributions to the rights of same-sex couples

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<sup>205</sup> John H Knox, ‘Climate Change and Human Rights Law’ (2009) 50 *Virginia Journal of International Law* 163, 166.

<sup>206</sup> See: Inter-Agency Standing Committee (n 28); Sphere Project (n 28).

within the UN framework.<sup>207</sup> *Toonen v Australia* was a landmark case which resulted in the repeal of Australia's last sodomy law in Tasmania.<sup>208</sup> The Committee reasoned that sexual orientation should be understood as a status which should be afforded protection from discrimination under Articles 2 (universality), 26 (non-discrimination) and 17 (freedom from unlawful interference with privacy, family, home or correspondence) of the ICCPR.<sup>209</sup> It incorporated the right to freedom from arbitrary interferences with privacy on the ground of sexual orientation.<sup>210</sup> This decision was the first of its kind by any international tribunal and created the international basis for LGBTQ+ rights.<sup>211</sup> More recently, the ruling of the Committee in *Young v Australia* concerned the Australian Veteran's Entitlement Act which granted pensions to a person who was dependent on a veteran even if they were not married, as long as they met the conditions of being the "opposite sex" and engaged in a "marriage-like relationship."<sup>212</sup> The Committee found that the State party provided no argument or arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction had been advanced by the State.<sup>213</sup> In a concurring opinion, Committee members Ruth Wedgwood and Franco De Pasquale noted that the Committee has not purported to canvas the full array of "reasonable and objective" arguments that other states and other complainants may offer in the future on these questions in the same or other contexts and indeed that the Committee should be mindful of what it has, and has not, decided in each case.<sup>214</sup> The UN has canvassed a broader array of in recent years to recognises the basic rights of LGBTQ+ individuals beyond the rights of same-sex couples. Further, the UN has developed important principles to address systemic discrimination which threaten LGBTQ+ rights.

In 2013, the UN launched the Free and Equal (UNFE) campaign – noting the continued criminalisation of same-sex relationships and widespread discrimination against LGTBQ+ people.<sup>215</sup> The UNFE Impact Report 2020 notes the continued push for diverse societies that are inclusive of LGBTQ+ people and stronger legal protection against violence and discrimination based on sexual orientation, gender identity and sex characteristics.<sup>216</sup> In pushing for a more coherent and detailed

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<sup>207</sup> See: Office of the United Nations High Commissioner on Human Rights (OHCHR), 'Human Rights Committee' <<https://www.ohchr.org/en/treaty-bodies/ccpr>> accessed 26 April 2022.

<sup>208</sup> *Toonen v. Australia* (n 155).

<sup>209</sup> *ibid* para 8.5.

<sup>210</sup> *ibid* para 8.6.

<sup>211</sup> Emma Mittelstaedt, 'Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations' (2008) 9 *Chicago Journal of International Law* 353, 360.

<sup>212</sup> *Young v Australia* (n 155) 3.

<sup>213</sup> *ibid* 7.

<sup>214</sup> *ibid* 17-18.

<sup>215</sup> UN Human Rights Office of the High Commissioner (n 155).

<sup>216</sup> UN Human Rights Office of the High Commissioner, 'UN Free & Equal Campaign - Impact Report 2020' (2020).

framework for non-discrimination and equality, the UN has expanded the protections granted to LGBTQ+ rights holders. In June 2016, the UNHRC appointed an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.<sup>217</sup> The mandate involves overcoming violence and discrimination to implement existing human rights instruments, raising awareness based on sexual orientation and gender identity, and identifying the root causes of violence and discrimination.<sup>218</sup> In a 2017 report on social inclusion, the Independent Expert notes they are guided by two principles:

“The first is dialogue. For the preparation of the present report the mandate holder sought input from a wide range of stakeholders: he called for written submissions on 6 May 2019 and as a result some 50 submissions were received from Member States, civil society organizations, national human rights institutions, academics and an agency of the United Nations.

[...]

The second guiding principle is intersectionality. Adequate analysis of the causes and consequences of violence and discrimination requires an intersectional lens, as they are experienced in ways that are compounded by factors such as ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability and property ownership.”<sup>219</sup>

These principles are mirrored by the approach of queer theory in Chapter 2 (see section 2.3) – which as established calls for the use of narratives and intersectionality as tools to promote LGBTQ+ rights.<sup>220</sup> In a report on violence and discrimination during the COVID-19 pandemic, the Independent Expert notes a range of human rights concerns amplified during the pandemic which focused on the lived realities of LGBTQ+ people and addressing the intersecting factors which exacerbate vulnerability.<sup>221</sup> LGBTQ+ persons are exposed to violence at home, particularly with a risk of being “outed” due to stay at home orders and noted increases in domestic violence in many States.<sup>222</sup> Further, LGBTQ+

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<sup>217</sup> UN Human Rights Council, ‘Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity’ (n 155).

<sup>218</sup> *ibid.*

<sup>219</sup> UN General Assembly, ‘Report on Socio-Cultural and Economic Inclusion of LGBT People’ (2019) UN Doc A/74/181 paras 3, 4.

<sup>220</sup> Valdes (n 16); Hutchinson (n 24).

<sup>221</sup> UN General Assembly, ‘Violence and Discrimination Based on Sexual Orientation and Gender Identity during the Coronavirus Disease (COVID-19) Pandemic’ (2020) UN Doc A/75/258.

<sup>222</sup> *ibid* para 11.

individuals face significant problems with homelessness which they experience at twice the rate of the general population across the board, this has been exacerbated by the loss of temporary housing facilities during the COVID-19 pandemic due to health concerns.<sup>223</sup> The human rights concerns during COVID-19 are clear, maintaining dialogue and ensuring an intersectional approach allows the Independent Expert identify the complex socioeconomic factors which exacerbate the root causes of violence and discrimination in disasters:

“Violence is clearly not only physical but also psychological. Owing to socioeconomic instability, the inability to leave abusive environments and aggravation of anxiety and other pre-existing conditions related to mental and emotional well-being, LGBT and gender-diverse persons have suffered a significant impact from the pandemic.

[...]

In general, LGBT and gender-diverse persons are disproportionately affected by poverty, and will as a consequence experience an equally disproportionate burden during the pandemic. For example, a recent survey carried out by a civil society organization in Bangladesh found that 86 per cent of respondents had no savings and 82 per cent had earned no income in the weeks before the survey. Other sources document that trans persons are commonly trapped in the multiple loaning systems, with money borrowed from private money lenders.”<sup>224</sup>

The UN Independent Expert is advocating a queer human rights-based grounded in intersectionality, this approach helps inform and gives credibility to emerging research in disaster studies, which takes into consideration sexual and gender minorities in disasters, where vulnerabilities are differentiated by race, ethnicity, age, socioeconomic means, and cultural context.<sup>225</sup> The power of this narrative portrays an image of the UN as a beacon for LGBTQ+ rights with the Independent Expert demonstrating the malleability of IHRL and the core principle of non-discrimination in informing substantive human rights. In challenging the systems of subordination and recognising LGBTQ+ communities the Independent Expert has constructed an approach which can challenge and expand traditional methods of mainstream vulnerability analysis.

The *Blaikie et al.* model of vulnerability notes the root causes of vulnerability as processes in society which are viewed as spatially distant (arising in a distant centre of economic or political power), temporally distant (in past history), and distance in being bound up with assumptions, ideologies, beliefs

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<sup>223</sup> *ibid* para 30.

<sup>224</sup> *ibid* paras 15 & 25.

<sup>225</sup> Gaillard, Gorman-Murray and Fordham (n 137) 20.

and social relations that are taken for granted.<sup>226</sup> An approach grounded in intersectionality and dialogues promotes the interests of the LGBTQ+ community - shining a light on these distant factors and brings IHRL closer to substantively addressing the systems of intolerance and homophobia which has demonstrably impacted LGBTQ+ communities in disasters (see section 2.3.2 – Queer Narratives). In a report on the “law of inclusion”, the UN Independent Expert on SOGI notes the importance of IHRL in constructing a system to challenge socio-cultural constructs under gender and the need to challenge these norms are based on a set of preconceptions which must be challenged if all humankind is to enjoy human rights.<sup>227</sup> In constructing a law of inclusion which observes universal human rights the Independent Expert is promoting a vision of IHRL which can adapt to a wide range of situations to ensure universality, equality, and non-discrimination. These basic tenets of IHRL can be constructed to ensure inclusion for LGBTQ+ persons within a human rights framework. In assessing the relevance of these principles to mainstream vulnerability analysis it is necessary to analyse how the UN informs human rights-based approach to disasters and how it incorporates LGBTQ+ persons into the narrative.

### 3.2.2 Disaster Risk Reduction

The UN has acknowledged the vulnerability of LGBTQ+ communities in disasters. A 2016 Report by the Special Rapporteur on the human right to safe drinking water and sanitation observes:

“Lesbian, gay, bisexual, transgender, intersex and gender non-conforming people face additional challenges in areas affected by disaster [...] In line with international human rights law, States should therefore use an “intersectionality lens” in all policy initiatives, to ensure that special attention is given to those persons most disadvantaged in the enjoyment of their rights.”<sup>228</sup>

This human rights-based approach grounded intersectionality has the potential to tackle the root causes of vulnerability by identifying the complexity of subjectivities which are often disregarded in disaster research.<sup>229</sup> Further, it has potential to combat gender stereotyping which promotes a heteronormative ideals and fails to recognise the unique hardships of LGBTQ+ people.<sup>230</sup> The SFDRR is the central international framework of DRR and calls for the explicit incorporation of all human rights to ensure empowerment and inclusive, accessible, and non-discriminatory participation.<sup>231</sup> However, *Seglah and Blanchard* observe the discussion around gender within the SFDRR is limited –

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<sup>226</sup> Blaikie and others (n 4) 52.

<sup>227</sup> UN Human Rights Council, ‘The Law of Inclusion’ (n 27) para 13.

<sup>228</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation’ (2016) A/HRC/33/49 para 13.

<sup>229</sup> Kadetz and Mock (n 5) 219.

<sup>230</sup> *ibid* 219-220.

<sup>231</sup> Sendai Framework for Disaster Risk Reduction 2015-2030 A/RES/69/283.

Whilst there is discussion around gender within the Framework, the document relies largely on the binary understanding of gender (male and female only), and as such, excludes a part of the community which is often amongst the most vulnerable to disasters.<sup>232</sup>

Notably, the SFDFRR also calls for the incorporation of *all human rights* in DRR planning, policy and implementation.<sup>233</sup> There is a need to assess how the UN framework for human rights practically interacts with DRR – whether it reflects the binary approach of the SFDRR or whether the human rights-based approach envisaged by the Special Rapporteur can contribute to more inclusive strategies in DRR which protect vulnerable LGBTQ+ communities.

Adequate housing is a key measure of inclusive DRR and invites an examination of whether human rights-based approaches to DRR can recognise the sexual and gender diversity of the LGBTQ+ and challenge systems of heteronormative subordination. The right to adequate housing is protected in Article 11 of the ICESCR and is viewed as of central importance for all economic, social and cultural rights.<sup>234</sup> *Seglah and Blanchard* stress that LGBTQ+ communities are exposed to discriminatory practice and harassment in accessing gender segregated shelters – impacting their right to adequate housing.<sup>235</sup> It is a pressing issue in climate related disasters, with an immediate need for temporary shelter in the immediate aftermath of a disaster often arising (see Nepal Case Study – section 2.3.2). Assessing how the UN informs the right to adequate housing allows for a broader assessment of whether it ensures the universality of rights through substantive equality and non-discrimination protections for LGBTQ+ people. The importance of adequate housing in a disaster setting has been recognised by the UNHRC in Resolution 19/4, stressing the right to adequate housing should be protected, promoted, and fulfilled without discrimination of any kind.<sup>236</sup> The UN has gone further to stress the rights of LGBTQ+ persons in accessing a right to housing. In a joint statement, the Independent Expert on SOGI, and the Special Rapporteur on Adequate Housing note:

“Non-discrimination legislation should explicitly protect all persons from violence and discrimination on the grounds of sexual orientation and gender identity. The housing status itself should be a prohibited ground for discrimination and actors who violate the right to

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<sup>232</sup> *Seglah and Blanchard* (n 9) 6.

<sup>233</sup> Sendai Framework for Disaster Risk Reduction 2015-2030 A/RES/69/283.

<sup>234</sup> Office of the United Nations High Commissioner on Human Rights (OHCHR), ‘UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) - Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991’ (1991) E/1992/23.

<sup>235</sup> *Seglah and Blanchard* (n 9) 4.

<sup>236</sup> UN General Assembly, ‘Adequate Housing as a Component of the Right to an Adequate Standard of Living’ (2016) UN Doc A/71/310.

adequate housing as a result of discrimination on the basis of sexual orientation and gender identity should be held accountable.”<sup>237</sup>

This is an encouraging statement for the inclusion of LGBTQ+ person in DRR. However, it does not define how non-discrimination should be interpreted under the grounds of sexual orientation and gender identity. *Seglah and Blanchard* observe that the unique impacts of disasters on LGBTQ+ people are exacerbated by the multidimensional forms of discrimination, with discriminatory practices often originating at policy level and the consequent emergence of unique exclusions as LGBTQ+ households don't conform to narrow and heteronormative assumptions.<sup>238</sup> As previously observed, *Hutchinson* found a multidimensional approach must recognise “systems of oppression and how social identity categories around which social power and disempowerment are distributed.”<sup>239</sup> The UN would have to engage with the systems of heteronormativity and power – explicitly identifying subordination and calling for systemic change across society and within the law to ensure LGBTQ+ inclusive DRR. The UNHRC released an analytical study on gender-responsive climate action, noting:

“Diverse factors, such as social status, gender, poverty level, access to resources and discrimination affect one’s capacity to adapt to climate change. International human rights law prohibits gender-based discrimination. Yet, women often face systemic discrimination, harmful stereotypes and social, economic and political barriers that limit their adaptive capacity

[...]

Lesbian, gay, bisexual, transgender and intersex persons are uniquely vulnerable, due to stigmatization and discrimination.”<sup>240</sup>

Recognising the vulnerability of LGBTQ+ persons in IHRL is an important step in ensuring inclusive DRR. However, the UNHRC remains committed to heterosexuality as a norm within which gender-based discrimination does not warrant an analysis of systemic subordination. *Mayroffer*

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<sup>237</sup> United Nations Office of the High Commissioner for Refugees, ‘The Right to Housing of LGBT Youth: An Urgent Task in the SDG Agenda Setting - Statement by the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, Mr. Victor Madrigal-Borloz, and the Special Rapporteur on Adequate Housing as a Component on the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context, Ms. Leilani Farha on International Youth Day’ <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24877&LangID=E>> accessed 10 March 2022.

<sup>238</sup> Seglah and Blanchard (n 9) 9.

<sup>239</sup> Hutchinson (n 24) 309.

<sup>240</sup> UN Human Rights Council, ‘Analytical Study on Gender-Responsive Climate Action for the Full and Effective Enjoyment of the Rights of Women - Report of the Office of the United Nations High Commissioner for Human Rights’ (2019) UN Doc A/HRC/41/26 paras 4 and 17.



observes that “heterosexuality emerges as a category, which is deeply interconnected with gender roles and inequalities is not mentioned as an issue, it is assumed to be the norm.”<sup>241</sup> Whilst the UNHRC importantly recognises LGTBQ+ vulnerability, it fails to clearly challenge the systemic heteronormativity which broadly discriminates against LGTBQ+ individuals. Queer theory calls for intersectional and multidimensional perspectives to challenge not just one form of subordination but to understand how it is affected by other systems of domination.<sup>242</sup> It is apparent the UNHRC has confined these intersectional and multidimensional tools to a cisgender and heterosexual rights holders. The conclusions and recommendation of the study on gender-responsive climate actions note:

“Be guided by the multi-dimensional and intersectional experience of women to incorporate a broad range of human rights and gender considerations in mitigating climate change and building climate resilience.”<sup>243</sup>

In confining multidimensional and intersectional experiences to a gender binary human rights remains (inadvertently?) supportive of a system of heteronormativity and ignores the deeply rooted social, legal, and cultural factors which exacerbate LGTBQ+ vulnerability. The Committee on the Elimination of Discrimination against Women (CEDAW) further cemented this gender-binary, essentialist and heteronormative approach to DRR in GR No 37 on Gender Related Dimensions of Disaster Risk Reduction in the Context of Climate Change.<sup>244</sup> The recommendation acknowledges the increasing frequency of hazards which heightens the vulnerability of communities with clear human rights consequences (e.g., political and economic instability, growing inequality and threats to healthy).<sup>245</sup> Importantly, GR 37 notes pre-existing gender inequalities and compound intersecting forms of discrimination against **sexual minorities** with vulnerability impacted by socio-cultural contexts and that gender is largely a social construct.<sup>246</sup> Everyone has a gender identity and CEDAW uses this identity to draw connections to the systems of subordination which exacerbate vulnerability. However, this connection assumes heterosexuality as an uncontroversial norm. In negotiations leading up to GR 37, the Russian Federation successfully advocated for the following to be removed from the draft recommendation:

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<sup>241</sup> Monika Mayrhofer, ‘Gender (In)Equality, Disaster and Human Rights - The CEDAW Committee and General Recommendation No. 37’ (2020) 1 Yearbook of International Disaster Law Online 233.

<sup>242</sup> Hutchinson (n 24) 308.

<sup>243</sup> UN Human Rights Council, ‘Analytical Study on Gender-Responsive Climate Action for the Full and Effective Enjoyment of the Rights of Women - Report of the Office of the United Nations High Commissioner for Human Rights’ (n 240) para 61.

<sup>244</sup> Committee on the Elimination of Discrimination against Women, ‘General Recommendation No. 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change’ (2018) CEDAW/C/GC/37.

<sup>245</sup> *ibid* para 1.

<sup>246</sup> *ibid* para 6.

“In paragraph 22 delete the words “sexual orientation and gender identity” and in paragraph 25 (a) delete the words “LBTI women”. We consider it unacceptable for the treaty body to use in its recommendations controversial terms and concepts that are not supported by the majority of countries.”<sup>247</sup>

This is indicative of a lost narrative for persons of sexual and gender diversity in IHRL with men assumed as posing the “norm” for gender to which women deviate – leading to a lack of consideration for LGBTQ+ communities.<sup>248</sup> Mayrhofer observes the implication of removing these so-called ‘controversial terms’ –

“Although lesbian, bisexual, transgender and intersex girls are mentioned twice in CEDAW GR 37 they are framed as (sexual) minority groups. Thus, the GR fails to adopt a ‘much more expansive and progressive language against discrimination on the basis of sexual orientation and gender identity and expression’. Sexual orientation is restricted to those deviating from the heterosexual norm. Heterosexuality as a category, which is deeply interconnected with gender roles and inequalities is not mentioned as an issue, it is assumed to be the norm.”<sup>249</sup>

The UN has made important statements which purport to incorporate LGTBQ+ communities into DRR. In certain way, this has been achieved and LGBTQ+ communities are incorporated into DRR. The debate is not about the inclusion of these communities but rather how they have been incorporated into a human rights-based approach of DRR. The UN has failed to develop non-discrimination principles which recognises the sexual and gender diversity of the LGBTQ+ community, let alone challenge underlying systems of heteronormative subordination which are the root causes of violence and discrimination in disasters. A deconstructive reading of the UN’s approach to DRR demonstrates how heterosexuality emerges as a silent but privileged norm which questions the goals of formal equality.<sup>250</sup> The emergence of this norm sees LGBTQ+ people procedurally incorporated into human-rights based approaches within DRR whilst substantively excluded, leading to the denial of basic rights. The denial of these rights is examined in the following subsection which analyses how heterosexuality is operationalised in DRR to exacerbate LGTBQ+ vulnerability in disasters.

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<sup>247</sup> Committee on the Elimination of Discrimination against Women, ‘Russian Comments on the Draft General Recommendation No 35 on the Gender-Related Dimensions of Disaster Risk Reduction in a Changing Climate’ CEDAW/DRRCC/2016/2.

<sup>248</sup> Gabrielle Simm, ‘Disasters and Gender: Sexing International Disaster Law’ (2021) 2 Yearbook of International Disaster Law Online 144, 158-159.

<sup>249</sup> Mayrhofer (n 241) 252.

<sup>250</sup> Kepros (n 11) 283-284.

### 3.2.3 Humanitarian Reponse

There are various international frameworks which operationalise human rights-based approaches in DRR. The Sphere Handbook 2018 and the IASC Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action both seek to promote universal human rights in the disaster risk response.<sup>251</sup> The Sphere Handbook is crucial in the planning and managing of a humanitarian response to disasters, and is in part informed in consultation with the UN agencies.<sup>252</sup> The IASC Guidelines were created by a UNGA resolution with a view that humanitarian assistance is of cardinal importance for victims of natural disasters and this assistance must be provided on the basis of humanity, neutrality and impartiality.<sup>253</sup> The Sphere Handbook addresses vulnerability with a two-step process:

- People affected by disaster or conflict have the right to life with dignity and, therefore, the right to assistance; and
- All possible steps should be taken to alleviate human suffering arising out of disaster or conflict.<sup>254</sup>

The IASC Guidelines similarly seek to protect the rights and wellbeing of the most vulnerable at every stage, with natural disasters exacerbating violence and diminishing means of protection.<sup>255</sup> In recognising vulnerable groups, both frameworks note that the term “people” should be understood in a broad sense to include “women, men, boys and girls, regardless of their age, disability, nationality, race, ethnicity, health status, political affiliation, sexual orientation, gender identity or any other characteristics.”<sup>256</sup> Further, the Sphere Handbook identifies the need for “meaningful engagement with LGBTQI individuals and organisations at every stage of the humanitarian process”, and throughout the IASC Guidelines there is a need to understand the particular challenges faced by LGBTQ+ persons.<sup>257</sup> Both frameworks identify LGBTQ+ communities as particularly vulnerable groups subject to discrimination. However, neither framework addresses exactly how LGBTQ+ vulnerability should be addressed within DRR. *Seglah and Blanchard* observe –

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<sup>251</sup> See: Sphere Project (n 28); Inter-Agency Standing Committee (n 28).

<sup>252</sup> Sphere Project (n 28) 4.

<sup>253</sup> UN General Assembly, ‘Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations’ (1991) A/RES/46/182.

<sup>254</sup> Sphere Project (n 28) 4.

<sup>255</sup> Inter-Agency Standing Committee (n 28).

<sup>256</sup> Sphere Project (n 28) 11; Inter-Agency Standing Committee (n 28) 59 “When sources of vulnerability—such as age, disability, sexual orientation, religion, ethnicity, etc.—intersect with gender-based discrimination, the likelihood of women’s and girls’ exposure to GBV can escalate.”

<sup>257</sup> Sphere Project (n 28) 15; Inter-Agency Standing Committee (n 28) 6 “The term ‘gender-based violence’ is also used by some actors to describe violence perpetrated against lesbian, gay, bisexual, transgender and intersex (LGBTI) persons.”

“The Sphere Handbook 2018, for example, advocates for the meaningful consultations of LGBTQIA+ individuals and organisations at every stage of humanitarian response but provides no further indication of exactly how this should be done, what sensitivities should be considered when engaging with the community, nor the role of cultural and societal constructs around sexuality and gender identity which need to be considered to ensure a meaningful approach to engagement.”<sup>258</sup>

It is critical that humanitarian actions consider and engage with these constructs to ensure inclusive strategies for DRR. As discussed throughout, vulnerability is rooted in economic, demographic, and political processes which affects the allocation and distribution of resources and consequently the enforcements of rights and gender relations.<sup>259</sup> A failure to consider the root causes of vulnerability in DRR leads to a lack of consideration for the societal and cultural constructs in the law, which preserve heteronormative scripts of gender and sexuality which normalize existing hierarchies of power.<sup>260</sup> Preserving these heteronormative tropes leads to response and recovery policies which often elide the needs of LGBTQ+ people – the language “women, men, boys and girls” preserve the gender binary in law and leads to the exclusion of sexual and gender diversity in DRR policy.<sup>261</sup> The age, gender and diversity (AGD) policy of the UNHRC is a good example of an effort to move past the gender binary and the need for human rights-based approaches to take a systemic approach to discrimination:

“Combatting discrimination based on sexual orientation and gender identity is inextricably linked to gender equality, as it challenges negative gender stereotypes and systemic discrimination arising from prejudice.”<sup>262</sup>

This systemic engagement with discrimination is not reflected in either framework. In an Opinion Note on the IASC Guidelines, *Dolan* observes that current humanitarian approaches preserve the gender binary leading to a heteronormative positioning which offers little support for those are sexually or gender “non-conforming”.<sup>263</sup> Indeed, in the humanitarian context it is necessary to move past the essentialist framework which constructs social categories that do not provide the necessary information needed for targeting disaster vulnerability and providing interventions for those most in need in any given population.<sup>264</sup> The gender binary-driven essentialism is largely reflective of the mainstream

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<sup>258</sup> Seglah and Blanchard (n 9) 7.

<sup>259</sup> Blaikie and others (n 4) 53.

<sup>260</sup> Otto, ‘Queerly Troubling International Law’s Vision of “Peace”’ (n 12) 24.

<sup>261</sup> Gorman-Murray, McKinnon and Dominey-Howes (n 81) 250.

<sup>262</sup> United Nations High Commissioner for Refugees, ‘Policy on Age, Gender and Diversity’ (2018) <<https://www.unhcr.org/5aa13c0c7.pdf>> accessed 29 April 2022 19.

<sup>263</sup> Chris Dolan, ‘Letting Go of the Gender Binary: Charting New Pathways for Humanitarian Interventions on Gender-Based Violence’ (2014) 96 *International Review of the Red Cross* 485, 500.

<sup>264</sup> Kadetz and Mock (n 5) 218.

theories of vulnerability analysis (see section 2.2). In practice, human rights have been operationalised to revolve around the gender binary which leads to assumptions around gender that fail to engage the complex systems of heteronormativity which exacerbate LGBTQ+ vulnerability during a disaster. LGBTQ+ vulnerability is identified in DRR but often there is a failure to inform on the measures needed to address this vulnerability. The consequence of this in practice is clear – a weak human rights-based framework which informs disaster policy from a heterosexist perspective that ultimately fails to protect the substantive rights of LGBTQ+ persons in DRR policy, planning, and implementation. Human right-based approaches grant legitimacy to frameworks for DRR under the guise of inclusive policies, planning and implementation to address the most vulnerable in society. The following section will examine the Yogyakarta Principles, which are the only set of international principles relating to sexual orientation and gender identity.<sup>265</sup> The section will analyse whether the principles provide a basis for a human rights-based challenge to the systemic discrimination faced by LGBTQ people.

### **3.3 The Yogyakarta Principles: One Step Forward, Two Steps Back**

The Yogyakarta Principles (‘the Principles’) are the result of the efforts of a distinguished group of international human rights experts who outlined a set of international principles relating to sexual orientation and identity.<sup>266</sup> The Principles open with the following statement in its preamble:

“All human beings are born free and equal in dignity and rights, and that everyone is entitled to the enjoyment of human rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>267</sup>

The Principles seeks to provide a comprehensive regime for IHRL and its application to the issue of sexual orientation and gender identity.<sup>268</sup> Principle 2 protects universal human rights without discrimination on the basis of sexual orientation and gender identify-

“Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and

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<sup>265</sup> The Yogyakarta Principles (2007) Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, and The Yogyakarta Principles Plus 10 (2017).

<sup>266</sup> *ibid.*

<sup>267</sup> *ibid* Preamble.

<sup>268</sup> ‘About the Yogyakarta Principles’ <<http://yogyakartaprinciples.org/principles-en/about-the-yogyakarta-principles/>> accessed 28 March 2022.

fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.”

This definition of discrimination is notably progressive, recognising sexual orientation and how discrimination is compounded by a range of social factors. Firstly, recognising sexual and orientation and gender identity a critical component to ensure LGBTQ+ inclusive DRR. As discussed in the previous section, the UN Independent Expert on SOGI report on COVID-19 notes the importance of the lived experience of LGBTQ+ and gender-diverse persons to document violence and discrimination. Further, he observes the need to observe “multiple and intersecting forms of discrimination”.<sup>269</sup> This progressive interpretation of non-discrimination combats the essentialism of mainstream vulnerability analysis to understand socio-structural inequalities which produce gender differences and exacerbate vulnerability.<sup>270</sup> Curiously, the problem is not with how the Principles inform discrimination but rather how gender identity is defined. In promoting non-discrimination, the Principles rely on the following definition of gender identity:

“‘gender identity’ to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”<sup>271</sup>

In part, the definition is to be commended – *Otto* states it sets out to be inclusive, acknowledging everyone has a gender identity and indeed stressing that any bodily modification must be ‘freely chosen’ is to be welcomed as there is no correspondence between ‘bodily appearance or function’ and a person’s gender identity.<sup>272</sup> Whilst these advances are to be welcomed *Otto* identifies two major pitfalls within this definition. Firstly, it holds onto a physiological base through the description of gender as a ‘deeply felt’ and ‘internal’ experience – suggesting it is an innate and unitary characteristic. This approach ignores the fluidity of gender (e.g. non-binary, gender fluid etc.) and promotes a stable m/f binary; this incorporation has been accused of sweeping queer radicality into the binary of human rights, to promote

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<sup>269</sup> UN General Assembly, ‘Violence and Discrimination Based on Sexual Orientation and Gender Identity during the Coronavirus Disease (COVID-19) Pandemic’ (n 221).

<sup>270</sup> Kadetz and Mock (n 5) 217.

<sup>271</sup> The Yogyakarta Principles (2007) Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, and The Yogyakarta Principles Plus 10 (2017) 6.

<sup>272</sup> *Otto*, ‘Queering Gender [Identity] in International Law’ (n 19) 312.

a dualist heteronormative framework.<sup>273</sup> Secondly, (and rather critical for a disaster context) it ignores the influence of social context on the way gender is understood and expressed, representing gender as an individual's destiny without reference to social contexts which can constrain gender expression.<sup>274</sup> *Otto* observes the implications of this lack of engagement with the fluidity of gender and the social context of gender –

“My fear is that the Yogyakarta Principles, despite their queer historiography, step away from hard-won social constructivism and threaten to uncritically embrace (bio)logic and heteronormative family forms as normative for everyone.”<sup>275</sup>

The normalising and normative force of IHRL takes the radicality out of queer to systemically challenge vulnerability and its ability to reflect on the diversity of LGBTQ+ identities and their experiences in disasters. This treatment of queer within the law legitimises a heteronormative binary with impacts that are never evenly distributed nor uniformly experienced in a disaster because different social groups exhibit varying characteristics of vulnerability and resilience.<sup>276</sup> Duffy makes the following observation of the Yogyakarta Principles -

“In terms of theorising gender variance and the law, it is possible to conceive of a cisgender matrix: a system of intelligibility in which identities are privileged which perform a binary, stable, mono-identity [...] the Yogyakarta Principles consider gender identity to be ‘deeply felt,’ thereby implying a unitary, non-fluid part of the individual’s personality.”<sup>277</sup>

The maintenance of the gender binary permits international frameworks governing DRR (e.g. the SFDRR) to reflect the needs of heterosexual women in strategies and policies, consequently national institutions and legal frameworks remain consistently silent on the risk of disasters for the needs and potential contributions of LGBTQ+ people.<sup>278</sup> The Principles may appear progressive but there reflection of current IHRL and progressive interpretation legitimises viewing gender as a unitary characteristic, preserves the gender binary and ignores the social contexts which are critical to building a queer human rights-based approach to DRR. This narrative further entrenches the exclusion of LGBTQ+ individuals in DRR which has direct and serious consequences in disasters and humanitarian

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<sup>273</sup> *ibid* 312-315.

<sup>274</sup> *ibid*.

<sup>275</sup> *ibid* 301.

<sup>276</sup> Ratna Kapur, ‘The (im)possibility of queering international human rights law’ in Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge 2018) 135.

<sup>277</sup> Sandra Duffy, ‘Contested Subjects of Human Rights: Trans- and Gender-variant Subjects of International Human Rights Law’ (2021) 84 *The Modern Law Review* 1041, 1044.

<sup>278</sup> Gaillard, Gorman-Murray and Fordham (n 137) 19.

settings with continued harassment and the perpetuation of discrimination and marginalisation. On the one hand, issues around sexual orientation and gender identity are appearing more frequently in the discourse of IHRL. However, LGBTQ+ people are being pushed into a heteronormative mould which at best fails to understand the diversity of the community and at worst promotes DRR policies which are a product of a binary system of heteronormative subordination.

### **3.4 Concluding Remarks**

Indisputably, disasters pose an existential threat to the realisation of human rights. Whilst the SFDRR calls for the incorporation of all human rights it does little to define what is meant by human rights, how they are applicable to DRR, and particularly what this means for vulnerable groups like LGBTQ+ communities. On reaching this observation, it becomes incumbent to trace the development of IHRL on two planes – LGBTQ+ jurisprudence and DRR jurisprudence to understand how the IHRL framework informs mainstream vulnerability analysis. This chapter carefully selected the ECtHR, the UN and the Yogyakarta Principles to build a comprehensive analysis regarding the state of LGBTQ+ rights, how LGBTQ+ rights inform DRR, and what this means for marginalised LGBTQ+ communities in disasters.

The first section explored the role of the ECtHR – examining the importance of a right to family life which is critical to informing public policy. There has been an evolution in the Courts interpretation of the ECHR Article 8 right to private and family life. The analysis uncovers a hierarchy of relationships in the reasoning of the Court which granted a private life to LGBTQ+ individuals but fails to extend protections of family life. LGBTQ+ individuals do not possess a family life equivalent to their heterosexual counterparts. Denying the full protections of a right to family life denies the public identity of LGBTQ+ families and how they should be protected by State policies. Whilst the Court has in more recent jurisprudence directly recognised the right of LGBTQ+ individuals to a family life this still revolves around a gender binary. The Court's references to sex instead of gendered experiences, the inconsistent notion of family life whereby States maintain a margin of appreciation regarding the status LGBTQ+ families, and a separate but equal policy all preserves heteronormative underpinnings of power in the legal system. The second subsection examined how the Court informs on DRR. Whilst a small area of jurisprudence the Court has developed important principles on human rights-based approaches to DRR. Overall, whilst the Court recognises the need to ensure appropriate measures to protect substantive rights (e.g., the right life) the Court defers to the State, seeking not to substitute its view and disproportionality burden authorities. The deference to the heteronormative and its particularly serious consequences for LGBTQ+ individuals was examined in the final subsection which engaged a fictional case before the Court (*X v Italy*). Ultimately, the maintenance of a separate but equal policy regarding the public identity of LGBTQ+ individuals, and a failure to substantively inform policymaking in DRR ignores the challenges and vulnerabilities of LGBTQ+ individuals in disasters.



The second section examined the role of the UN. The UN has taken considerable strides in recent years regarding the recognition of LGBTQ+ rights. The UN Human Rights Committee has protected same-sex couples from discrimination in landmark rulings on sodomy laws and pensions access.<sup>279</sup> There have been further advances with the UNFE Campaign and the appointment an Independent Expert on SOGI.<sup>280</sup> The following subsection examined the role of the UN in ensuring LGBTQ+ inclusion in DRR. The clear starting point is the SFDRR which infers a need to protect all human rights but is itself grounded in a binary understanding of gender.<sup>281</sup> There was an examination of the right to housing (Article 11 of the ICESCR) which is particularly pertinent in disasters when emergency shelter becomes an immediate need.<sup>282</sup> There has been encouraging statements regarding discrimination faced by LGBTQ+ people in accessing housing however there is little to define what is meant by discrimination in this context. Whilst the UN has recognised the unique vulnerability of LGBTQ+ individuals it has not fully engaged with the systems of oppression and multidimensional discrimination which exacerbates this vulnerability. Notably, GR No. 37 purposefully excludes reference to sexual and gender identity – reproducing the heteronormativity as a principle of IHRL. The final subsection examined the operationalisation of DRR through the Sphere Handbook and the IASC Guidelines.<sup>283</sup> Whilst these frameworks recognise LGBTQ+ individuals in DRR they fail to engage with the unique challenges and vulnerabilities perpetuated by heteronormative sociolegal systems. Ultimately, there is a weak framework to practically realise the rights of LGTBQ+ individuals in disasters.

The final section examined the role of the Yogyakarta Principles in informing on LGBTQ+ rights as a critical international document which is relevant exclusively to LGBTQ+ individuals and gender diverse persons.<sup>284</sup> The Principles are a welcome advance in recognising sexual orientation and gender identity. However, their reliance on the current state of IHRL, static interpretation of gender identity which promotes a gender binary and ignoring the influence of social context has led to system which inadvertently reflects the heteronormativity of IHRL. In failing to engage directly with these issues the Principles do not engage with the root causes of vulnerability which as established are a function of economic, social, and political structures.<sup>285</sup>

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<sup>279</sup> *Young v Australia* (n 155); *Toonen v. Australia* (n 155).

<sup>280</sup> See: UN Human Rights Office of the High Commissioner (n 155); UN Human Rights Council, ‘Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity’ (n 155).

<sup>281</sup> Sendai Framework for Disaster Risk Reduction 2015-2030 A/RES/69/283; Seglah and Blanchard (n 9).

<sup>282</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1976, entered into force 3 January 1976).

<sup>283</sup> Sphere Project (n 28); Inter-Agency Standing Committee (n 28).

<sup>284</sup> The Yogyakarta Principles (2007) Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, and The Yogyakarta Principles Plus 10 (2017).

<sup>285</sup> Blaikie and others (n 4) 52.

This chapter has devoted considerable space to addressing the limitations of IHRL in addressing the vulnerability of LGBTQ+ communities in disasters. However, there remains scope within human rights to envisage an alternative path which address the limitations of mainstream vulnerability analysis. In the introductory remarks the following observation was made:

In 2009, the ICJ published a Sexual Orientation and Gender Identity Casebook which identifies equality, non-discrimination, and universality as cornerstones of IHRL.<sup>286</sup> Disasters pose an existential threat to these principles and LGBTQ+ individuals find themselves particularly exposed to human rights violations.

Whilst the practical realisation of these Principles leaves a lot to be desired, the core values remain applicable to LGBTQ+ communities. The following chapter deconstructs IHRL – it removes heteronormativity, viewing it as a social concept with no enforceable legal standing. By addressing the critiques of the previous chapters and building a responsive framework grounded in universality, equality, and non-discrimination it is possible to reorientate the law away from heteronormativity to address the basic rights of LGBTQ+ individuals. In doing so, it is possible to construct a queer human rights-based approach of the limitations of mainstream vulnerability analysis.

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<sup>286</sup> Jernow and others (n 152) 47.

#### 4 A Queer Human Rights-Based Approach for Vulnerability

The previous chapters discuss the conflict a queer perspective presents to the normative frameworks of mainstream vulnerability analysis and IHRL. A methodological approach highlights the deficiencies of mainstream vulnerability analysis by examining various academic critiques of the gender binary, the need to incorporate LGBTQ+ narratives to understand the impact of systems of heteronormative subordination, and finally the potential of intersectionality and multidimensionality to address this subordination (see section: 2.3). The deference to systems of social dominance in mainstream vulnerability analysis negatively impacts LGBTQ+ persons, leaving them exposed to heteronormative DRR policies which can lead to human rights violations (see section: 2.3.2). The third chapter examined the specific role of Council of Europe, UN and the Yogyakarta Principles – delving into their respective human rights regimes. The European Court of Human Rights has taken considerable strides in recent years aimed at advancing LGBTQ+ rights, as well as developing a small but authoritative body of disaster risk jurisprudence. Ultimately, the use of majoritarian doctrines such as the margin of appreciation and European Consensus excludes LGBTQ+ people. The Courts reasoning ensures a separate but equal policy (demonstrated in the hypothetical case – X v Italy), upholding dominant social and legal norms which skew towards the heteronormative and have notable consequences on the universal application of rights (see section: 3.1.3). The UN has also taken considerable strides in the field of LGBTQ+ rights with the appointment on an Independent Expert,<sup>287</sup> clear statements from the UNHRC protecting and promoting LGBTQ+ rights (both generally and in disasters),<sup>288</sup> jurisprudence which recognizes the need for equality and non-discrimination,<sup>289</sup> and CEDAW GR No. 37 noting the need to incorporate LGBTQ+ persons into DRR.<sup>290</sup> However, challenges remain with a tendency towards binary language on gender and a lack of inclusive practical guidance regarding implementing humanitarian action in an LGBTQ+ sensitive manner. Finally, in the absence of any “hard” source of IHRL specifically pertaining to the LGBTQ+ community, the Yogyakarta Principles offer a major source of guidance. They are a clear reminder that all human rights are universal, interdependent, indivisible and interrelated and that sexual orientation and gender identity are integral to every person’s

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<sup>287</sup> UN Human Rights Council, ‘Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity’ (n 155).

<sup>288</sup> See: UN Human Rights Council, ‘Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity’ (2015) UN Doc A/HRC/29/23; UN Human Rights Council, ‘Analytical Study on Gender-Responsive Climate Action for the Full and Effective Enjoyment of the Rights of Women - Report of the Office of the United Nations High Commissioner for Human Rights’ (n 240).

<sup>289</sup> *Toonen v. Australia* (n 155); *Young v Australia* (n 155).

<sup>290</sup> Committee on the Elimination of Discrimination against Women, ‘General Recommendation No. 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change’ (n 244).

dignity and humanity and must not be the basis for discrimination or abuse.<sup>291</sup> However, the Principles do not offer a solution to LGBTQ+ inclusion in mainstream vulnerability – offering a static understanding of gender identity which promotes a m/f dualism and fails to understand how society constructs gender to deploy subordinative power within the human rights framework, and largely reflecting heteronormative international human rights standards (see section: 3.3). *Otto*'s work on *Queer Contexts in International Law* summarizes the findings of the previous chapters neatly -

“Through a queer lens, heterosexuality emerges as the basic model for all dominant systems of social relations - it provides some of the building blocks for international law's conception of "order." Understood as the elemental, natural, "normal" form of human association, heterosexuality not only shapes how we think of "normal" interpersonal and familial relationships, but is also the presumed basis for all forms of "normal" community, including that encompassed by the "normal" nation-state, international law's primary subject. A queer perspective also reveals how international law provides a conduit for the micromanagement and "disciplining" of everyday lives.”<sup>292</sup>

As a dominant force, heterosexuality subordinates LGBTQ+ persons in the law and across society – ensuring exacerbated LGBTQ+ vulnerability which in turn leads to human rights violations. As discussed, the goal of this thesis is to engage the complex relationship of mainstream vulnerability analysis in DRR and IHRL through a queer lens. The previous chapters have constructed a narrative which demonstrates how mainstream vulnerability analysis and IHRL are mutually supportive of normative and dominant systems which can lead to an uneven approach to LGBTQ+ individuals in DRR. These normative systems reflect narratives which have socially, politically, and culturally tended towards the heteronormative – this has filtered through to DRR policy, planning and implementation. Consequently, LGBTQ+ persons are often lost in human rights narratives – leaving space for systemic human rights violations in disasters. Queer theory critiques these systems of heteronormativity – these critiques open space for a reimagined queer framework for IHRL. On observing a process of “dreaming”, *Otto* observes –

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<sup>291</sup> The Yogyakarta Principles (2007) Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, and The Yogyakarta Principles Plus 10 (2017). “Sexual orientation is defined as each person’s capacity for profound emotional, affectional, and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender. Gender identity is defined as each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”

<sup>292</sup> *Otto*, ‘Taking a Break from Normal: Thinking Queer in the Context of International Law’ (n 37) 120.

“It requires stepping out the framing presumptions of “normal” law to reveal and challenge the heteronormative underpinnings of the hierarchies of power and values that the law sustains”<sup>293</sup>

Queer theory can help in reimagine human rights to aspire to its purported universality, in doing so it sheds light on the plight of LGBTQ+ communities in disasters and tackles systems of heteronormative domination. The following section will engage in this reimagining – by combining the queer critiques and analyses to imagine a space for queer people in mainstream vulnerability analysis through a human rights framework.

#### **4.1 A Queer Framework for International Human Rights Law**

Universality, equality, and non-discrimination – it is hard to see how a purist reading of these principles should not include LGBTQ+ communities. On Human Rights Day in 2010, Secretary-General Ban Ki-moon remarked –

“Let there be no confusion: where there is tension between cultural attitudes and universal human rights, universal human rights must carry the day

[...]

It is not called the partial declaration of human rights. It is not the sometimes declaration of human rights. It is the Universal Declaration, guaranteeing all human beings their basic human rights – without exception. Violence will end only when we confront prejudice. Stigma and discrimination will end only when we agree to speak out.”<sup>294</sup>

Building a queer human rights-based approach to mainstream vulnerability analysis is not about reimagining the foundations of IHRL but instead advocating for a shift in practice which speaks out for diverse LGBTQ+ identities. This reimagining is critical to call out the framework of heteronormativity which essentialises experiences along a gender binary and ignores the systemic discrimination faced by LGBTQ+ communities. Gonzalez-Salzberg observes –

- (i) if human rights law is properly understood it must protect consensual sexual identities and diverse intimate relationships (without discrimination),

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<sup>293</sup> Otto, ‘Queerly Troubling International Law’s Vision of “Peace”’ (n 12) 22.

<sup>294</sup> United Nations, ‘Universal Decriminalization of Homosexuality a Human Rights Imperative – Ban’ (10 December 2010) <<https://news.un.org/en/story/2010/12/361672>> accessed 21 April 2022.

- (ii) the universal character of human rights ensures that one's lifestyle must not be the standard by which all life's are lived,
- (iii) human rights should not validate any institution which is aimed at delegitimising those who do not take part in it as personal autonomy is one of the main principles on which human rights are based.<sup>295</sup>

Human rights treaties are grounded in the principles of universality, equality, and non-discrimination – they permeate from the very foundation of modern human rights law. The UDHR proclaims in the first line of its preamble the “recognition of the inherent dignity and of the equal and inalienable rights of **all** members of the human family.”<sup>296</sup> There is common ground between queer theory and human rights – a deconstructive reading of IHRL can assist with moving beyond essentialism and systemic heteronormativity, to take advantage of techniques developed which can interrogate and improve upon the universality of rights. Considering the observations of *Gonzalez-Salzberg* and the common ground between queer theory and universal human rights, it is possible to envisage a framework which addresses the vulnerabilities of LGBTQ+ populations in DRR. First, IHRL and mainstream vulnerability analysis must **recognise sexual and gender diversity** to ensure a universal approach to the LGBTQ+ community which is noted for its diverse identities, expressions, and orientations. Secondly, IHRL and mainstream vulnerability analysis must **challenge systems of subordination** which exacerbate vulnerability is to produce an equality theory which engages substantively with discrimination. In constructing this queer framework, it is possible to imagine a positive role for human rights-based approaches to address the limitations of mainstream vulnerability analysis. Finally, there will be an operationalisation of these two principles – referring to the case studies of Nepal and Uganda to demonstrate how this approach can assist IHRL in achieving universality, equality, and non-discrimination.

(i) Recognising Sexual and Gender Diversity

First, IHRL must recognise sexual and gender diversity. *Otto* observes that the advent of universal human rights law in 1945 with the core principles of equality and non-discrimination made it possible to challenge assumed hierarchy of gender (m>f), the understanding of sex/gender as dualist (m/f) remained unquestioned.<sup>297</sup> Recognising sexual and gender diversity moves IHRL closer to a universal protection of basic rights. *Duffy* observes the centrality of gender to human rights and indeed the importance of its recognition as a pressing human rights concern -

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<sup>295</sup> Gonzalez-Salzberg (n 166) 25.

<sup>296</sup> UDHR preamble.

<sup>297</sup> Otto, ‘Queering Gender [Identity] in International Law’ (n 19) 302.

“The recognition of, or failure to recognise, gender, can be extremely important for the gender-variant subject in particular. Access to medical, educational, employment, or social services can be impacted by a failure to present identity documents which conform to the gender presentation of the individual. The importance of appropriate gender recognition to the life of every individual means that its implementation is a pressing human rights concern.”<sup>298</sup>

To engage in a process of gender recognition is to engage in universal human rights protection. Simply, LGBTQ+ rights are human rights. The simplicity of this statement is marred by the adversity faced by sexual and gender diverse persons in IHRL – with no specific UN human rights treaty, no reference within the ECHR, and a deference to gender as a stable identity centred around a m-f binary as well as a failure to appreciate social constructivism in the Yogyakarta Principles. *Winter* observes the consequences of this binary and heteronormative framework –

“Society has acknowledged certain human rights for 'men' and 'women', but not necessarily for people who transgress those categories [...] In reality, all human rights require some level of customisation to the needs of an individual person.”<sup>299</sup>

Recognising people of sexual and gender diversity would customise IHRL, applying the tools already at its disposal – to assert the universal nature of human rights by ensuring the principles of equality and non-discrimination. In assessing inequality, human rights jurisprudence must recognise gender is primarily (if not entirely) a social category.<sup>300</sup> *Salomon* observes that in unlocking the potential of IHRL, inequality should evaluate the system of rules and institutions, introducing an imperative to modify the international rules, including how they are determined and interpreted.<sup>301</sup> In unlocking this potential, IHRL must take steps towards substantive equality of sexual and gender diverse persons. In working towards substantive equality, queer theory assists IHRL in building towards a broader understanding of human rights – one which proactively responds to the vulnerabilities of people to ensure effective protection of their rights. The UN Independent Expert on Sexual Orientation and Gender Identity in a report on the ‘law of inclusion’ highlights the importance of substantive equality – viewing gender norms as a product of preconception that must be challenged if all humankind is to enjoy human rights.<sup>302</sup> The report went on to argue that human rights must acknowledge the stereotypes, power asymmetries, inequality and fundamental violence that lies at the foundation of this system, with a

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<sup>298</sup> Duffy (n 277) 1042.

<sup>299</sup> Sarah Winter, ‘Are Human Rights Capable of Liberation? The Case of Sex and Gender Diversity’ (2009) 15 *Australian Journal of Human Rights* 151, 154.

<sup>300</sup> Otto, ‘Queering Gender [Identity] in International Law’ (n 19) 306.

<sup>301</sup> Margot E Salomon, ‘Why Should It Matter That Others Have More? Poverty, Inequality, and the Potential of International Human Rights Law’ (2011) 37 *Review of International Studies* 2137, 2154.

<sup>302</sup> UN Human Rights Council, ‘The Law of Inclusion’ (n 27) para 3.

requirement that for the State to comply with its obligations of non-discrimination it must address this violence.<sup>303</sup> Further, in addressing this violence gender-based approaches and intersectionality are viewed as tools to address the asymmetries of power which are derived from how sex is constructed and operated in society.<sup>304</sup> *Hutchinson* calls for deeper legal and policy reforms to challenge systems of subordination by gaining an understanding of the various social statuses of groups in society (whether that be race, gender, class).<sup>305</sup> In advocating deeper legal and policy reforms a first obvious step is to recognise the impact of subordination – for LGBTQ+ communities this must entail deconstructing gender binary-driven essentialism and recognising sexual and gender diversity in mainstream vulnerability analysis.

The ability of human rights to have a transformative effect through queer theory does not ignore the reality of the binary focus of human rights frameworks, the lack of attention to LGBTQ+ persons and the subversiveness to heteronormative systems of socio-political power. The reality remains, as established in the previous chapters, that human rights and mainstream vulnerability analysis uphold the systemic subordination of LGBTQ+ persons – which is particularly evident in disasters. However, an approach grounded in real equality and non-discrimination can help deconstruct these systems to challenge institutional power in a meaningful way. In many ways, human rights frameworks have taken considerable steps in at least recognising the sexual and gender diversity of LGBTQ+ persons (notably with the appointment of a UN Independent Expert on Sexual Orientation and Gender Identity, and recognition of sexual and gender diversity in the Yogyakarta Principles).<sup>306</sup> Recognising LGBTQ+ individuals and their diverse experiences is an important first step in challenging the heteronormative perceptions of the law. An examination of LGBTQ+ rights must understand the legal, social, and political systems of power which subordinate their rights. Following from this, the next section examines the need to challenge subordination, and the power IHRL can hold as a liberating force to ensure broader queer inclusive approaches in DRR.

#### (ii) Challenging Systems of Subordination

Posing a challenge to the systems of subordination is critical in building a queer human rights-based approach to mainstream vulnerability analysis. IHRL cannot be properly understood in isolation if it is to practically uphold the universality of rights – heteronormativity is an interlocking system which transcends social, cultural and legal boundaries, marginalising LGBTQ+ individuals and denying their basic rights. In that framing the UN Independent Expert on SOGI reasons –

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<sup>303</sup> *ibid* para 3.

<sup>304</sup> *ibid* para 7.

<sup>305</sup> *Hutchinson* (n 24) 291.

<sup>306</sup> UN Human Rights Council, ‘Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity’ (n 155).



“Anti-gender narratives defend a world of absolutes that must be challenged if human rights are to be enjoyed universally [...] Challenging the male/female binary system is a daunting task. It has been an ordering principle for the socioeconomic, cultural, civil and political framing within States and at the regional and global levels and is a cornerstone of patriarchal and heteronormative concepts that are at the origin of most injustice, including discrimination and violence against women. It is, however, also a part of the framework that has shaped the development of international human rights law [...] From a rights-based perspective, there is no justification for defending a system of oppression at the expense of the individual; on the contrary, there is an imperative to defend the individual’s freedom from violence and discrimination.”<sup>307</sup>

Challenging systemic heteronormative subordination is critical in the defence of individuals freedom from violence and discrimination in disasters. As previously discussed, *Blaikie et al.* observe the root causes of vulnerability which are viewed as distant general processes in society which inform the function of legal definitions, the enforcement of rights and gender relations.<sup>308</sup> The implication being that the legal order is complicit in constructing the root causes of vulnerability. Heteronormativity emerges as a dominant system in human rights and mainstream vulnerability analysis. Human rights systems remain grounded in heteronormativity which understands that heterosexuality is a privileged class – the UDHR, the ECHR and other major human rights conventions are formulated around understandings of privacy, family and marriage grounded in a binary model of sex – male/female.<sup>309</sup> This exclusion is reflected in DRR, in particular with the SFDRR relying largely in binary understandings of gender (male/female) and excluding a community which is amongst the most vulnerable to disasters.<sup>310</sup> It becomes pertinent to reimagine human rights as a tool to promote universal protection for the most vulnerable – in doing so one must examine and challenge the heteronormative foundations of the legal order.

LGBTQ+ communities sit outside of human rights norms which are centred the heterosexual subject. The *Yogyakarta Principles* observed this outsider status by commenting on the advances which have been made to ensure the rights of non-discrimination and equality for people of all sexual orientations.<sup>311</sup> This implies an obvious outsider status to the law with LGBTQ+ persons needing to

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<sup>307</sup> UN General Assembly, ‘Practices of Exclusion’ (2021) UN Doc A/76/152 paras 14-15.

<sup>308</sup> *Blaikie and others* (n 4) 52.

<sup>309</sup> Matthew Waites, ‘Critique of “Sexual Orientation” and “Gender Identity” in Human Rights Discourse: Global Queer Politics beyond the Yogyakarta Principles’ (2009) 15 *Contemporary Politics* 137, 140.

<sup>310</sup> *Seglah and Blanchard* (n 9) 6.

<sup>311</sup> *The Yogyakarta Principles* (2007) *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, and *The Yogyakarta Principles Plus* 10 (2017).

make advances to secure basic human rights. In their observations on being queer in the law, *Croce* observes that legal norms ideologically benefit the dominant class to nurture a culture of heterosexist and crystallises the binary nature of the law.<sup>312</sup> A queer perspective leads us to challenge the role of norms and how they operate within IHRL. Butler made a critical observation of this relationship in their work on *Undoing Gender*, observing -

“A norm is not the same as a rule, and it is not the same as a law. A norm operates within social practices as the implicit standard of normalization. Norms may or may not be explicit, and when they operate as the normalizing principle in social practice, they usually remain implicit, difficult to read, discernible most clearly and dramatically in the effects that they produce.”<sup>313</sup>

In understanding the relationship of the law with gender it becomes apparent that gender norms - which have traditionally viewed binary definitions and heterosexuality favourably – are not part of the law per se but are influencing factors on the law. In reaching this understanding there is a realisation that IHRL does not set norms in isolation – the law does not develop heteronormativity but has been used as force to reflect certain narratives which have been viewed favourably. *Huffer* observes the fluid nature of this social influence on the law –

“Legal decisions are the consequence of particular narrative decisions, choices about which parts of stories should be retained and which parts should be discarded. Those narrative choices produce, again dialectically, a prevailing image of the law as ultimately something that transcends the singularity of stories: a complex grid of general, objective rules that cohere to a rational set of norms.”<sup>314</sup>

It follows that the law is fluid in nature, swaying according to shifting dominant social narratives. This opens a space for human rights, informed by queer theory, to influence the dominance of heterosexuality and construct an alternative narrative. The UN Independent Expert on Sexual Orientation observes in a report on violence and discrimination the need to ensure that -

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<sup>312</sup> Mariano Croce, ‘CLT and sexuality: Queer in the law’ in Emiliós A Christodoulidis, Ruth Dukes and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar Publishing 2019) 85.

<sup>313</sup> Judith Butler, *Undoing Gender* (Routledge 2004) 41.

<sup>314</sup> Lynne Huffer, ‘Queer Victory, Feminist Defeat? Sodomy and Rape in *Lawrence v. Texas*’ in Fineman, Jackson and Romero (n 112) 421.

“violence and discrimination based on sexual orientation and gender identity is both local and global, requiring strong national and international countermeasures to promote respect for sexual and gender diversity under the umbrella of international human rights law.”<sup>315</sup>

This vision for human rights – to engage with the factors which conspire to promote homophobia and intolerance across society certainly allows for a hopeful reimagining of IHRL. It also poses difficult questions – precisely what factors IHRL should adopt to ensure universality, equality, and non-discrimination. The UN Independent Expert on SOGI observes there are root causes which exacerbate violence and non-discrimination – noting “structural factors influence vulnerability to violence, including discriminatory or harsh laws and policy practices and cultural and social norms that legitimate stigma and discrimination”.<sup>316</sup> Of course, this poses significant challenges for IHRL, with the Independent Expert going on to note the violence and discrimination are complex – linked with emotional, psychological, physical and structural.<sup>317</sup> Queer theory provides some answers to these deep structural questions. *Valdes* observed the importance of moving past the hetero-patriarchy to incorporate sexual minorities –

“Queer legal theory must strive to weave the experiences of sexual minorities as sexual minorities into the law’s fabric – at every level and in every context – to make us explicitly and determinedly visible to the law.”<sup>318</sup>

In challenging the heteronormative subordination of society – which informs the law – queer legal theory deploys the methods of “using narratives”.<sup>319</sup> There is space to construct an alternative narrative and to develop alternative norms to influence human rights law. The power of a narrative is critical – it brings to life the reality of inequality and discrimination – it effectively troubles international laws vision of order by highlighting the systemic inequalities and discrimination grounded in heterosexuality.<sup>320</sup> Narratives can help shift norms – writing on the “law of inclusion”, the UN Independent Expert on Sexual Orientation and Gender Identity noted –

“The notion that there is a gender norm, from which identities and expressions vary or depart, is based on a series of preconceptions the must be challenged if all humankind is to enjoy all human rights [...] sources of international human rights law reveals a robust corpus iuris in which gender is the term used to describe the sociocultural constructs that assign roles,

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<sup>315</sup> UN Human Rights Council, ‘Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity’ (2017) UN Doc A/HRC/35/36.

<sup>316</sup> *ibid* para 36.

<sup>317</sup> *ibid* para 39.

<sup>318</sup> *Valdes* (n 16) 362.

<sup>319</sup> *ibid* 366.

<sup>320</sup> *Otto*, ‘Taking a Break from Normal: Thinking Queer in the Context of International Law’ (n 37) 120.

behaviours, forms of expression, activities and attributes according to the meaning given to biological sex characteristics. Under this definition, gender and sex do not substitute each other, and gender identity and gender expression are inextricably linked to them as practices of concern in anti-discrimination analysis.”<sup>321</sup>

The law is influenced by these socio-cultural constructs and there is a growing need to highlight the experiences of LGTBQ+ communities with non-discrimination and inequality. In shifting the narrative, it is also possible to shift the norm, there is evidence of this in the evolution of jurisprudence of the ECtHR which relies on evolutive interpretation under the living instrument doctrine (see section 3.1.1), as well as in the UN system which has taken steps to incorporate LGTBQ+ persons in recent years (see section 3.2.1). Of course, the process is incomplete and flawed, *Seglah and Blanchard* observes a need to champion

“A human rights-based approach to disaster risk reduction, preparedness and response, where a person’s sexual or gender identity is not a barrier to receiving the assistance and opportunities needed to recover from a disaster.”<sup>322</sup>

To reorientate IHRL towards the universal protection and promotion of rights is clearly an incomplete process. Queer theory provides methods to develop this – critically it does not envisage an impossible task of changing the foundations of IHRL but a need to work towards universality, equality and non-discrimination which recognises the sexual and gender diversity, and the important social context which has subordinative effects on LGTBQ+ individuals. The importance of this has broad ramifications for IHRL but it is particularly pressing in a disaster setting where LGBTQ+ people are subject to uneven approaches in DRR in part due to mainstream vulnerability analysis failing to engage with the intersecting and multidimensional forms of subordination. The impact of recognising sexual and gender diversity and challenging systems of subordination in human rights will be examined below by revisiting the case studies examined in chapter 2 (see section 2.3.2).

## **4.2 Uganda: COVID-19**

The COVID-19 pandemic led to emergency responses by governments across the world with lockdowns, restrictions on gatherings and enforced curfews. As previously discussed, a well-informed critique of the use of emergency powers is necessary to understanding the vulnerability of affected communities.<sup>323</sup> The use of emergency powers can often lead to poor accountability and in certain cases can lead to clear cases of discrimination and inequality. The use of these powers in Uganda had serious

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<sup>321</sup> UN Human Rights Council, ‘The Law of Inclusion’ (n 27) paras 3 and 13.

<sup>322</sup> *Seglah and Blanchard* (n 9) 14.

<sup>323</sup> See: *Imperiale and Vanclay* (n 58).

impact on the LGBTQ+ community, the facts of which were explored in section 2.3.2 and are summarised below -

- In Uganda, emergency lockdown laws were adopted in response to the COVID-19 pandemic, aimed at restricting the number of people who could gather at any given place,
- This led to police targeting an LGBTQ+ communal home in Kampala with over 20 arrests – the emergency powers were used as a justification for the arrests,
- LGBTQ+ people complained police were abusing the laws to further criminalise and discriminate against them,
- There were reports of physical and verbal violence after the arrests with widespread intolerance and homophobia.<sup>324</sup>

The Human Rights Awareness and Promotion Forum filed a lawsuit in the Civil Division of the High Court in Kampala, seeking redress for alleged torture, inhuman and degrading treatment, discrimination, and violation of privacy.<sup>325</sup> There are clear potential human rights violations emerging from these facts. Uganda acceded to the ICCPR in 1995, there are potential violations of discrimination on the basis of sex,<sup>326</sup> an arbitrary or unlawful interference with privacy, family and home,<sup>327</sup> and the prohibition of torture, cruel, inhuman or degrading treatment.<sup>328</sup> The ICCPR also calls for the promotion of universal respect for, and observance of, human rights and freedoms.<sup>329</sup> In engaging a process of recognition of sexual and gender diversity and challenging systems of subordination human rights law a human rights framework can ensure a universal approach which should inform vulnerability analysis and DRR. As observed, a queer human rights-based approach will not persuade a State like Uganda which is steeped in homophobia to immediately change its approach to DRR to include its LGBTQ+ population. However, as an example it stresses the importance of addressing the limitations of mainstream vulnerability analysis. Challenging heteronormative subordination is critical to address the unique vulnerabilities experienced by LGBTQ+ individuals. The following example denotes the practical importance of constructing this framework.

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<sup>324</sup> See: Burke (n 109); Akumu (n 110).

<sup>325</sup> Samuel Okiror, 'Ugandan LGBTI Community Left Vulnerable in Pandemic Lockdown' *International Bar Association* (10 September 2020) <<https://www.ibanet.org/article/E13D94F1-FF3E-45EC-8E95-A593FC22D487>> accessed 18 May 2022.

<sup>326</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 4.

<sup>327</sup> *ibid* Article 17.

<sup>328</sup> *ibid* Article 7.

<sup>329</sup> *ibid* Preamble.

The first step in ensuring a (queer) human rights-based approach to disasters is engaging in a process of recognising sexual and gender diversity. This starts with the reminder the human rights law is anchored in universality, which according to the UDHR ensures the "...inherent dignity and of the equal and inalienable rights of all members of the human family..."<sup>330</sup> Recognising universality as the foundation of IHRL must entail a recognition of sexual and gender diversity, the core human rights principles of non-discrimination and equality must be determined with a need to ensure flexibility to ensure the needs of an individual person (not a rigid identity category) are accommodated.<sup>331</sup> In determining these needs, IHRL must recognise the influence society has in determining gender and in ascribing certain human rights within the gender binary.<sup>332</sup> Mainstream vulnerability analysis generally suffers from a similar binary and essentialist driven approach which ignores socio-structural inequalities observed with gender differences.<sup>333</sup> A queer human rights-based approach addresses the limitations of mainstream vulnerability analysis in moving past its general focus on essentialism which has for a considerable period of time focused on a male-female gender binary.<sup>334</sup> This approach ensures the LGBTQ+ individuals are visible in mainstream vulnerability analysis which can assist with informing a universal human rights-based approach within DRR.

In Uganda, engaging with a process of recognition of sexual and gender diverse persons uncovers widespread homophobia. Firstly, one uncovers the criminalisation of the LGBTQ+ community under the Penal Code (1950) which discusses unnatural offences, attempts to commit unnatural offences and indecent practices.<sup>335</sup> Secondly, there are clear signs of openly hostile rhetoric with violence and discrimination against the LGBTQ+ community, threats against NGOs fighting for rights, and openly homophobic statements by public officials.<sup>336</sup> In moving past binary definitions of vulnerability, a queer human rights-based approach grounded in universality and substantive equality recognises the marginalisation of sexual and gender diverse groups both in the law and in society. It is critical for mainstream vulnerability analysis to move its overt adherence to essentialism. *Kelman* reminds us that vulnerability must strive to be relevant to all people.<sup>337</sup> The experiences of LGBTQ+ persons are not universal, recognising the sexual and gender diversity of people in Uganda entails a process of sociolegal analysis. At the international level, treaty bodies have recognised the discrimination and inequality faced by LGBTQ+ communities in Uganda. CEDAW expresses concern

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<sup>330</sup> UDHR preamble.

<sup>331</sup> Winter (n 303) 154.

<sup>332</sup> *ibid* 154.

<sup>333</sup> Kadetz and Mock (n 10) 218.

<sup>334</sup> *ibid* 217.

<sup>335</sup> ILGA: Ramon Mendos (n 111) 383.

<sup>336</sup> *ibid* 384 "Uganda's President, Yoweri Museveni, 2017: "Africans here, we know a few people who are 'rumoured' to be homosexuals, even in history we had some few being rumoured, but you cannot stand up here and say "I am a homosexual." People will not like it. So whenever we talk to our partners in other parts of the world [we say]: "please that's a private matter, you leave it". But no, they want to impose it on you... that I should stand up and say, 'oh yeah, homosexuals, oh yeah'."

<sup>337</sup> *Kelman, Disaster by Choice* (n 1) 44.

about the criminalisation of homosexual behaviour in Uganda – noting discrimination on employment, health care and education.<sup>338</sup> In its concluding observation on the initial report, the Committee on Economic, Social and Cultural Rights expressed concern about the lack of comprehensive anti-discrimination legislation to encompass the societal stigma and discrimination on the grounds of sexual orientation and gender identity.<sup>339</sup> In recognising this, IHRL must move to challenge these systems of subordination.

There are norms evident across the law and society. Identifying and challenging these norms are critical in building a (queer) human rights-based approach to vulnerability. Legal definitions, the enforcement of rights and gender relations form part of the root causes of vulnerability in a disaster.<sup>340</sup> Heterosexuality as a norm emerges as the dominant system in Uganda – it permeates social, cultural and legal values. *Dicklitch, Yost and Dougan* note the de jure there is no protection for LGBTQ+ individuals, and de facto there is a history of oppression and dehumanisation in Uganda.<sup>341</sup> In noting this de jure and de facto oppression it becomes apparent that in Uganda the law and society is centred around the heterosexual right holders. In understanding this norm, IHRL is posed with a challenge – how to uphold universal human rights when cultural attitudes and the national legal system are demonstrably heteronormative. In engaging with “troubling” of these systems of oppression, human rights law must seek to highlight the narratives as envisaged by QLT, examining the discrimination faced by LGTQ+ communities in Uganda.<sup>342</sup> The narrative in this case shows clear discrimination and inequality with acts of violence perpetrated against the LGBTQ+ community in Uganda’s response to COVID-19. In shifting the narrative, it is possible to shift the norm and in turn exposes IHRL to heterosexist sociocultural gender norms that have devastating consequences for the rights of LGBTQ+ Ugandans. A queer human rights-based approach to vulnerability helps bridge the gap of distance which traditionally view the root causes of vulnerability in this case as a distant process which is difficult to analysis and challenge.<sup>343</sup> *Henderson* stresses the importance of narratives within legal scholarship –

“Thus, legal discourse determined by category will often foreclose the narrative of experience of "out-groups" affected by a legal rule or doctrine [...] While abstract legal categories can strip

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<sup>338</sup> Committee on the Elimination of Discrimination against Women, ‘Concluding Observations of the Committee on the Elimination of Discrimination against Women’ (2010) CEDAW/C/UGA/CO/7, para 47.

<sup>339</sup> Committee on Economic, Social and Cultural Rights, ‘Concluding Observations on the Initial Report of Uganda’ (2015) E/C.12/UGA/CO/1 para 15.

<sup>340</sup> *Blaikie and others* (n 4) 52.

<sup>341</sup> Susan Dicklitch, Berwood Yost and Bryan M Dougan, ‘Building a Barometer of Gay Rights (BGR): A Case Study of Uganda and the Persecution of Homosexuals’ (2012) 34 *Human Rights Quarterly* 448, 456-459.

<sup>342</sup> See: *Valdes* (n 16) 365.

<sup>343</sup> *Blaikie and others* (n 4) 52.

persons of their very humanity, the narrative of that humanity often can also find a place in a legal category.”<sup>344</sup>

In recognising the sexual and gender diversity of LGBTQ+ individuals and challenging systemic subordination in Uganda this analysis constructs an important counter-narrative to heteronormativity as an organising principle. A queer focus on human rights-based approaches offers the best opportunity to encompass the range of vulnerabilities experienced in society. In focusing the narrative on the oppression of LGBTQ+ people one uncovers preconceived gender norms which criminalise, discriminate, and ostracise LGBTQ+ individuals. Whilst it may be practically difficult to change DRR in Uganda to incorporate LGBTQ+ individuals disaster literature must shift to engage with over homophobia and contribute towards an argument for more inclusive DRR. The importance of this is practically realised when analysing the Nepal case study through a queer lens.

### **4.3 Nepal: Gorkha Earthquakes**

The Ugandan case study is indicative of a clear case of human rights abuse perpetrated actively by a homophobic State. The Nepal case study is more nuanced – unlike Uganda the country does not criminalise the LGBTQ+ community and has been commended by ILGA as a beacon of hope in the region with the Supreme Court enshrining equality and non-discrimination on the basis of sexual orientation, gender identify and gender expression.<sup>345</sup> The facts of this case study can be found in section 2.3.2 and are summarised below –

- Devastating earthquakes occurred in Nepal in April 2015. There was extensive damage to infrastructure with 500,000 houses destroyed.<sup>346</sup>
- In the aftermath of the earthquake temporary camps and facilities were segregated into male-female.
- Third gender and transgender persons could not access basic facilities.<sup>347</sup>

It is clear from the facts that members of the LGBTQ+ community have been excluded from Nepal’s DRR policy, planning and implementation. This leads to the first method in the queer human rights-based approach – recognising sexual and gender diversity. As examined, the UN Independent Expert on SOGI discussed the importance of substantive equality – viewing gender norms as a product of

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<sup>344</sup> Lynne N Henderson, ‘Legality and Empathy’ (1987) 85 Michigan Law Review 1574, 1591.

<sup>345</sup> ILGA: Ramon Mendos (n 111) 127.

<sup>346</sup> ‘Nepal: Gorkha Earthquake 2015’ (n 116).

<sup>347</sup> Maude Froberg, ‘Cast out and Unwelcome: Life for Transgender People after Nepal’s Earthquake’ *Pink News* (25 May 2015) <<https://www.pinknews.co.uk/2015/05/25/cast-out-and-unwelcome-life-for-transgender-people-after-nepals-earthquake/>> accessed 11 February 2022.



preconception that must be challenged if all humankind is to enjoy human rights – calling for a need to challenge stereotypes, power asymmetries, inequality and fundamental violence that lies at the foundation of this system.<sup>348</sup> A policy of gender segregated shelters may not be a direct attack on the basic rights of the LGBTQ+ community by the State but it is critical to acknowledge the root causes of this policy grounded in stereotypes, power asymmetries and inequalities which excludes those of diverse sexual orientation and gender identity communities from DRR implementation. A process of recognising sexual and gender diversity entails a recognition of intersecting subordination which privileges relatively privileged individuals – in this instance those that conform to the gender binary.<sup>349</sup> This process can be replicated in mainstream vulnerability analysis by recognising those sociocultural systems (as root causes of vulnerability) privilege certain groups over others, producing disaster vulnerability of those excluded groups.<sup>350</sup> Recognising sexual and gender diversity in this case study would uncover the multiple and compounding vulnerabilities – notably by the trans community in Kathmandu where many relied on sex work and in the aftermath of the earthquakes could not earn money, lost their homes and were denied access to relief camps.<sup>351</sup> Nepal is a case study of formal equality for LGBTQ+ communities, but IHRL cannot stop its engagement here and must ensure substantive equality, recognising sexual and gender diversity entails a queer human rights-based approach which acknowledges the structural barriers to societal resources, such as poverty and institutionalized racism and sexism.<sup>352</sup> In recognising sexual and gender diversity in Nepal, IHRL takes an important step in ensuring a universal approach to rights holders. Of course, this recognition of the role of gender norms challenges the identity driven approach of mainstream vulnerability analysis – advocating a deeper socio-structural analysis which looks past identity driven vulnerability analysis which tends to focus on the male-female binary.<sup>353</sup> Substantive equality and non-discrimination must advocate deeper legal and policy reforms in this instance.<sup>354</sup> The social exclusion of those of diverse sexual orientation and gender identity is a process, trans people are denied a right to participate in equal terms due to complex power relations which exclude them from normative discourse.<sup>355</sup> This leads us to our second method in queer human-rights based approach to vulnerability analysis challenging systems of subordination.

The UN Independent Expert on SOGI observes that binary gender narratives continue to dominate socioeconomic, cultural, civil, and political framings.<sup>356</sup> Further, if IHRL is to inform a right-based perspective it has no justification in defending a system of oppressions and on the contrary must

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<sup>348</sup> UN Human Rights Council, ‘The Law of Inclusion’ (n 27) para 3.

<sup>349</sup> See: Hutchinson (n 24) 308.

<sup>350</sup> Kadetz and Mock (n 5) 216.

<sup>351</sup> See: Asia Pacific Transgender Network (n 119).

<sup>352</sup> Hutchinson (n 24) 291.

<sup>353</sup> Kadetz and Mock (n 5) 219.

<sup>354</sup> Hutchinson (n 24) 291.

<sup>355</sup> See: Khan, Combaz and McAslan (n 118) 27-28.

<sup>356</sup> UN Human Rights Council, ‘Practices of Exclusion’ (n 307) para 14.

“defend the individual’s freedom from violence and discrimination.”<sup>357</sup> In acknowledging this dominance IHRL can pose a challenge to the systems of subordination. In a report submitted to the HRC, the Heartland Alliance – Global Initiative for Sexuality and Human Rights notes that whilst Nepal has made considerable legal advances that human rights violations were an ongoing reality, observing

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Discrimination on grounds of sexual orientation and gender identity is not only committed by state officials, but private citizens also mistreat individuals with impunity because of persistent prejudicial views regarding homosexuality and gender identity and the failure of Nepal’s legal system to protect sexual and gender minorities. For instance, Nepal currently lacks hate crime legislation or anti-discrimination laws to protect sexual and gender minorities from violence, harassment, or discrimination based on sexual orientation or gender identity. For transgender individuals, especially transgender youth, the legal system’s failure to effectively protect them has tragic consequences and puts them at risk of social exclusion and marginalization.<sup>358</sup>

This report underlines the importance of IHRL in observing the reality of marginalisation for LGBTQ+ people. There is a need to acknowledge the complex systems of social, legal, and political power as interlocking systems which perpetuate a system of heteronormativity which ensures human rights violations for LGBTQ+ persons. In addressing the reality of de facto discrimination, a queer human-rights based approach grapples with the heteronormativity as a social process which in mainstream vulnerability analysis is viewed as a distant yet powerful force.<sup>359</sup> A queer human rights-based approach grapples with this distance by using these diverse narratives to reorientate legal culture to earnestly do battle with systemic heteronormativity and to inform decision-making based of the realities of sex/gender inequality and discrimination.<sup>360</sup> For IHRL to effectively promote respect for sexual and gender diversity there must be an acknowledgement that strong national and international measures are required to combat homophobia and intolerance. In doing so, queer theory calls for a need to weave sexual minorities into law’s fabric and to challenge heteronormative subordination.<sup>361</sup> In Nepal, LGBTQ+ communities have more robust protections compared to neighbouring countries but IHRL must take into account the narratives of intolerance wherever they arise – ensuring a robust system to

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<sup>357</sup> *ibid* para 17.

<sup>358</sup> Blue Diamond Society (BDS) and Heartland Alliance for Human Needs & Human Rights - Global Initiative for Sexuality and Human Rights, ‘The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Nepal’ (2013) Submitted to the Human Rights Committee on Relevant Issues Prior to Reporting <[https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/NPL/INT\\_CCPR\\_NGO\\_NPL\\_14738\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/NPL/INT_CCPR_NGO_NPL_14738_E.pdf)> accessed 19 May 2022.

<sup>359</sup> Blaikie and others (n 4) 52.

<sup>360</sup> Valdes (n 16) 366.

<sup>361</sup> Valdes (n 16) 362.

challenge preconception of gender norms and to build a system within IHRL to challenge the socio-cultural contexts that lead to inequality and discrimination. In challenging the norms which have led to the discrimination of gender diverse persons during the Nepal earthquake a queer human rights-based approach ensures universal approaches to human rights law grounded in inclusive policies and practices. This assists mainstream vulnerability analysis in building towards more inclusive approaches in DRR. In challenging these systems of subordination, a queer human rights-based persuades mainstream vulnerability analysis to move past strict and narrow criteria to understand the fluid nature of subordination, to practically assist in ensuring inclusive approaches grounded in the principles of universality, equality, and non-discrimination.

## 5 Conclusion

The research undertaken in this thesis chartered a path through the complexities of mainstream vulnerability analysis as a sociolegal concept informed by human rights-based approaches in DRR. An assessment through queer theory observes the shortcomings of mainstream vulnerability analysis and IHRL in informing LGBTQ+ inclusive approaches in DRR.

In building an understanding of mainstream vulnerability analysis a clear departing point is the SFDRR 2015-2030, which notes the importance of understanding vulnerability in all its dimensions.<sup>362</sup> There has been a notable evolution in vulnerability scholarship – shifting from a hazard paradigm which overtly focused on the natural impacts of disasters to a social paradigm which recognises the various social contexts which make certain individuals more vulnerable than others.<sup>363</sup> Mainstream vulnerability analysis is informed by an enlarging body of research which is progressively evolving to inform more inclusive approaches of social factors to consider in DRR. Some individuals are more vulnerable than others, the law must therefore strive to respect, protect, and promote the natural dignity of all individuals on equal terms, failing to do so would sacrifice the basic rights of the most vulnerable.

LGBTQ+ individuals are generally a marginalised group in many parts of the world, and are subjected to systemic social, legal, and political discrimination. This research observes the influence of gender-binary driven essentialism and systems of heteronormativity in mainstream vulnerability analysis and IHRL. It became clear as research for this thesis progressed that the body of literature pertaining to LGBTQ+ vulnerability was very limited with mainstream vulnerability analysis offering few reflections on the challenges and vulnerabilities related to LGBTQ+ communities.<sup>364</sup> The focus of mainstream vulnerability analysis often lends itself to identity-driven assessments which are too focused on a gender binary and exclude those of diverse sexual orientational and gender identity in the LGBTQ+ community. There is an increasing call for vulnerability research to consider queer perspectives in disasters, but this research is in its infancy and has not yet drawn considerable connections directly to IHRL. This thesis aimed to make this connection, and in doing so deployed queer theory as a tool to recognise LGBTQ+ rights and challenge systems of subordination. Queer theory helps expose many of the shortcomings of mainstream vulnerability analysis by observing the impact of the gender binary focus, the importance of incorporating queer narratives to demonstrate the discrimination faced by LGBTQ+ communities, and finally to use intersectionality and multidimensionality to uncover the systemic discrimination faced by LGBTQ+ people. These critiques observe the failures of mainstream

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<sup>362</sup> Sendai Framework for Disaster Risk Reduction 2015-2030 A/RES/69/283.

<sup>363</sup> For a discussion on the social paradigm, see: Blaikie and others (n 4); Anthony Oliver-Smith and others (n 10); Kelman, *Disaster by Choice* (n 1). For a discussion on the hazard paradigm see: Hilhorst (n 51); Shaw, Izumi and Shiwaku (n 30).

<sup>364</sup> See: Rushton and others (n 36) 3991 "Following our review of 260 peer-reviewed journal articles, we noted that only 12 went beyond the gender binary of woman/man. Two out of the 12 articles referred to the acronym LGBT(I/Q) and a further one article mentioned transgender groups."

vulnerability analysis in considering the needs of LGBTQ+ communities in disasters. Ultimately, this has led to a system of heteronormativity which leads to sustained and systemic human rights violations for LGBTQ+ communities in disasters. As noted, the concept of vulnerability is connected to IHRL which seeks to preserve the natural dignity of all persons in a framework which promotes basic rights through the principles of universality, equality, and non-discrimination.<sup>365</sup> In constructing a queer human rights-based approach of the limitations of mainstream vulnerability analysis it is pertinent to examine the role of IHRL in recognising and challenging LGBTQ+ vulnerability.

In recent years, the Council of Europe has made considerable advances in its jurisprudence relating to LGBTQ+ rights. Notably, a considerable body of caselaw has developed relating to the private and family life of LGBTQ+ individuals under Article 8 of the ECHR. Recognising family life is an important step in ensuring inclusive DRR. *Johnson* observes the importance of recognising family life as a concept which is protected by social, structural, and institutional processes.<sup>366</sup> Early jurisprudence of the ECtHR preserved conservative and heteronormative interpretations of family life. Initially, there was only recognition of the private life of LGBTQ+ individuals but over time this evolved, and the family life was recognised by the ECtHR. However, in recognising the family life of LGBTQ+ individuals the ECtHR defers to the State regarding the exact status of this right, promoting a separate but equal policy.<sup>367</sup> This evolution preserves heteronormativity as an organising principle within DRR by failing to engage with the social, structural and institutional processes which exacerbate LGBTQ+ vulnerability in disasters. Secondly, in its jurisprudence on DRR the Court has developed important principles. Whilst recognising the applicability of human rights within DRR it has consistently deferred to local authorities regarding the operational choices it takes in dealing with social, economic, and urban problems.<sup>368</sup> The combined effect of a separate but equal right to family life and deference to the operational choices of the State in DRR ignores the vulnerability of LGBTQ+ individuals. The hypothetical case study demonstrates how the margin of appreciation is used to reflect dominant social rules and norms which can often reflect heteronormative subordination. In reflecting dominant social rules, the Court does little to challenge the systems which exacerbate LGBTQ+ vulnerability – the social, political, and legal power operate concurrently and interdependently to subordinate LGBTQ+ communities and deny their basic rights. Secondly, the UN has also made considerable strides in recent years in making progress on the rights of LGBTQ+ persons – in *Young v Australia* invoking the principles of non-discrimination between those in an opposite-sex marriage and those in a “marriage like relationship.”<sup>369</sup> Further, the appointment of an Independent Expert on Sexual Orientation and Gender Identity and several influential reports has demonstrated the increasing

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<sup>365</sup> See: Masferrer and García-Sánchez (n 41) 5; Jernow and others (n 152) 47.

<sup>366</sup> *Johnson* (n 160) 78.

<sup>367</sup> See: *Schalk and Kopf v. Austria* (n 180) para 108 and dissenting opinion para 8.

<sup>368</sup> See: *Budayeva and Others v. Russia* (n 185) para 107.

<sup>369</sup> *Young v Australia* (n 155) 3.

importance afforded to LGBTQ+ rights in the UN.<sup>370</sup> However, these positive developments are marred by a deference to the gender binary, the politicisation of the UN with some States refusing to recognise sexual and gender diversity, and the lack of critical engagement with systemic discrimination. Further, the operationalisation of DRR in the IASC Guidelines and Sphere Standards further entrench gender binary driven essentialism which serves to entrench heteronormative social, political, and legal norms that fail to protect and promote the basic rights of LGBTQ+ populations in disasters.<sup>371</sup> Finally, the Yogyakarta Principles are perhaps the brightest beacon for LGBTQ+ rights and whilst they broadly recognise the importance of engaging with sexual and gender diversity, they defer to mainstream IHRL.<sup>372</sup> In deferring to mainstream IHRL they fail to challenge the systems of discrimination which leads to a never-ending cycle of LGBTQ+ rights violations which are acutely felt during disasters.

Emerging from these critiques are two core failings in mainstream vulnerability analysis and IHRL. Firstly, there is a general failure to recognise sexual and gender diversity with a deference across both scholarships to identity driven analysis which works to preserve the gender binary and excludes diverse LGBTQ+ identities. Secondly, there is a general lack of engagement with the systems of heteronormative subordination which entrench the systemic denial of basic rights. This is notably problematic in disasters where policymakers are required to enact policies which protect basic rights but often fail to recognise LGBTQ+ people, and in doing so reflect and preserve the heteronormativity of their social, legal, and political systems. Queer theory pushes us to imagine a framework which recognises sexual and gender diversity, and challenges systems of heteronormative subordination. These principles are not a radical reimagining of IHRL but simply reflect and strengthen its core principles. Universality, equality, and non-discrimination should apply to all people, at all times, and in all places.

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<sup>370</sup> See: UN Human Rights Council, ‘Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity’ (n 155); UN Human Rights Council, ‘The Law of Inclusion’ (n 27).

<sup>371</sup> Inter-Agency Standing Committee (n 28); Sphere Project (n 28).

<sup>372</sup> The Yogyakarta Principles (2007) Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, and The Yogyakarta Principles Plus 10 (2017).

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