The updated ICRC Commentary on the Fourth Geneva Convention: identifying relevant State practice on the treatment of civilians in international armed conflicts since 1949

Submitted by

Fatih Barsak, Stefano Colacino and Jessica Peery

Applied Research Project 2023

Human Rights and Humanitarianism

Academic supervisor: Bugra Gungor

Tutor: Kudzai Tamuka Moyo

Partners: Matt Pollard, Legal Adviser at ICRC Legal Division;

Jean-Marie Henckaerts, Head of the ICRC Commentaries Update Project

Geneva Graduate Institute

7 July 2023

Applied Research Project 2023 - ARP 2_06

Human Rights and Humanitarianism

Academic supervisor: Bugra Gungor

Tutor: Kudzai Tamuka Moyo

Partner: Matt Pollard, Legal Adviser at ICRC Legal Division;

Jean-Marie Henckaerts, Head of the ICRC Commentaries Update project

I. Executive summary

Since its creation in 1949, the Fourth Geneva Convention has been subject to much discussion and research to ascertain its efficacy in the protection of civilians in international armed conflict. To this end, the Legal Division at the International Committee of the Red Cross (ICRC) has undertaken the task of updating the Commentaries on the four Geneva Conventions. This research study seeks to aid in this goal by analyzing archival records kept by the ICRC in order to determine the existence and implementation of modern State practices in relation to Articles 93, 105, 107, 120, 122, 123, 124, and 125 of the Fourth Geneva Convention. Through the study of a variety of conflicts since 1949, we have identified trends in State practice showcasing imperfect application of the Fourth Geneva Convention. The findings reveal various areas of concern as well as improvements observed in the treatment of civilian internees. In the case of disciplinary proceedings (Artt. 122-125), reports from the ICRC indicate several instances of punitive actions, also regarding internees who attempted to escape (Art. 120), however over time improvements were observed thanks to the intervention of the ICRC. Regarding religious duties (Art. 93), internees belonging to minority religions in the detaining power were generally allowed to practice their religion and respect their cults. Concerning notification of measures taken and correspondence rights (Artt. 105-107), the study found the efforts made by the authorities to properly notify internees of measures taken, as well as the possibility to use Red Cross Messages to allow internees to stay in contact with their family. Overall, the research study reveals the crucial role of the ICRC in improving the condition of civilian internees, intervening to push authorities to comply with the relevant provisions of the Geneva Conventions.

II. Introduction

The Fourth Geneva Convention is one of the four Geneva Conventions adopted in 1949 and specifically addresses the treatment of and protection of civilians during international armed conflict.

Applied Research Project 2023 - ARP 2_06

Human Rights and Humanitarianism

Academic supervisor: Bugra Gungor

Tutor: Kudzai Tamuka Moyo

Partner: Matt Pollard, Legal Adviser at ICRC Legal Division;

Jean-Marie Henckaerts, Head of the ICRC Commentaries Update project

It provides a legal framework for ensuring the humane treatment of civilians[1] and sets out the rules for their protection. The International Committee of the Red Cross (ICRC) Commentaries on the Geneva Conventions are widely recognized as influential sources for legal interpretation and practical guidance on implementing the obligations outlined in the Conventions. They provide in-depth analysis, historical context and interpretations of the provisions.

The existing ICRC Commentary on the Fourth Geneva Convention was published in 1958. Over the years, there have been developments in the interpretation and understanding of international humanitarian law (IHL) accompanied by additional developments in State practices. State practice plays a crucial role in interpreting and implementing IHL and understanding how States have fulfilled their obligations under the Fourth Geneva Convention over time can provide valuable insights into the evolution of norms and serve as a source of practical guidance for others. That being so, there is an urgent need to update the Commentaries to reflect these developments and enhance the implementation and respect of the Fourth Geneva Convention. A dedicated team at the ICRC has already published updated Commentaries on the other three 1949 Conventions. Because the subject matter of the Fourth Convention is more expansive and the number of rules it contains more extensive than for the other Conventions, the ICRC sought external assistance in identifying and analyzing relevant State practice for a selection of Fourth Convention provisions, with a particular focus on the ICRC's own extensive public and closed archives. The research conducted by the ARP team in response to this request will strengthen the persuasive authority and reach of the relevant updated Commentary entries, which has in turn the potential to enhance their influence as a source of interpretation and guidance for States and other stakeholders, ultimately resulting in better protection of civilians in situations of armed conflict.

[1] According to the Article 50 of 1977 Additional Protocol to the 1949 Geneva Conventions, a civilian is any person who does not belong to one of the categories of persons belonging to the military and armed forces (and therefore entitled to the potential status of Prisoner of War-POW) as referred to in Article 4 of the Third Geneva Convention and Article 43 of the same Protocol. See more at "Article 50 - Definition of civilians and civilian population". International Humanitarian Law Databases. The ICRC. 2023. <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-50?activeTab=undefined> last consultation: June 2023.

Applied Research Project 2023 - ARP 2_06

Human Rights and Humanitarianism

Academic supervisor: Bugra Gungor

Tutor: Kudzai Tamuka Moyo

Partner: Matt Pollard, Legal Adviser at ICRC Legal Division;

Jean-Marie Henckaerts, Head of the ICRC Commentaries Update project

Research objectives and questions:

Our research questions focus on how States have interpreted or implemented the relevant obligations under the Fourth Geneva Convention over time in relation to the protection of civilians in international armed conflicts, and how State practice can be relevant to the legal interpretation of the treaty provisions and improving their implementation.

Prior to the outset of the research project, a selection of articles of the Fourth Geneva Convention and related research questions were identified by the ICRC Commentaries Update Team. They cover a range of important issues on the treatment of civilians during international armed conflicts. The ICRC identified these articles as being the most in need of supporting research and analysis of State practice, especially from the ICRC Archives, to ascertain how they have actually been implemented by States. The ICRC also emphasized that even if relevant information was not found on one of the issues in the archives for a particular conflict, this fact was still very useful to know in order to respond to questions on the basis for the eventual commentaries and to be able to state confidently that the relevant archive files had been searched for such practice, but none had been found. The ICRC included a larger number of research questions than could be addressed within the time available to the ARP team, with the intention that the team would select a more limited set of questions to focus on.

Due to the wide range of research questions, the ARP team decided to primarily focus on those included in the Civilian Internees[2] section given the high relevance of the topic and the literature gap found during the literature review. Indeed, as analyzed in the Literature Review and Methodology Annex attached to this research work, the treatment of civilian internees has been a contentious issue throughout centuries and the rules governing their treatment have often been subject to interpretation and debate. Although the Fourth Geneva Convention provides some clear rules on the treatment of

[2] In the context of an armed conflict, a civilian internee is a civilian who is detained in designated internment facilities or camps because is considered to pose a security threat or whose presence is deemed necessary to safeguard public order or the security of the detaining power. See more at "Civilian internees". How Does Law Protect in War? The ICRC. 2023. <http://casebook.icrc.org/a_to_z/glossary/civilian-internees> last consultation: June 2023.

civilian internees, there is disagreement about how some of these rules should be applied in practice. For this reason, we primarily focused our research on **Article 93 - Religious Duties; Article 105 - Notification of Measures Taken; Article 107 – Correspondence; Article 120 – Escapes;** and **Articles 122-125 – Disciplinary proceedings against civilian internees**. We also addressed the research question related to **Article 81 - Maintenance**, which provides that the Detaining Power shall provide support to those dependent on the internees if they are unable to earn a living. Through the archival research carried out during the timeframe set for the present research project and by the analysis of a set of conflicts, it has not yet been possible to find relevant information about State practice which involved examples of States paying allowances to internees' families.

To illustrate how our process worked: "Article 93 – Religious Duties" deals with the full enjoyment by internees of the exercise of their religious duties, including attendance at the services of their faith. For instance, did the Detaining Power allow civilian internees to practice and observe their religious holidays? Did they provide the internees with religious texts in multiple languages? Did they prepare food respectful of internees' religious precepts and taboos? Additionally, it is important to highlight that all questions were very specific to each Article. They differed for content and goal according to the sector and topic each Article dealt with[3].

Brief overview of the research methodology

To answer the questions about each article and fill in the gaps in knowledge and understanding crucial to find specific evidence needed for the update, the ARP team exclusively analyzed sources found in the ICRC archives. Source analysis is a series of processes that take place during the review and evaluation of printed documents/archives to gather information on target research questions (O'Leary 2017). The ICRC holds extensive archives that contain a wealth of information about State practice and its own work in armed conflicts. These archives serve as valuable resources for whoever seeks to

[3] For a complete and broad overview of the wide range of research questions we were required to address as well as to better understand what our archival research dealt with, please see Annex II on Research Questions and Articles.

understand and document the implementation of IHL. The research method primarily consisted in document analysis, in particular of the visit reports drafted by the ICRC Delegates during the missions within the internment camps. The ARP team was mindful of the reliability of the documents, the relevance of the sources, the selection of the sources to be considered, and the importance of careful evaluation and analysis of the content of the sources (Neuman, 2014). We did not focus on other sources such as other archives, academic literature, States' military manuals and jurisprudence, expert interviews, or questionnaires as those sources had already been thoroughly pursued by the ICRC, and the range of articles proposed to us by the ICRC were precisely those on which its own previous research from these sources had left significant gaps. In order to develop interpretations of these gaps, data were collected and analyzed through documentary research on case study research from the main tradition of qualitative research (Creswell, 2013). We consulted both the open (1864-1975) and closed (1975-today) ICRC archives and consistently received general guidance from the archivists on how to understand and effectively use these resources. Although the Fourth Geneva Convention dates back to before 1949 (Pictet, 1951), we have focused only on international armed conflicts that occurred after the treaty entered into force. In more detail, we adopted a specific systematic research method. We matched our topic and research questions with a list of several conflicts we wanted to focus on, spanning from 1949 to the present as it provided us with more representative examples of State practice as well as access to reliable information across time and geography. We carried out an in-depth examination of the ICRC sources and we took notes of the most relevant information that constitute the fundamental basis of the present report.

Applied Research Project 2023 - ARP 2_06

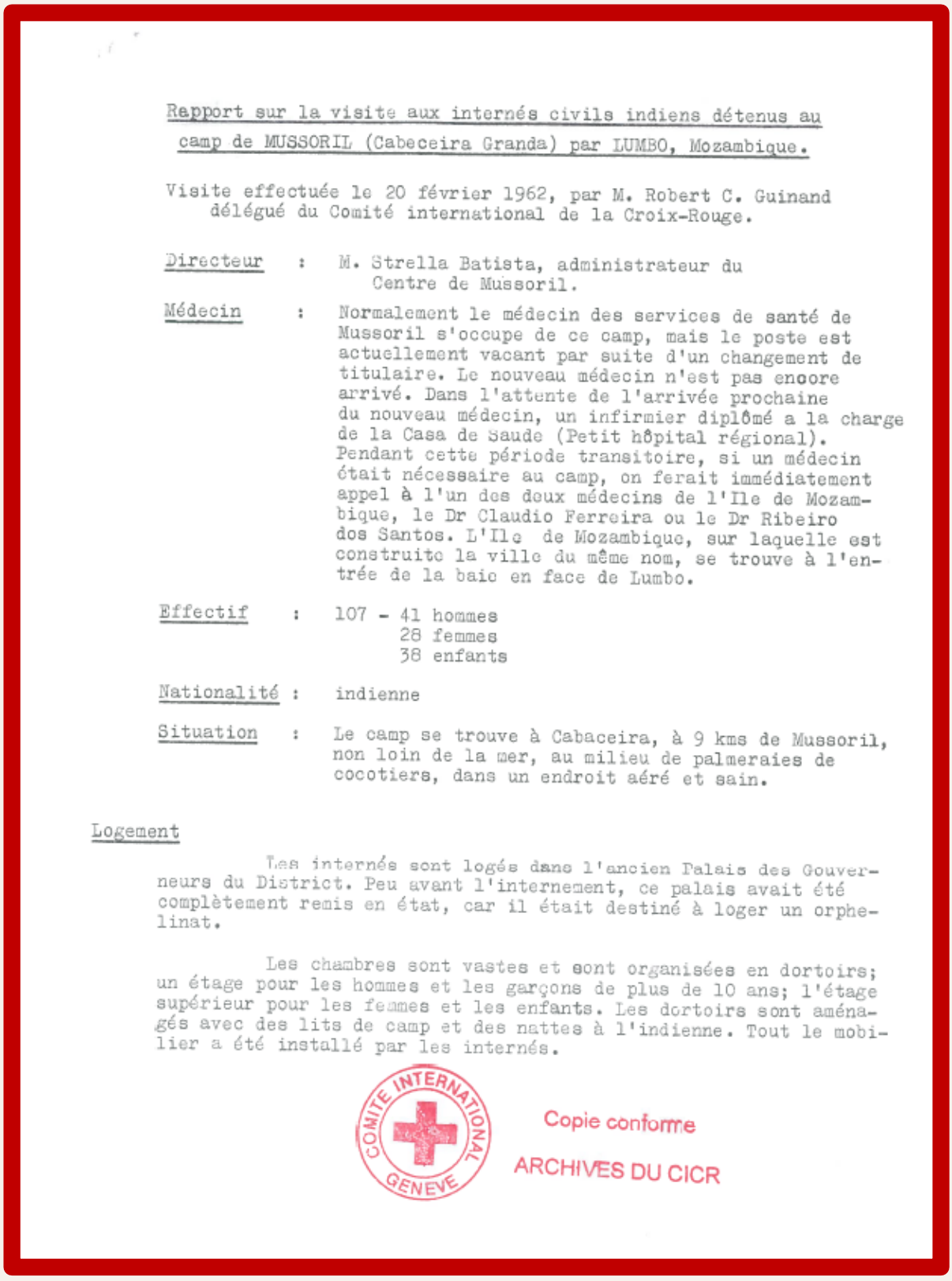
Human Rights and Humanitarianism

Academic supervisor: Bugra Gungor

Tutor: Kudzai Tamuka Moyo

Partner: Matt Pollard, Legal Adviser at ICRC Legal Division;

Jean-Marie Henckaerts, Head of the ICRC Commentaries Update project



Rapport sur la visite aux internés civils indiens détenus au camp de MUSSORIL (Cabeceira Granda) par LUMBO, Mozambique.

Visite effectuée le 20 février 1962, par M. Robert C. Guinand délégué du Comité international de la Croix-Rouge.

Directeur : M. Strella Batista, administrateur du Centre de Mussoril.

Médecin : Normalement le médecin des services de santé de Mussoril s'occupe de ce camp, mais le poste est actuellement vacant par suite d'un changement de titulaire. Le nouveau médecin n'est pas encore arrivé. Dans l'attente de l'arrivée prochaine du nouveau médecin, un infirmier diplômé a la charge de la Casa de Saude (Petit hôpital régional). Pendant cette période transitoire, si un médecin était nécessaire au camp, on ferait immédiatement appel à l'un des deux médecins de l'Ile de Mozambique, le Dr Claudio Ferreira ou le Dr Ribeiro dos Santos. L'Ile de Mozambique, sur laquelle est construite la ville du même nom, se trouve à l'entrée de la baie en face de Lumbo.

Effectif : 107 - 41 hommes
28 femmes
38 enfants

Nationalité : indienne

Situation : Le camp se trouve à Cabaceira, à 9 kms de Mussoril, non loin de la mer, au milieu de palmeraies de cocotiers, dans un endroit aéré et sain.

Logement

Les internés sont logés dans l'ancien Palais des Gouverneurs du District. Peu avant l'internement, ce palais avait été complètement remis en état, car il était destiné à loger un orphelinat.

Les chambres sont vastes et sont organisées en dortoirs; un étage pour les hommes et les garçons de plus de 10 ans; l'étage supérieur pour les femmes et les enfants. Les dortoirs sont aménagés avec des lits de camp et des nattes à l'indienne. Tout le mobilier a été installé par les internés.

COMITE INTERNATIONAL GENEVE

Copie conforme

ARCHIVES DU CICR

Applied Research Project 2023 - ARP 2_06

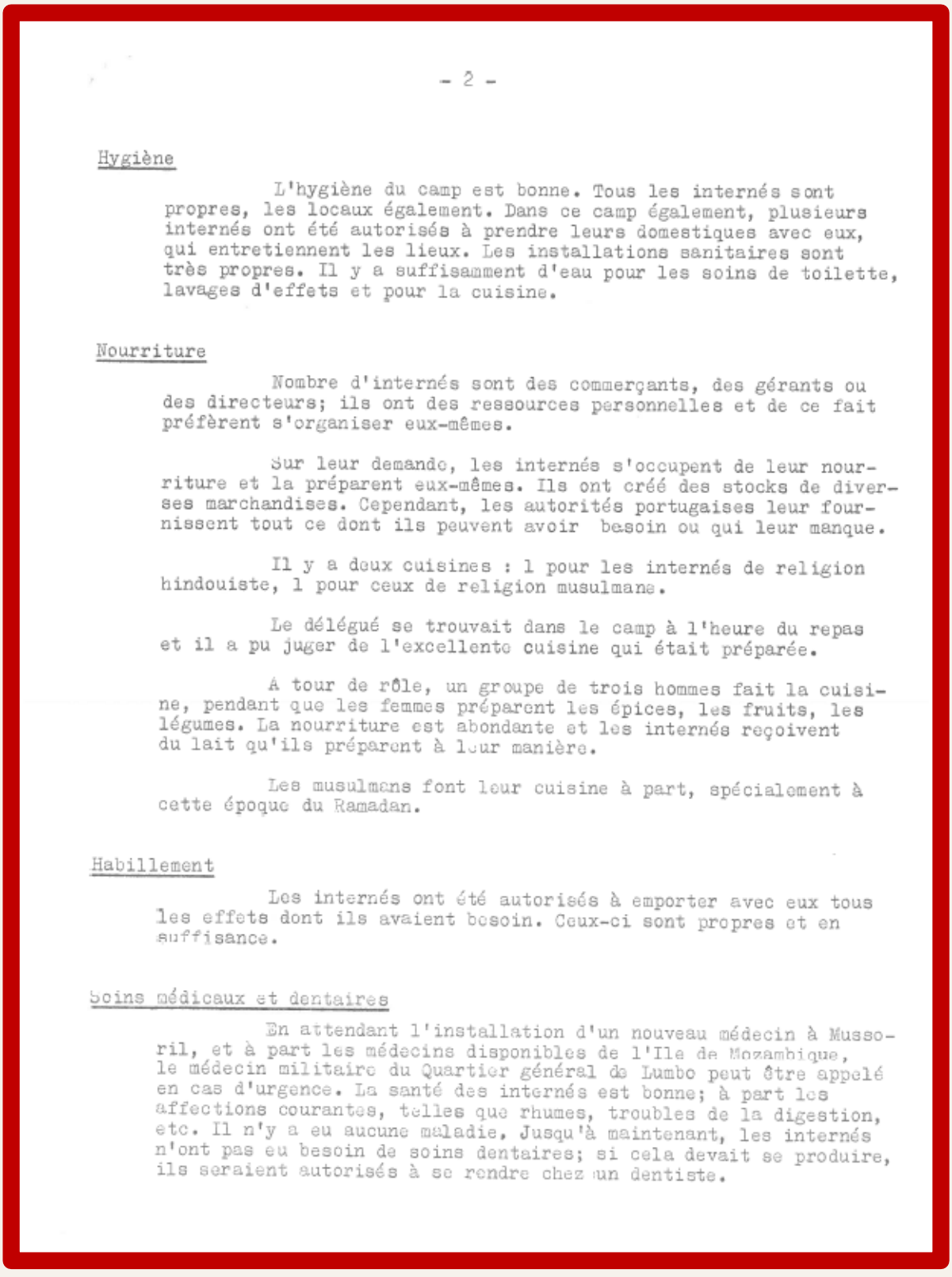
Human Rights and Humanitarianism

Academic supervisor: Bugra Gungor

Tutor: Kudzai Tamuka Moyo

Partner: Matt Pollard, Legal Adviser at ICRC Legal Division;

Jean-Marie Henckaerts, Head of the ICRC Commentaries Update project



- 2 -

Hygiène

L'hygiène du camp est bonne. Tous les internés sont propres, les locaux également. Dans ce camp également, plusieurs internés ont été autorisés à prendre leurs domestiques avec eux, qui entretiennent les lieux. Les installations sanitaires sont très propres. Il y a suffisamment d'eau pour les soins de toilette, lavages d'effets et pour la cuisine.

Nourriture

Nombre d'internés sont des commerçants, des gérants ou des directeurs; ils ont des ressources personnelles et de ce fait préfèrent s'organiser eux-mêmes.

Sur leur demande, les internés s'occupent de leur nourriture et la préparent eux-mêmes. Ils ont créé des stocks de diverses marchandises. Cependant, les autorités portugaises leur fournissent tout ce dont ils peuvent avoir besoin ou qui leur manque.

Il y a deux cuisines : 1 pour les internés de religion hindouiste, 1 pour ceux de religion musulmane.

Le délégué se trouvait dans le camp à l'heure du repas et il a pu juger de l'excellente cuisine qui était préparée.

A tour de rôle, un groupe de trois hommes fait la cuisine, pendant que les femmes préparent les épices, les fruits, les légumes. La nourriture est abondante et les internés reçoivent du lait qu'ils préparent à leur manière.

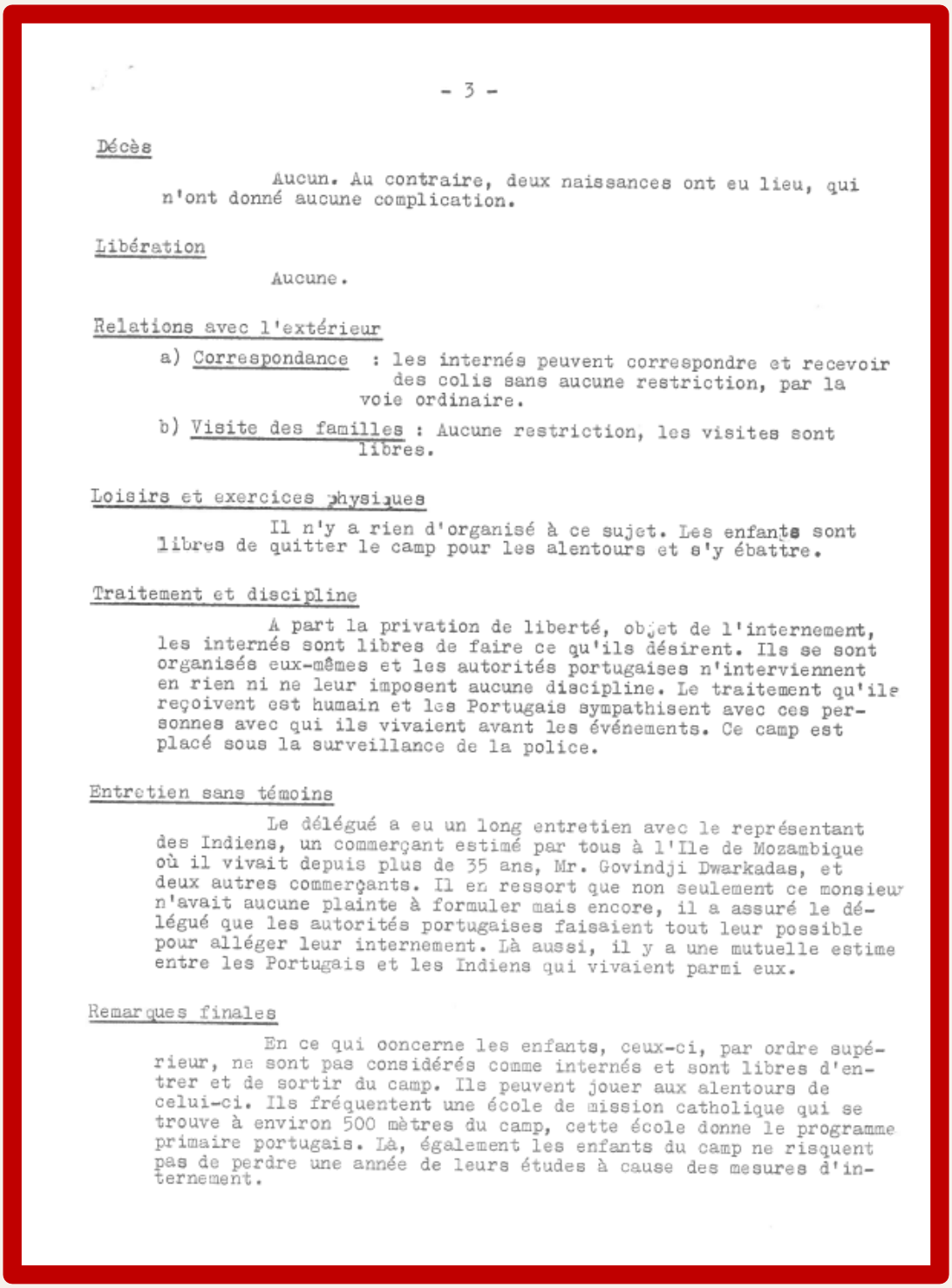
Les musulmans font leur cuisine à part, spécialement à cette époque du Ramadan.

Habillement

Les internés ont été autorisés à emporter avec eux tous les effets dont ils avaient besoin. Ceux-ci sont propres et en suffisance.

Soins médicaux et dentaires

En attendant l'installation d'un nouveau médecin à Mussoril, et à part les médecins disponibles de l'Ile de Mozambique, le médecin militaire du Quartier général de Lumbo peut être appelé en cas d'urgence. La santé des internés est bonne; à part les affections courantes, telles que rhumes, troubles de la digestion, etc. Il n'y a eu aucune maladie. Jusqu'à maintenant, les internés n'ont pas eu besoin de soins dentaires; si cela devait se produire, ils seraient autorisés à se rendre chez un dentiste.



- 3 -

Décès

Aucun. Au contraire, deux naissances ont eu lieu, qui n'ont donné aucune complication.

Libération

Aucune.

Relations avec l'extérieur

a) Correspondance : les internés peuvent correspondre et recevoir des colis sans aucune restriction, par la voie ordinaire.

b) Visite des familles : Aucune restriction, les visites sont libres.

Loisirs et exercices physiques

Il n'y a rien d'organisé à ce sujet. Les enfants sont libres de quitter le camp pour les alentours et s'y ébattre.

Traitement et discipline

A part la privation de liberté, objet de l'internement, les internés sont libres de faire ce qu'ils désirent. Ils se sont organisés eux-mêmes et les autorités portugaises n'interviennent en rien ni ne leur imposent aucune discipline. Le traitement qu'ils reçoivent est humain et les Portugais sympathisent avec ces personnes avec qui ils vivaient avant les événements. Ce camp est placé sous la surveillance de la police.

Entretien sans témoins

Le délégué a eu un long entretien avec le représentant des Indiens, un commerçant estimé par tous à l'Ile de Mozambique où il vivait depuis plus de 35 ans, Mr. Govindji Dwarkadas, et deux autres commerçants. Il en ressort que non seulement ce monsieur n'avait aucune plainte à formuler mais encore, il a assuré le délégué que les autorités portugaises faisaient tout leur possible pour alléger leur internement. Là aussi, il y a une mutuelle estime entre les Portugais et les Indiens qui vivaient parmi eux.

Remarques finales

En ce qui concerne les enfants, ceux-ci, par ordre supérieur, ne sont pas considérés comme internés et sont libres d'entrer et de sortir du camp. Ils peuvent jouer aux alentours de celui-ci. Ils fréquentent une école de mission catholique qui se trouve à environ 500 mètres du camp, cette école donne le programme primaire portugais. Là, également les enfants du camp ne risquent pas de perdre une année de leurs études à cause des mesures d'internement.

***Source*: B AG 221 096-003 Internés indien au Mozambique et à Macao 10/02/1962 - 28/04/1962**

As was anticipated and discussed with the Institute and the ICRC before the project began, much of our source material was found in the closed and confidential archives. A version of the report with full details of the findings from the closed archives, including archival reference numbers, numbering some forty pages in length, has been submitted to the ICRC. In accordance with the terms agreed ahead of time, this and any other version of our report that will be published and submitted for the records of the Institute, has been subject to a process of removal of specific archival reference numbers and other identifying information, to preserve the confidentiality of the information. Strict observance of this confidentiality is regarded by the ICRC as essential to its being able to fulfill the functions assigned to it by the Geneva Conventions and other international instruments. The ARP team decided, to best give effect to this aim, to also de-contextualize references to sources from the open archives in this version of the report.[4]

This study identifies compliance with and violations of the Fourth Geneva Convention in state practice and is publicly finalized with gaps, challenges, and limitations, with commentary by the researchers. Although the first version of the report was made available by our ICRC partner with archives cited as references, we need now to present the final publicly available version without references in accordance with our Pledge of Discretion signed at the beginning of our collaboration with the ICRC.

III. Discussion of the findings

Presentation of the findings and analysis:

a. Articles 122-125 - Disciplinary proceedings against civilian internees, and Article 120 – Escapes

Based on the research questions related to Articles 122-125 about the disciplinary proceedings against civilian internees, we were asked to find if any procedures were in place, if followed in practice, who

[4] This was also emphasized in the Literature Review and Methodology that formed the first pillar of our project under the title “Modern Interpretation of the Fourth Geneva Convention”.

made the decision, what was the length of pre-trial confinement, and if any was imposed. We also looked at whether a person was put in isolation, where they were confined, in what conditions (sanitation, bedding, hygiene, exercise outside), if men were separated from women, and finally if the ICRC could visit them during their confinement. Regarding the question related to Article 120 about the measures to apply to internees attempting to escape or when recaptured, we were asked to find whether authorities' reactions consisted exclusively of disciplinary punishment (typically a confinement for up to 30 days or confiscation of personal items) or if unlawful sanctions were applied, such as ill-treatment (i.e. beatings) or humiliation.

In a first conflict, we examined the internal reports of ICRC delegates visiting civilian internees in internment camps over a period of two months. From the dossiers, some relevant information emerged showing that after several prisoners attempted to escape, they were recaptured and placed under arrest in the same disciplinary cell as the other prisoners undergoing punishment and in conditions of scarce hygiene. Reportedly, the Commandant of the Camp forced the prisoners to remain standing for several hours after the escape attempt, serving as punishment for work badly done during a cleaning fatigue as well. On the same occasion, some of the prisoners who had attempted to escape were first interrogated, then beaten and all put in isolation (although for no more than 30 days) in an empty venue of the camp with reduced food rations, left barefoot with a single blanket each, and were only allowed to leave the venue for hygienic needs. Visit reports consulted concerning a second conflict showed that, during the visit of the ICRC to a certain internment camp in that conflict, the Camp Commander had confined all internees to their rooms, except for the Camp representative; nonetheless, further to the request of the ICRC, the Ministry of Interior authorized the internees to move freely within the building.

In a further conflict, looking at several internment camps across a series of consecutive visits, we were able to evaluate how, at the outset, the ICRC identified a number of areas of concern where the rules, regulations and practices concerning disciplinary punishment appeared not to be in accord with the provisions of the Fourth Geneva Convention. As time went on, through the series of visits, reports, and responses by authorities, improvements were observed in some but not all areas of concern.

Among the areas of concern were:

- Punitive deprivation of access to showers and toilets, and to on-demand sources of water;
- Use of physical restraints and being forced to maintain particular physical positions;
- Punitive denial of family visits;
- Use of threats of non-reunification with family members as a disincentive for misbehavior;
- Exposure to inappropriate climatic conditions and other aspects of the material conditions of detention;
- Imposition of harsh conditions to facilitate questioning for intelligence purposes;
- Lack of access to reading material;
- Temporary removal of items seen as essential to compliance with the Convention, such as blankets and mattresses, clothing and/or religious books, whereas Article 119(2) specifies that the punishment of "discontinuance of privileges" only applies to privileges "granted over and above the treatment provided for by the present Convention."
- Internees not being aware of the general rules on discipline in the place of interment, or the duration of particular punishments or restrictions to which they were subject;
- Use of collective punishment;
- Reduction of recreation time to a period shorter than the minimum required by Article 125 of the Convention;
- Placement of internees in restricted facilities used for disciplinary punishments, in the absence of any disciplinary process, on the basis of a risk assessment arising out of acts they were accused of having committed before their internment.
- Frequency and manner of strip searches on internees in disciplinary facilities, with the strip search itself being referred to by the authorities in some cases as a form of punishment.
- Imposition of disciplinary punishments without a formal investigation, hearing, calling of witnesses, or possibility of defense by the internee or ability to seek review of decisions.

Among the improvements observed over time were:

- Translating, posting, and explaining the rules on discipline throughout the place of internment;
- Commitment by the authorities to improve internees' awareness about reason, duration and conditions of disciplinary punishments to which they were subjected.
- Affirmation by authorities that periods of disciplinary confinement did not exceed one month and that internees were permitted family visits while in disciplinary isolation.
- Recreation time during disciplinary confinement was revised to comply with Article 125 of the Fourth Geneva Convention, which provides for a minimum of 2 hours exercise to be spent daily in the open air.
- Elimination of some of the most restrictive conditions of disciplinary confinement.
- The rules were subsequently amended to more clearly restrict the range of possible disciplinary punishments to those categories permitted by Article 119 of the Geneva Convention. In practice however, certain punishments continued to be imposed in conditions or methods that, in the view of the visiting ICRC delegates, went beyond what is permitted by Article 119.
- Reduction in the frequency of incidents of collective punishment.
- Reduction of the number of strip searches, and improvements in relation to the manner of carrying them out, including procedures and physical structures to improve respect for privacy.
- Improvements in the procedures prior to imposition of disciplinary punishment, in terms for instance of providing the internee with information about the alleged offense, providing them an opportunity to be heard before the decision, and allowing them to call witnesses.

As previously mentioned, our research work also covered the question related to Article 120 about the attempted escapes and the consequent disciplinary measures adopted. Through the analysis of the ICRC Delegates' reports of visit to internment camps in another conflict, we were able to examine

the treatment of civilian internees who had attempted, but also helped some detainees, to escape. Among the issues identified through the visits were the following:

- Poor material conditions, in terms of lack of windows or other openings for air and natural light, insufficient lighting and ventilation or climate more generally, small cell size, reduced and insufficient access to toilet facilities and deprivation of bedding material.
- Lack of written rules and regulations of camp administration, including with respect to disciplinary procedures and offenses (although it appeared internees were informed during regular meetings, verbally). Lack of awareness of the length of the isolation imposed, with periods in isolation in some cases reaching three or four months.
- Family visits reduced, in two separate places of detention, to two minutes per visit.
- Access to open air only once a week. Deprivation of all recreational activities and basic personal items.
- Inappropriate physical restraints.
- An internee who was recaptured during an escape attempt, when captured, spent two nights in a prison before being transferred back to the camp.

In one camp at least, certain of these conditions improved after the intervention of the ICRC, including ending extended periods of confinement, restoration of access to the open air, and access to books and sport activities.

b. Article 93 – Religious Duties

Regarding the question related to Article 93 about the religious duties, we were asked to find whether authorities allowed civilian internees to practice their religion, to observe religious holidays, if food was prepared with respect for internees' precepts and taboos, if there were any limitation on internees' practice of religion, if the Detaining authorities provided civilian internees with religious texts in multiple languages, and if internees were allowed to receive articles of religious character through individual or collective shipments from relief agencies, families or private donors.

Applied Research Project 2023 - ARP 2_06
Human Rights and Humanitarianism
Academic supervisor: Bugra Gungor
Tutor: Kudzai Tamuka Moyo
Partner: Matt Pollard, Legal Adviser at ICRC Legal Division;
Jean-Marie Henckaerts, Head of the ICRC Commentaries Update project

From the analysis of the ICRC Delegates' reports of visits in the internment camps from one conflict, it emerged that internees belonging to a religion that was a majority in their own country and a minority in the detaining power, were free to exercise their religion. The internees were given full access to facilities to practice their creeds and to dispose of their dead according to their religious rites. Religiously significant personal items (e.g. bracelets, earrings) were duly registered and given back upon repatriation.

In another camp, all internees were given the opportunity to pray in the areas adjacent to their rooms. Certain internees requested to be given the possibility to congregate in larger numbers for their prayers, as well as - since there had been a few deaths – complained that they had not been able to dispose of their relatives' bodies in satisfactory conditions. Further to the request of the ICRC, the Camp Commander agreed to reconsider the matter. Detaining authorities also respected religious considerations in relation to food, including in both preparation, presentation and consumption.

Through the examination of another conflict, a general religious freedom could be reported. In the internment camp, at the request of the internees, the authorities had granted the possibility of having the service of different religious authorities once a week, depending on availability. In yet another conflict, in the camp analyzed, the practice of each of several different religions was reportedly free, and each religious holiday was respected.

In a further conflict, as a general practice, internees were allowed to spend their time praying, smoking, sometimes working as well as possessing and reading their religious books, although they were usually submitted for screening. On one occasion, the Director expressed his gratitude regarding the symbolic relief package delivered by the ICRC to the detainees on a religious holiday. On another occasion, however, internees requested the ICRC to urge the authorities to allow them more freedom during religious festivities and holidays in order to share a meal together.

c. Article 105 – Notification of Measures Taken, and Article 107 – Correspondence

Regarding Article 105, we were asked to examine how information about measures taken was disseminated to internees and the Protecting Power. Particular focus was placed on the methods by which parties were informed and specific examples by which the ICRC was informed and took steps to further disseminate this information to the Power to which internees owed their allegiance, relief agencies and internees' families. Regarding Article 107, we examined how internees were either enabled or prevented from communicating with the outside world and the impact that had.

According to materials from one conflict, recurring issues and practices on a spectrum ranging from positive efforts facilitating communication to deliberate blockages to communication included:

- In general, in the conflict examined, internees on both sides had the opportunity to communicate with the outside world to some degree, though this was not the case for every internee. Internees in one country had the opportunity to write uncensored Red Cross Messages (RCM), as well as being able to send letters and other messages with visitors. While the ICRC offered to let camp authorities censor the RCM, the authorities maintained that internees were freely able to write and receive news from their family without the need for censorship. These RCM were important not only for the mental wellbeing of the internees, but their families as well.
- An early attempt by authorities to facilitate contact between detainees and the outside world through a website with pictures and information listed for all the civilian internees (and POWs), and the facility to send (censored) emails, was on the one hand, appreciated by some of the internees and their family members, but also raised concern about public curiosity. The possibility of such an online/electronic service being operated by the ICRC, in a manner more consistent with the Conventions, was contemplated.
- Internees not having access to written information, including as regards rules and regulations and their application in specific cases. Instead, information seemed to be conveyed by authorities primarily verbally. In some cases, internees were not informed of the reasons for their internment, or the reasons for and the length of their time in disciplinary isolation.

Informal networks of internee-to-internee verbal communication were important to all internees being informed of significant matters.

- On some occasions, interviews with certain internees, and family members at liberty, revealed to the ICRC the existence of additional places of internment they had not been notified of by the authorities.
- Inconsistencies in the way the ICRC was informed, and challenges for the ICRC in getting information about and access to internees. Sometimes the ICRC only received specific information and access when asked to help with repatriation late in the conflict. Authorities did express intention to keep the ICRC informed of movements in and out of camps, deaths, and escapes, but this did not always take place in practice.
- In some instances, internee communication was impeded or prevented altogether. There were challenges in collecting or delivering RCMs in regions where the ICRC had no standing presence. Certain internees were isolated from the general internee population and were limited to receiving parcels with cooked food from family members and limited to two-minute-long visits with families. Inconsistencies were observed in relation to, for instance, civilian internees' access to radios. In at least one situation, internees were only allowed to write letters to family and friends in the country where they were being held, and not to family members living outside the country.
- In certain instances, even the existence of a camp in a particular location was denied. Lack of records of internees hindered, for instance, ICRC work to deliver Red Cross Messages to family members the sender believed to be interned but did not know their specific fate or whereabouts. Delegates were not always informed of internees being repatriated to their home country, or transfers to other camps. In practice, ICRC delegates further reported challenges physically visiting camps and registering new internees. Although there might be similar problems on both sides of a conflict, in some cases one party did more to inform and give access to the ICRC, than the other.

Interpretation of key observations and patterns in the context of the research objectives:

a. **Articles 122-125 Disciplinary proceedings against civilian internees, and Article 120 - Escapes**

Rules and regulations: In some cases, rules and regulations were specific to each camp. In others, common discipline and disciplinary punishment were adopted across multiple camps. Even where common rules existed, in some camps they were strictly applied to all the camp's detainees, while in others they were only applied for more "problematic" internees, such as those categorized as "riskier" and thus put in isolation. In addition to this inconsistent application, certain issues of compliance with the Fourth Geneva Convention, were recurring, particularly as regards restricting family visits (Art 116) as a disciplinary punishment, using Disciplinary Punishments not authorized by Article 119, and in relation to Articles 122, 123, 124 and 125 regarding the Procedural Safeguards for internees facing disciplinary measures.

Family visits denial: In several conflicts, denial of family visits as a punishment seemed to be adopted by authorities as a general practice for those in solitary confinement, more than just a measure for more "problematic" internees. Despite the constant and pressing requests of the ICRC, detaining authorities tended to either deny the existence of this measure or justify for strictly necessary purposes.

Information on punishment reason and length: Another constant element, which reportedly improved only thanks to the ICRC intervention, is the lack of communication to internees about the reason and length of their punishment, or in some cases even what conduct would constitute a disciplinary offense.

Collective punishments: A further worrying trend was represented by the use of collective punishment. In some facilities, the authorities had set a clear distinction of offenses that would have been punished either collectively or individually. In some cases, the collective punishment would be imposed when the perpetrator could not be identified, but in some other situations the measure would be used on purpose to punish an entire compound, even if the offender was already known. When

inquired by the ICRC, the authorities justified or denied this measure. Nevertheless, it can be said that the intervention of the ICRC proved crucial to, at least, reduce the use of this practice to the minimum.

Excessive use of confinement: Another pattern is the use of solitary confinement for more than 30 days in contrast to Article 119 of the Fourth Geneva Convention. The intervention of the ICRC proved to be beneficial in terms of protection of civilians and respect of relevant IHL provisions. In at least one instance, where rules appeared to contemplate the potential for solitary confinement for an extended and indefinite period, intervention by the ICRC led to a revision of the rules to provide specific limits.

Authorities' behavior: Detaining authorities rarely explicitly recognized their own misbehaviors, violation of IHL provisions and ill treatment of civilians. They would justify the measures taken not as punishments but most often as temporary security measures. They were more prone instead to accommodate the ICRC requests about specific material and logistical readjustments, without specifically admitting that the previous practice had been inconsistent with the Convention.

b. Article 93 – Religious Duties

From the examination of the situation in different internment camps and by analyzing multiple conflicts, it is possible to record a general State practice allowing civilian internees to exercise their religious freedom. In particular, detaining authorities would usually permit the internees to gather and pray together, to practice their rituals (i.e. burying) if compliant with the Camp rules and general security regulations, as well as granting them access to religious facilities. They were also allowed to use traditional items and religious dresses, access to religious books, and were granted respect for the religious festivities. In general, internees did not have great difficulty in practicing their religious beliefs. Nevertheless, they expressed multiple times the request to have more free time during holidays and more space and time for praying.

c. Article 105 – Notification of Measures Taken, and Article 107 – Correspondence

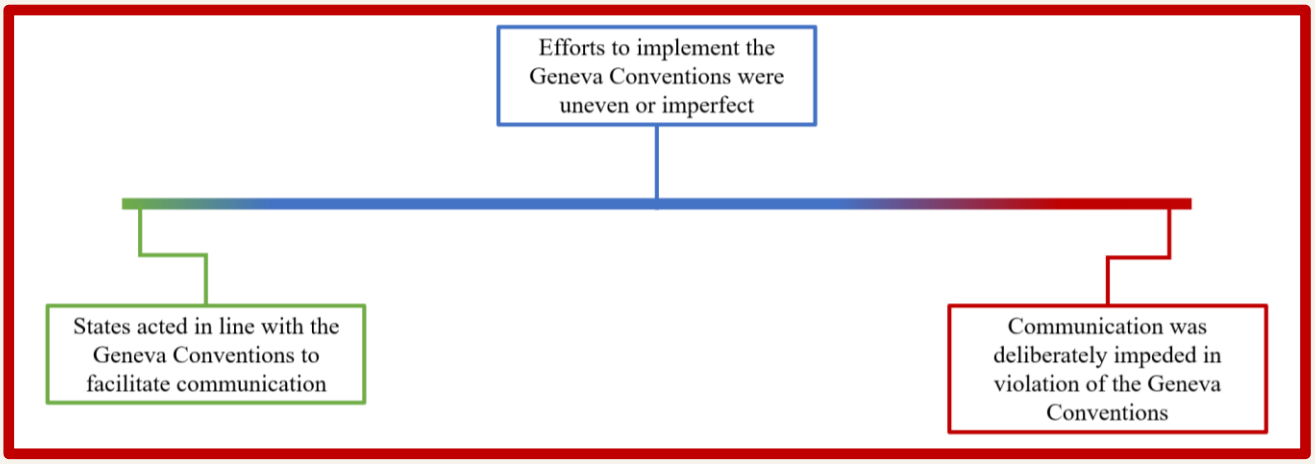


Figure 1: Application of Articles 105 and 107 of the Fourth Geneva Convention[5]

In one conflict from the private archives, overall trends analyzed in one country showed that, while there were instances where states acted completely in line with the Geneva Conventions or completely against the provisions set out in the Geneva Conventions, most of the evidence gathered demonstrated an imperfect application of Articles 105 and 107, as shown in Figure 1. Oftentimes effort was made to properly notify internees and the ICRC as the Protecting Power of measures taken, with shortcomings often stemming from miscommunication or insufficient communication. Much of the information was delivered verbally, which made it difficult to verify at times and limited written records posed challenges when the specific member of staff with the relevant information was not physically present. The consistent use of RCM to allow internees to stay in contact with loved ones was positive, but the response of internees to the flawed online system introduced by the authorities highlighted a desire for a more efficient system and raised questions about the speed to which the ICRC adapts to technological development as it pertains to the implementation of the Geneva Conventions. Challenges connecting with internees in another country until late in the conflict makes it difficult to analyze overall trends, however increased communication with relatives within the

[5] This figure was constructed by categorizing evidence found during the archival research process in the three categories listed above and creating a gradient based on the size of each category.

country and efforts made to improve the information provided to the ICRC also showed a desire to comply with the Geneva Conventions, even if, in both cases, the compliance was imperfect.

Based on the patterns produced by our research findings and our literature review results, we can now highlight how our literature review supports and grounds our key observations:

- **Rules on the treatment of civilian internees:** The literature review highlighted the contentious nature of the treatment of civilian internees throughout history, with rules governing their treatment often subject to interpretation and debate (Benard, 2011). In particular, we highlighted in our literature review that although the Fourth Geneva Convention provides some clear regulations for the treatment of civilian internees, there is often disagreement about how these rules should be applied in practice. Our findings provide empirical evidence that supports this concept, especially in terms of inconsistent application of rules across different internment camps. In some cases, rules were specific to each camp, while in others common disciplinary punishments were adopted across multiple camps. In some camps, they were strictly applied to all the camp's detainees, while in others they were only applied for more "problematic" ones. This notion underlines the ongoing challenges in ensuring proper treatment for civilian internees indicating a need for further examination and improvement in this area. It also corroborates the idea that the treatment of civilian internees is still a complex and disputed issue.
- **Religious and Communication freedom:** The literature review briefly touched upon the respect of internees' rights, while our findings provide more detailed insights into this aspect. In particular, our research highlights that - in general - detaining authorities permitted internees to gather for prayers, practice rituals, and access religious facilities and materials. It also shows the efforts made by the authorities to properly notify internees of measures taken, as well as the possibility to use RCM to allow internees to stay in contact with their family, despite some shortcomings stemming from miscommunication. This connection emphasizes the significance of considering and accommodating the religious and communication needs

of civilian internees to ensure the fulfillment of their rights, along with the importance of overcoming the technical, logistical, and physical challenges posed to communication.

- **General compliance with Fourth Geneva Convention:** The literature review mentioned the provisions of the Fourth Geneva Convention regarding the treatment of civilian internees, emphasizing the importance of humane treatment, provision of adequate food and medical care, and communication with families and the ICRC (Arsenault, 2017). Our research findings shed light on the lack of compliance with these provisions in actual practice. For example, the denial of family visits as a punishment, lack of proper information about punishment reasons and length, and excessive use of solitary confinement all indicate potential violations of the Convention and international humanitarian law (IHL). These connections also underscore the importance of adherence to the Geneva Conventions' guidelines as key to ensure the protection of civilians.
- **Role of the ICRC:** Both the literature review and our findings highlight the role of the International Committee of the Red Cross (ICRC) in monitoring and intervening in challenging situations occurring within internment camps. The literature review discusses the need to learn from historical experiences and the importance of the ICRC's involvement (Bugnion, 2003), while our findings demonstrate how the ICRC's intervention has led to improvements in certain aspects, such as the reduction of collective punishments and the establishment of specific limits to solitary confinement. This connection emphasizes the crucial role of external actors (such as the ICRC) in promoting compliance with IHL and upholding the rights and well-being of civilian internees.

By establishing these connections, we want to demonstrate how our research findings align with and provide empirical evidence for the observations identified in the literature review. Indeed, this integration contributes to strengthening the overall relevance of our research work.

IV. Gaps, challenges, and limitations in the research

Time constraints, the volume of dossiers to be analyzed as well as research methodology necessities did not allow the team to address and answer all the potential research questions originally envisaged in the Terms of Reference (ToR) with the ICRC. The team decided to prioritize its research work on some very relevant questions included in the Civilian Internees section, namely the questions related to: Article 81 Maintenance; Article 93 Religious Duties; Article 105 Notification of Measures Taken; Article 120 Escapes; Articles 122-125 Disciplinary proceedings against civilian internees.

In addition, the filing structure of the ICRC archival system after a certain point in time no longer separated documents from one another on the basis of their status under IHL (POWs, Detainees, Internees). Multiple categories of detainee were also sometimes addressed in a single document. That being so, we were not always able to immediately identify the parts of the documents exactly dealing with our topic. We had to analyze the overall content of the document in order to identify the exact status of individuals involved (narrowing it down to only report information about civilian internees) and the relevant elements useful to answer our research question. Great help and support have been provided by the archivists always available and supportive with our research needs.

Furthermore, the ICRC archives are distinguished between a public open archive which comprises the events from the foundation of the ICRC until 1975, and a closed confidential archive from 1975 until today. In order to gather the maximum information possible relevant to answer our research question we drew upon both archives. Nonetheless, the closed archive as such requires the compliance with specific confidentiality standards and forbids the use of pictures, digital translators or other software, digital typing on personal computers and sharing on personal cloud storage software. To overcome this challenge the team has, among other things, been equipped with ICRC laptops and a related IT training.

Moreover, some members of the team started the research work focusing on a more general dossier related to a large-scale conflict from the private archives. The large amount of material as well as the lack of focus on the research pushed the team to switch to small-scale conflicts in order to narrow the

scope and enhance the focus of the research. The approach proved successful since we were able to find the relevant element needed to address the research question taken into consideration. Although the overall quantity of information found may also have been smaller than for larger conflicts, it was nonetheless necessary to check these documents and make sure about the content and the potential significance for our research questions. Furthermore, in the context for which the research will ultimately be used, the aim was in any event primarily to produce qualitative rather than quantitative data.

Finally, the reporting approximation and incomplete nature of some documents made it difficult to clearly understand some situations, challenges and dynamics depicted during the visits of the ICRC Delegates in the internment camps. Sometimes it proved challenging to clearly identify the specific status of individuals involved in a certain situation, but when the team was doubtful about this element, we decided not to include unclear information in order to preserve the clarity and accuracy of our work.

V. Conclusion

No two conflicts occurred in exactly the same context. Each conflict started with a unique context and history situated specifically in that region at that period of time. Nevertheless, comparisons can be made to illuminate the impact of the Fourth Geneva Convention on these conflicts and the civilians impacted by them. There was no article listed where the Conventions were perfectly applied. Some articles, such as Article 93, showcased a lot of positive steps taken to ensure the conditions outlined in the Fourth Geneva Convention were met. Other articles, such as the ones regarding disciplinary proceedings, revealed areas where State application in the files examined often fell short. These findings are consistent with much of the discussion found currently in academic literature debating the application and efficacy of the Geneva Convention (Solis, 2009; Hassouna, 2001; Arsenault, 2017.) Nevertheless, even hidden amongst apparent shortcomings was a stated desire to follow the rules of the Geneva Conventions appropriately. This desire was not always shown in a linear fashion

by which states received feedback from delegates and applied it without question. At times, feedback was met with resistance. Other times it was met with temporary compliance before slipping back into old habits, perhaps multiple times over the course of the conflict. Nevertheless, our research did show cases where lasting improvements were made. All of these situations provide valuable insight that was not available in 1958 that can help guide future applications of the Fourth Geneva Convention.

The ICRC has an incredibly powerful position in not only setting the standards for the treatment of civilian internees, but guiding states towards better application of these standards. The desire of States to comply is crucial, but is not enough if authorities believe the costs of compliance are too high. This could be seen in the discussion of disciplinary measures, where certain policies identified as being in violation of the Geneva Conventions were at least perceived as being necessary to maintain order in the camp. While religious observation was allowed up to a point, however, the refusal to allow internees more time and space for prayer and the observance of religious holidays illustrate the limit at which the perceived costs become too great. Moreover, improvements made to the treatment of civilian internees in a variety of conflicts and circumstances were not always long-lasting, creating a cycle of improvement and backsliding insufficiently effective at creating lasting change. In order to ensure greater compliance with the Geneva Conventions, the identification of these breaking points is necessary to create lasting solutions that allow for the ICRC to circumvent the anticipated negative consequences of proper application over a longer period of time.

This is not an easy task and certainly provides space for further research. Moreover, it requires a comprehensive approach as the most obvious solution to a problem pertaining to one article may be at odds with another. Such was the case with the website set up by authorities in one conflict that facilitated quicker and more efficient communication than traditional RCM on one hand while exposing internees to public curiosity on the other. As experts in the Geneva Conventions, the ICRC is uniquely positioned to create such solutions that can both work with State needs and balance all the relevant provisions outlined in IHL, such as a tool to allow for digital communication between civilian internees and their loved ones that is not open to the public in the same way of the abovementioned example. This is one of the many reasons why the work being conducted by the

ICRC to update the Commentary on the Fourth Geneva Convention is so vitally important. The discussion of State practices over the past 74 years since 1949 provide a context by which solutions relevant to future conflicts can be ascertained and implemented proactively.

References

Arsenault, E. G., (2017). Geneva Convention compliance in Iraq and Afghanistan, in: Do the Geneva Conventions matter? *Oxford University Press*, Oxford.

Civilian internees - How does law protect in war? Online casebook. <https://casebook.icrc.org/a_to_z/glossary/civilian-internees> last consultation: June 2023.

Creswell, J. W. , Qualitative Inquiry and Research Design: Choosing Among Five Approaches. Los Angeles, CA: Sage Publications, 2013.

Hassouna, H. A., (2001). The Enforcement of the Fourth Geneva Convention in the Occupied Palestinian Territory, Including Jerusalem. *ILSA Journal of International & Comparative Law*, Vol. 7 : Issue 2 , Article 19.

Jean S.Pictet, "The New Geneva Conventions for the Protection of War Victims". The American Journal of International Law, Vol. 45, No. 3 (Jul., 1951).

Neuman, W. L., Social Research Methods: Pearson New International Edition: Qualitative and Quantitative Approaches. Pearson Education Limited, 2014.

Solis, G. D., (2009). The U.S. Removal of 'Protected Persons' From Occupied Iraq and Afghanistan. *Georgetown Journal of International Affairs*, Vol. 10, No. 1.

O' Leary, Z., The Essential Guide to Doing Your Research Project. SAGE Publications Ltd., London, 2017.

Applied Research Project 2023 - ARP 2_06

Human Rights and Humanitarianism

Academic supervisor: Bugra Gungor

Tutor: Kudzai Tamuka Moyo

Partner: Matt Pollard, Legal Adviser at ICRC Legal Division;

Jean-Marie Henckaerts, Head of the ICRC Commentaries Update project

Annex I

Literature Review and Methodology

Literature Review

The Geneva Conventions of 1949, along with their Additional Protocols of 1977, represent the backbone of International Humanitarian Law[6], as they include the main provisions on the protection of civilians, medical and religious personnel, and other persons hors de combat (Henckaerts, 2012). The Geneva Conventions were adopted not in anticipation of the violations outlined occurring, but to widen the scope of the law to be as broad as possible to encompass future realities yet unknown (Pictet, 1951). Three quarters of a century later, it is necessary to evaluate to what extent these future realities have been encompassed. The following literature review aims at providing an overview of the existing academic research and debates on the topic, synthesizing the relevant knowledge in the field, developing an original theoretical framework and methodology, identify the main research gaps, and above all to place the main research project to update the Geneva Conventions' Commentaries within the context of existing literature. This will contribute to achieving this overall objective assessing how States have interpreted or implemented the relevant obligations over time, and how could this be relevant to the legal interpretation of the treaty provisions, or improving their practical implementation (Henckaerts, 2012), and understand the response of States for a better protection of civilians during armed conflict.

In this regard, it is inevitable to mention "The 1949 Geneva Conventions: A Commentary" edited by Andrew Clapham, Paola Gaeta, and Marco Sassoli. Referencing the old adage 'all's fair in love and war,' Clapham, Gaeta, and Sassoli (2015) spend their commentary meticulously finding evidence on how the regulations set forth through the use of IHL have proved that sentiment to be false in the modern era, primarily relying on information from relevant court proceedings. It is an essential and comprehensive commentary on the four Geneva Conventions and is considered as one

[6] 'International humanitarian law' shall henceforth be referred to as IHL

of the most authoritative resources for IHL practitioners and scholars which provides an in-depth analysis and interpretation of the Conventions, with Chetail (2016) and Carron (2016) serving as examples.

Additionally, since the present research project evaluates State practices as an aid to treaty interpretation, several prominent Commentaries on the 1969 Vienna Convention on the Law of Treaties compose the relevant literature on this topic, such as the commentaries by Oliver Dörr and Kirsten Schmalenbach, Olivier Corten and Pierre Klein, and the by Mark Villiger. They represent a notable and in-depth analysis of the 1969 Vienna Convention, providing a detailed analysis of each provision of the Convention, their interpretation and application. Nevertheless, as pointed out by Djeffal (2013), they are written by experts who may have different legal perspectives and thus which can lead to inconsistent interpretations, as well as this genre of sources usually focus on the status quo of legal scholarship and thus hold a limited potential for innovation.

Turning towards the content of the Geneva Conventions, the Common Articles found at the beginning of each Geneva Convention serve as an important backdrop for all the information that follows. First and foremost, Common Article 1 indicates that "the High Contracting Parties undertake to respect and to ensure respect for the present Conventions in all circumstances" (International Committee of the Red Cross, 1949). Historically, the formula regarding "respect" was partially present in the 1929 Geneva Conventions. These clauses represented a real revolution in IHL by implying that the commitments of each State were conceived as unconditional, subtracting the humanitarian obligations from the logic of reciprocity through the prohibition of reprisals against prisoners of war and the wounded and sick, and the violation of these obligations by a State does not authorize the victim State to violate them in response (Condorelli and Boisson de Chazournes, 1984). This requires the governments, militaries, and entire populations of signatory countries to respect the duties and prohibitions outlined in the Conventions at all times under any circumstance, regardless of whether the opposition is Party to the Conventions. In addition, it can be argued that even States that are not directly involved in a conflict have a duty under the Geneva Conventions to ensure compliance and actively prevent violations (Dörmann and Serralvo, 2014). The obligation to ensure respect features an external dimension, implying that every State has a legal interest and duty, independent

from its participation in a conflict, to do everything in their power to demand that other States comply with their humanitarian obligations as well as to avoid any encouragement and assistance in the violations of the Conventions). The existence of these obligations have been confirmed by subsequent practice, being explicitly acknowledged by the Tehran Conference on Human Rights in 1968, the 2013 Arms Trade Treaty, and endorsed by the International Court of Justice, the UN Security Council, and the International Conference of the Red Cross and Red Crescent. (ICRC Commentary on Article 1 of Third Geneva Convention, 2020). In legal terms, these obligations belong to the category of "*erga omnes* obligations": obligations that States hold towards the international community as a whole due to the importance of the rights involved and a breach of them are considered as committed against all States. (Condorelli and Boisson de Chazournes, 1984).

Among the measures included aimed at ensuring their application by the State Parties is the dissemination of the text of the Conventions within the Parties, the incorporation of the study of the Conventions by the military and in military training programs; conversely, to repress serious breaches of the Conventions, State Parties shall search for, prosecute or extradite those accused of grave breaches whatever their nationality and by imposing sanctions on anyone who commits offenses against the Conventions. (Chalifour, 2022). Rather than focusing on the language of the Geneva Conventions alone, scholars and practitioners often rely on the 1958 ICRC commentary on the Fourth Convention, edited by Jean Pictet, to inform their interpretations (Ball, 2004). According to Pictet, adopting the Geneva Conventions requires states to adapt their national legislation to punish and repress grave breaches to the conventions. Pictet recognized that, as important as it is to create strong legislation, appropriate application requires violations to be recognized, punished, and discontinued (Pictet, 1951). It might be further interpreted as a specification of the general principles expressed in Article 48 (Invocation of responsibility by a State other than an injured State) and 54 (Measures taken by States other than an injured State) of International Law Commission Articles on State Responsibility (Chalifour, 2022).

The key question that follows from this is to what extent have States fulfilled this aforementioned duty, particularly in the case of the Fourth Geneva Conventions. For many scholars, context is important. Before Pictet (1951) provided an explanation of the content of the then new

Geneva Conventions, he spent an equal amount of space in his writing providing background information relevant to its creation. Before discussing how the Fourth Geneva Conventions addressed forced deportation, Henry (2019) presented a historical background showcasing the gaps and failures in protection necessitating the strong protections subsequently outlined. With the memory of World War II still vividly fresh in the minds of the delegates drafting the 1949 Geneva Conventions, the failure of the 1929 Geneva Convention to prevent such atrocities led to a desire to widen the scope of who was protected (Ball, 2004). Furthermore, the war provided a plethora of data for the ICRC to work from (Pictet, 1951).

An area under-researched in the existing literature is the interaction between IHL and other areas of international law, such as international human rights law[7], and to understand how these different areas overlap during armed conflicts. The development of IHRL since the end of World War II reflects the growing humanization of international law, and confirms how the two sets of rules reinforce each other in situations of parallel application (Kubo Mačák, 2022). However, some scholars might argue that the law of war and human rights law are actually distinct and sometimes contradictory. The law of war creates a set of rules to be followed to create a more even playing field while minimizing suffering. Nonetheless, there is still an amount of human suffering otherwise considered unacceptable under human rights law allowed, so long as the rules have been followed and the damage caused is not disproportionate to the military advantage gained (Meron, 2000). But since the Fourth Geneva Convention is a typical international treaty, it must be interpreted in light of the entire framework of applicable international law, including IHRL. Following this logic, only through a comprehensive and coherent legal interpretation, it is possible to ensure a correct application and implementation of international norms and thus ensure the protection of civilians.

An example of this intersection can be found in literature surrounding occupation. The underlying rationale is the universality of human rights and the purpose of ensuring that the population under occupation would enjoy greater protection. The longer the occupation, the more weight has to be given to human rights and humanitarian principles (Ben-Naftali, 2005). However,

[7] 'International human rights law' shall henceforth be referred to as IHRL.

the starting point of when to begin applying these protections is not without debate. The Fourth Geneva Convention expanded protection to civilians in areas where an occupation occurs without resistance but did not clarify when, in cases where resistance does occur, the invasion turns into occupation (Zwanenburg, 2012). Sassoli (2012) argues that interpreting the beginning of occupation as coinciding with the first moment inhabitants come into contact with an invading power is necessary to protect them as the Fourth Geneva Convention does not sufficiently protect them otherwise. Failure to recognize them as such would open up the possibility of violence against civilians otherwise covered by Part III of the Convention. On the contrary, Zwanenburg (2012) holds that - as Article 4 of the Fourth Geneva Convention refers specifically to an Occupying Power - an existing occupation must necessarily be present in the territory argued. Bothe (2012) takes an approach seemingly in between, arguing that while situations of invasion and occupation are distinctly different, it is possible for them to occur at the same time if occupation is established in a part of a territory while the invasion continues to press forward.

One can make the argument that duties and protections outlined in the Fourth Geneva Convention seemingly provide a bill of rights for occupied populations (Benvenisti, 1993). If so, what duties are States required to fulfill at which point of the occupation. Bothe (2012) argues, the use of the term 'occupation' implies an objective level of minimal control in a region and that level of control is necessary to consider a state an Occupying Power. While invading forces are still subject to the negative duties required to avoid causing undue harm to civilians, they are under no obligation to perform the positive duties of maintaining public order and services in the territory in question. While Sassoli (2012) maintains that occupation, and therefore obligation, begins the moment citizens come in contact with enemy combatants, the positive duties required by Occupying Powers are only necessary in the case that there are no other adequate institutions in the region that can provide that duty. If these services can still be fulfilled on a local or national level, the Occupying Power is not required to provide them, thus limiting the burden upon said Power. However, Zwanenburg (2012) contends that if States in the process of invading a country were to obey all obligations, both positive and negative, of an Occupying Power, it may create a burden that may be beyond a state's resources

to meet. This could further disincentivize states from applying the Conventions in other situations as well.

According to some scholars, disagreements about the implications of the mass deportations perpetrated by Nazi Germany in World War II highlighted the role Article 49 of the Fourth Geneva Convention played in filling gaps in customary international law regarding forced deportations (Henry, 2019). This plays a role in the discussion of the rights of 'protected persons,' as defined by the Fourth Geneva Convention. The forced deportation of protected persons constitutes a grave breach to the Geneva Conventions (Solis, 2009). Though Article 49 is included in the section of the Fourth Geneva Convention entitled "Occupied Territories," protection against forced deportation encompasses a longer span of time, starting at the moment of first contact between protected persons and enemy military personnel (Henry, 2019), circumventing the previous debate outlined.

In one of the success stories of the Geneva Conventions, thirty-nine States as of 2009 had passed domestic legislation prohibiting the forced deportation of civilians, though this notably does not encompass all signatory states (Solis, 2009). The Military Commissions Act adopted by the United States in 2006 explicitly defined what should be considered a grave breach under Common Article 3 of the Geneva Conventions and gave the President the authority to interpret how the United States should apply the Conventions (Arend, 2007). Civilians under the Fourth Geneva Convention must pose a tangible security threat in order to be detained. Nationality or political affiliation alone is inadequate to justify internment. Internment of civilians must be a last resort for States to guarantee their security needs, only when no other means of defense are available (Goodman, 2012). However, challenges remain as the use of Guantanamo Bay Detention Camp to detain Afghan and Iraqi citizens has raised concerns over questions of forced deportation and unnecessary detention of protected persons, which the US Supreme Court has dismissed (Solis, 2009). According to the latest official data shared by Human Rights Watch, around a total of 780 detainees have been held at Guantanamo Bay since the 9/11 attacks, 731 of these were released without charges, after being detained for years, and 15 were children under age 18. In the overall number of detainees at Guantanamo, 9 died while in custody, 6 by suspected suicide (HRW, Guantanamo: Facts and Figures, 2017).

In this regard, there seems to be a relative gap in the historical literature on this topic on the topic of civilian internees, the primary focus of this paper's research. Benard (2011) notes that, primarily, the treatment of civilian internees has been a contentious issue throughout the history of warfare and that the rules governing their treatment have often been subject to interpretation and debate. He notes that although the Fourth Geneva Convention provides some clear rules on the treatment of civilian detainees, there is often disagreement about how these rules should be applied in practice. He contends that lessons can be learned from the treatment of civilian internees in World War II, including ways to better understand and categorize prisoners for their own safety, to influence them in ways that reduce their hostile feelings and intentions, and to develop skills and attitudes that can help in the aftermath of conflict. Arsenault (2017) highlights some of the key provisions of the Fourth Geneva Convention on the treatment of civilian detainees, such as treating them humanely, providing adequate food and medical care, and allowing them to communicate with their families and the ICRC. Nevertheless, Benard emphasizes that those responsible for detainee operations in the Iraq war faced problems that were common to previous conflicts, as well as some that were unique to the Iraqi context: The lack of cultural, sociological, political and economic recognition of enemy internees is one of them (Benard, 2011).

This brings into question the role of the Fourth Geneva Convention in a modern context. According to Pictet (1951) ideally, governments of the world could come together and outlaw war entirely. Unfortunately, past experience has shown attempts at the goal to be unrealistic to maintain. Furthermore, since a war can occur no matter how strongly society condemns it, IHL and the Geneva Conventions specifically provide society with a method of coping with the realities of war and preventing some of the worst outcomes from occurring. Despite the creation of several legal instruments and the multitude of important actors involved in the codification and implementation of IHL, it is fair to recognize a widening gap between IHL rules and their actual application, in particular of the Fourth Geneva Convention (Hassouna, 2001). Hoffman (2004) raises a concern that by treating terrorists and terrorist organizations as combatants subject to the same protections under international humanitarian law as lawful military actors, it would essentially be re-legalizing private warfare and would elevate their legal status to be on par with sovereign States. At the same time, if these actors

were not to be treated as combatants but as civilians, recourse for states facing the threat of these actors would be catastrophically limited. The Fourth Geneva Convention provides for some implementation mechanisms of its rules - such as the International Fact-finding Commission, which has remained dead letter and that could be instead revived pushing more States to recognize its competence (Hassouna, 2001).

One of the most prominent elements that fosters a deep need to modernize the Geneva Conventions is the new nature of contemporary wars and how it plays into state interpretation. Particular attention should be paid to the fact that, although past wars were fought primarily by the regular armies of established States, today wars of this kind are an exception, since they are now mainly fought by "irregular combatants", citizens directly participating in the hostilities, mercenaries and terrorists (Wolfendale, 2012). In fact, in the aftermath of the 9/11 attacks there has been a rhetorical debate, fostered by some White House legal memos, whether the Geneva Conventions were silent or ambiguous about the status of terrorists making their application impossible to this "new kind of war" (Hoffman, 2004; Jinks, 2005). Nonetheless, these arguments have been subsequently disavowed by the more recent doctrinal debate, since the argument that certain essential provisions of the 1949 Geneva Conventions do not apply to non-state actors are inconsistent with the principles and purpose of the Conventions which instead cover all kinds of conflicts, international and non-international, and to all parties, including non-state groups (Dinstein, 2016). Dinstein argues that the applicability of IHL strictly depends on the existence of a situation of armed conflict, rather than on the nature of the parties involved. Milanovic (2015) adds that the provisions of the Conventions do not contain any explicit limitation to their applicability

In particular, the most contemporary review states that the IHL applies to the so-called war on terror - despite the peculiar nature of these conflicts - since a conflict between States and terrorist groups meets the criteria of a non-international armed conflict (Patel King and Swaak-Goldman, 2003). Furthermore, taking into account that the (almost) entirety of terrorist groups belong to the conventional category of Non-State Armed Groups, today it is generally accepted that IHL is binding on organized armed groups as long as they meet the standard criteria: a sufficient level of organization

and the engagement in coordinated military operations (Kleffner, 2007). In this regard, it is reasonable to conclude that the IHL remains relevant and necessary in contemporary conflicts, although adapted and updated to the contemporary challenges.

Upholding and implementing the Conventions will ensure not only that the main victims of modern wars benefit from the essential protections afforded by these rules, but will also demonstrate the values the international community really stands for, such as the relief of civilian suffering, and not only the protection of national economic and political interests (Nevers, 2006). In "The International Committee of the Red Cross and the Protection of War Victims" (2003), François Bugnion showcases in detail the ICRC's efforts to promote and uphold IHL, as well as the dilemmas faced by the Organization, from the access to conflict zones to the changing nature of armed conflict. Although Bugnion's work examines the overall history and evolution of the ICRC from its very foundation, it can be said that it fails to address important elements such as the current challenges posed by contemporary conflicts as well as it does not capture the direct experiences of war victims on the field.

The importance of the Fourth Geneva Conventions cannot be overstated. There are many scholars, such as Henry (2019) or Dörmann and Serralvo (2014), who focus on specific articles in the Convention. Others focus on specific themes that are seen throughout the Convention as a whole, such as Meron (2000), while others focus on specific regions and conflicts, like Solis (2009). With so many scholars using this Convention for such a wide range of research, it is inevitable to feel the urge to update the original Commentaries in order to take account of the new developments, capture the different understandings and reflect the experience obtained in applying the Conventions and Protocols based on real examples of state interpretation, a sentiment outlined by the team at the ICRC tasked with updating the commentaries (Henckaerts, 2012). It is true that much of the aforementioned literature is limited in scope to the issues most salient to the times each of these articles were written in, something that is immensely valuable in showing the scholarly interpretation of the Conventions. The Geneva Conventions as a whole, however, are timeless, and the Commentaries produced by the ICRC provide guidance not only for the current issues of the day, but for a wide range of issues that may vary in relevance over time. The understanding of the scholarly interpretations of the Geneva

Conventions when balanced with the analysis of real situations where the Fourth Geneva Convention was applied will help researchers better understand the legal and practical implications of the Convention as a whole. Through the use of both the public and private archives at the ICRC, we will have the access to data unavailable to the researchers involved in the other commentaries, either because they did not consult the private archives in the case of Clapham, Gaeta, and Sassoli (2015), or because the events this data was drawn from had not yet occurred in the case of Pictet (1952), will allow us to contribute updating the Commentaries bringing them to the 21st century.

Research Methodology

Our research method will primarily focus on document analysis as outlined by O'Leary. In document analysis, data is obtained by examining existing records and documents. It is a series of processes that take place while examining and evaluating printed and electronic materials to collect information about the target research question. (O'Leary 2017). Our target research question centers around State practices and interpretations relevant to the Fourth Geneva Convention in order to aid in the efforts of the International Committee of the Red Cross, henceforth referred to as the ICRC, to complete the updated commentary for the Fourth Convention, having already updated commentaries for the first three Geneva Conventions (Henckaerts, 2012). Prior to the outset of the research project, key articles of the Fourth Geneva Convention and related research questions were identified by the commentaries team at the ICRC to reduce the scope of the research, namely Articles 25 to 27, 30, 35, 37, 38, 48, 81, 86, 93, 105, 107, 112, 120, 122 to 125, and 147. These Articles will serve as the reference point for the students and focus on how civilians have been affected during regional and historical conflicts between states as defined by the ICRC. To illustrate how this process will work: Article 25 of the GCIV deals with the right to news from family (International Committee of the Red Cross, 1949) and will be referenced to see if States have complied with the duties and responsibilities outlined. For example, did States act consistently with the criteria set out in the Article in relation to the exchange of news from the family of a civilian or combatant interned during the conflict between India and Pakistan in 1965 or the Ethiopian Eritrean war of 1998-2000? As evidenced by this

example, we will be required to research multiple case studies to adequately answer these questions. Though the process of the creation of the Fourth Geneva Convention stretches prior to 1949 (Pictet, 1951), we will only focus on international armed conflicts occurring after the treaty was enacted, and particularly those dating after the publication of the original commentary on the Fourth Convention (1958).

As the nature of our research relies on specific examples of State practice, it is inherently qualitative. O'Leary further describes document analysis as the collection, review, questioning and analysis of various forms of written text as a source of primary research data (O'Leary, 2017). We will not be conducting fieldwork for the data collection phase through questionnaires or interviews as that data has been thoroughly collected throughout the years by the ICRC. Creswell (2013) defines documentary research on case study research from the five main traditions of qualitative research (narrative research, phenomenology, grounded theory, ethnography and case study research). From this point of view, the "historical research" method, which Lancy (1993) refers to as used in the discipline of education, will be used. We will rely on both the public and private archives at the ICRC to find the evidence needed to answer our research question. These documents may include official documents related to the Convention, such as the text of the treaty, official reports and records, and correspondence between the parties involved. The project may also use the ICRC's customary law database, developments in international criminal law and international human rights law (Henckaerts, 2012). This will require careful planning and coordination with the archivists and will be conducted in a private reading room prepared for us. In order to obtain the documents from the archivists, we will create a list of topics and conflicts we want to research on a particular day and email it to the archivists in advance. It is necessary for us to choose a variety of conflicts spanning the period from 1949 to the present as it will provide us with more representative examples of State conflict and mitigate potential impacts of our own personal biases. We believe this is the best method of data collection as it gives us access to reliable information across time and geography and best suits the needs of our partner organization. Furthermore, as we are not starting our research from scratch but contributing to a larger project, we relied heavily on the request of our partner organization to focus on the ICRC archives. However, in case the data available does not adequately answer our research

question, we may look at secondary sources of information to supplement our findings, including via already-prepared research briefs compiling relevant information from such sources as military manuals, national legislation, and case law, as well as academic commentary and the ICRC field experience. Other materials in the ICRC library or online databases may also be of use. In this situation, our aim in using secondary sources as well as primary sources would be to reveal the strengths of document analysis as a research method, as Neuman (2014) emphasizes. Once data has been collected and reviewed, we will analyze it and create a final report.

We will be relying on documents primarily in English and French, which will cover much of what is present in the archives. However, there may be some documents produced in local languages that we will not be able to benefit from as we do not speak those languages and relying on outside translation would conflict with the nature of our research. Furthermore, for some questions it may be more difficult to find sufficient information in the archives or from secondary sources. This possibility has been presented to us by our project partner and may require further research our team is not equipped to do.

As we will be analyzing data from both the public and the private archives, there are pieces of our research that we will not be able to publicly share. This requires us to segregate information gathered from each archive and create two separate deliverables: a full report to be shared internally at the ICRC and a version with redactions to be agreed with the ICRC that can be shared externally. Although the use of this classified information does present logistical concerns and creates potentially ethical challenges as we as researchers may possess information that we cannot and should not share as we do not have the consent of the organization, we have obtained it from to share it publicly, the benefits of using information obtained from the private archives far outweigh potential costs. Finally, we will rely on the guidance from our partner organization, our academic supervisor, and academic tutor to ensure that the project is conducted in full compliance with the research ethics guidelines as outlined by the Geneva Graduate Institute.

Bibliography

Arend, A. C., (2007). Who's Afraid of the Geneva Conventions? Treaty Interpretation in the Wake of Hamdan v. Rumsfeld. *American University International Law Review 22, no. 5.*

Arsenault, E. G., (2017). Geneva Convention compliance in Iraq and Afghanistan, in: Do the Geneva Conventions matter? *Oxford University Press*.

Ball, D. J., (2004). Toss the Travaux - Application of the Fourth Geneva Convention to the Middle East Conflict - A Modern (Re)Assessment. *New York University Law Review 79*, no. 3.
Benard, C., (2011). The battle behind the wire: U.S. prisoner and detainee operations from World War II to Iraq. *Rand National Defense Research Institute*.

Ben-Naftali, O., (2004). A la Recherche Du Temps Perdu: Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion. *Israel Law Review*.

Benvenisti, E., (2012). The International Law of Occupation. Oxford: *Oxford University Press*, 2nd edition.

Bothe, M., (2012). Effective control during invasion: a practical view on the application threshold of the law of occupation. *International Review of the Red Cross.*

Bugnion, F., (2003). The International Committee of the Red Cross and the Protection of War Victims. *ICRC*.

Chalifour, E. T., (2022). La interpretación de los Convenios de Ginebra de 1949: una tarea indispensable para mantener su aplicabilidad a los conflictos armados contemporáneos. *Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas, Secretaría de Relaciones Exteriores*.

Carron, D., (2016). When is a conflict international? Time for new control tests in IHL. *International Review of the Red Cross, 98 (903).*

Chetail, V., (2016). Is There Any Blood on My Hands? Deportation as a Crime of International Law.

Leiden Journal of International Law, Vol 29.

Creswell, J. W., (2013). Qualitative Inquiry and Research Design: Choosing Among Five Approaches. *CA: Sage Publications*.

Condorelli, L., (1984). Laurence Boisson de Chazournes, "Quelques remarques à propos de l'obligation des Etats de «respecter et faire respecter» le droit international humanitaire «en toutes circonstances". *Comité international de la Croix-Rouge*.

De Nevers, R. (2006). Modernizing the Geneva Conventions. *The Washington Quarterly The MIT Press, Volume 29, Number 2.*

Dinstein, Y., (2016). The Conduct of Hostilities under the Law of International Armed Conflict. *Cambridge*.

Dörmann, K., & Serralvo J., (2014). Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations. *International Review of the Red Cross, Vol. 96 no. 895/896.*

Goodman, R., (2009). The Detention of Civilians in Armed Conflict. *The American Journal of International Law, Vol. 103, No. 1.*

Hassouna, H. A., (2001). The Enforcement of the Fourth Geneva Convention in the Occupied Palestinian Territory, Including Jerusalem. *ILSA Journal of International & Comparative Law, Vol. 7: Issue 2, Article 19.*

Henckaerts, J. M., (2012). Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the twenty-first century. *International Review of the Red Cross, Volume 94, Number 888.*

Henry, E., (2019). The Prohibition of Deportation and Forcible Transfer of Civilian Population in the Fourth Geneva Convention and Beyond. *Revisiting the Geneva Conventions.*

Hoffman, M. H., (2004). State Practice, the Customary Law of War and Terrorism: Adapting old rules to meet new threats. *Israel Yearbook on Human Rights, Volume 34.*

Kleffner, J. K., (2007). The Applicability of International Humanitarian Law to Organized Armed Groups. *International Review of the Red Cross, Vol. 89, no. 867.*

King, F. P., & Swaak-Goldman O., (2003). The applicability of international humanitarian law to the "war against terrorism". *Hague Yearbook of International Law, Vol. 15.*

Lancy, D. F., (1993). Qualitative Research in Education: An Introduction to the Major Traditions. *White Plains.*

Mačák, K., (2022). The Role of International Human Rights Law in the Interpretation of the Fourth Geneva Convention. *Israel Yearbook on Human Rights, Vol. 52.*

Meron, T., (2000). The Humanization of Humanitarian Law. *The American Journal of International Law, Vol. 94, No. 2.*

Milanovic, M., (2015). The Applicability of the Conventions to 'Transnational' and 'Mixed' Conflicts. The 1949 Geneva Conventions: A Commentary by Andrew Clapham, Paola Gaeta, Marco Sassòli. *Oxford Public International Law*.

Neuman, W. L., (2014). Social research methods: Qualitative and quantitative approaches. *Pearson*.

O'Leary, O., (2017). The Essential Guide to Doing Your Research Project. *SAGE Publications Ltd*., London.

Pictet, J. S., (1951). The New Geneva Conventions for the Protection of War Victims. *The American Journal of International Law, Vol. 45, No. 3.*

Solis, G. D., (2009). The U.S. Removal of 'Protected Persons' From Occupied Iraq and Afghanistan. *Georgetown Journal of International Affairs, Vol. 10, No. 1.*

Sassòli, M., (2012). A Plea in Defence of Pictet and the Inhabitants of Territories Under Invasion: The Case For the Applicability of the Fourth Geneva Convention During the Invasion Phase. *International Review of the Red Cross*.

The International Committee of the Red Cross, (2020). Article 1 - Respect for the Convention. ICRC Commentary on 1949 Third Geneva Convention on the Treatment of the Prisoners of War.

Applied Research Project 2023 - ARP 2_06

Human Rights and Humanitarianism

Academic supervisor: Bugra Gungor

Tutor: Kudzai Tamuka Moyo

Partner: Matt Pollard, Legal Adviser at ICRC Legal Division;

Jean-Marie Henckaerts, Head of the ICRC Commentaries Update project

Wolfendale, J. and Tripodi, P., (2012). New Wars and New Soldiers Military Ethics in the Contemporary World. *Routledge*.

Zwanenburg, M., (2012). The 'External Element' of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation. *International Review of the Red Cross*.

Applied Research Project 2023 - ARP 2_06
Human Rights and Humanitarianism
Academic supervisor: Bugra Gungor
Tutor: Kudzai Tamuka Moyo
Partner: Matt Pollard, Legal Adviser at ICRC Legal Division;
Jean-Marie Henckaerts, Head of the ICRC Commentaries Update project

Annex II

Research Questions and Articles

Articles that apply to all persons in the territory of a party to the conflict

Article 25 ***Family News*** **-** any practice relevant to 25(3) and particularly limitations on the number of words or number of forms ['If the Parties to the conflict deem it necessary to restrict family correspondence, such restrictions shall be confined to the compulsory use of standard forms containing twenty-five freely chosen words, and to the limitation of the number of these forms despatched to one each month.']

Article 25 ***Family News*** - any practice on States' interpretation of the meaning of 'family' and 'members of a family' when it comes to 'family news' - i.e. the right to exchange correspondence with family members (and see below Art 26, same question re: restoring family contact through matching enquiries, these two questions could be investigate together). Practice under other Articles on civilian internees, receiving visits from family members etc, or under 'family rights' in Article 27(1), for instance, could also be relevant.

Article 26 ***Dispersed Families*** - any mention in IACs of organizations OTHER than the ICRC and National Societies / CTA working to restore family links as contemplated by Art 26? Any practice relevant to the condition that such organizations be 'acceptable' to the Party 'and conform to its security regulations' - in particular, any instance where states actually invoked this in relation to ICRC, national society, or any other organization, to refuse to allow such work.

Article 26 ***Dispersed families*** - any practice on States' interpretation of the meaning of 'family' and 'members of a family' when it comes to restoring family contact through matching enquiries (what

we would today call 'family links' although has had various names in the past). See also above same question re: correspondence, these two questions could be investigated together.

Status and Treatment of Protected Persons

Article 27 ***Treatment of Protected Persons*** - find replacement sources for published GCIII text / other relevant CGIV specific practice on issues similar to GCIII (e.g. humane treatment) and new issues (e.g. family right) / specific practice on 27(2) on women.

Article 30 ***Application to Protecting Powers and relief organizations*** - Examples needed for this and related articles. Have there been such applications to the ICRC and what action was taken in response. Specifically have there been any applications related to employment (Article 40(4)) or labour detachments of civilian internees?

Article 35 and 48 ***Right to leave the territory / occupied territory*** - any examples of the institutional mechanism and procedures put in play by a state restricting departures of protected persons from its territory or from occupied territory? i.e. what authority takes the initial decision, and what 'court or administrative board' was designated to carry out reconsideration of initial decisions. Very little practice was found to date.

Article 37 ***Protected persons in confinement in the state's own territory*** - any examples where this article [applies to 'Protected persons who are confined pending proceedings or serving a sentence involving loss of liberty'] was applied outside the context of criminal proceedings?

Applied Research Project 2023 - ARP 2_06
Human Rights and Humanitarianism
Academic supervisor: Bugra Gungor
Tutor: Kudzai Tamuka Moyo
Partner: Matt Pollard, Legal Adviser at ICRC Legal Division;
Jean-Marie Henckaerts, Head of the ICRC Commentaries Update project

Civilian Internees

Article 81 *Maintenance*

Paragraph 3 says that 'The Detaining Power shall provide for the support of those dependent on the internees, if such dependents are without adequate means of support or are unable to earn a living.' Are there any examples of States' paying allowances to internees' families?

Article 86 *Premises for religious services*

Paragraph 6: says "When no specific premises are available, the Detaining Power may build and/or adapt existing places into premises for the exercise of religion." Are there any examples of premises for religious services for civilian internees to practice their religion? For instance, were they provided with materials to build a place of worship? Was there a building/tent that was adapted for religious services?

Article 93 *Religious duties*

Paragraph 8: An example of allowing civilian internees to practice/observe religious holidays?

Paragraph 9: examples of food being prepared with respect for internees' religious precepts and taboos, and ensuring they are not served religiously forbidden foods.

Paragraph 15: Examples of limitations that were placed on internees practice of religion. For instance, a Detaining Power would be entitled to impose restrictions where an individual's practice of religion involved a call for violence against the Detaining Power or other civilian internees. Paragraph 20: Examples where the Detaining Powers provided civilian internees with religious texts,

such as Qurans or Bibles in multiple languages; where the Detaining Power did not do so, it permitted organizations like the ICRC to provide such texts.

Paragraph 21: Under Article 108, internees may receive articles of a religious character through individual or collective shipments form relief agencies, families or private donors. In addition, Article 142 requires that representatives of religious organizations, relief societies or any other organization assisting protected persons receive all necessary facilities for, *inter alia*, distributing material for religious purposes. Examples of this? [for PoWs, at various times, the ICRC and relief or religious organizations have provided PoWs with a wide variety of religious items, where the Detaining Powers did not do so. The items distributed included prayer books, missals, devotional articles, theological and philosophical works, furnishings for chapels, chandeliers, wax, religious paintings, sacred music, religious publications, carpets, prayer wheels, hair oil, and other articles required for religious observances. Similar for civilian internees?]

Paragraph 17: Any examples where camp disciplinary routine was temporarily suspended to allow for some duties during religious holidays, such as allowing internees to get up at any time of the night to perform religious rites?

Paragraph 31: any examples of the activities or interned ministers of religion. For PoWs we said this may include: ministering; holding religious services; taking confessions; giving blessings; overseeing religious classes; conducting religious or spiritual study; visiting the sick; officiating at funerals in accordance with religious rites; and any other activities constituting spiritual assistance.

Paragraph 39: Any examples where, to ensure the satisfactory allocation of religious personnel and to remedy the lack or spiritual assistance available to civilian internees, the ICRC and other humanitarian or religious organizations have intervened to request a better distribution of religious personnel.

Paragraph 42: Any examples where security concerns influence decisions to give or refuse travel facilities to religious personnel, i.e. as means of transport are seen to favour outside contacts and may facilitate escapes? For PoWs, we said that on a number of occasions, the ICRC objected to what it considered unjustified restrictions on the movement of religious personnel and tried to impress upon the camp authorities the importance of providing such personnel with transport and other facilities.

Article 105 *Notification of Measures Taken*

Any examples where internees fell into the hands of authorities that were not under a centralized command, whether this affected the notifying of information as required under Article 105.

Examples of how internees were informed. In particular, to support the following: The information should, wherever possible, be provided in writing, since memory can fade, and internees must be able to access this information readily. This may also be of benefit to the Detaining Power, whose personnel may change over time. In Practice, the information tends to be provided through notices posted in camps and labour detachments. In such cases, the notices must be readily accessible and in a language which all the internees can understand. The necessary information could also be provided orally, such as to each internee or to the Internee Committee for onward communication.

Examples of the detaining power informing the Protecting Power (or where Protecting Powers have not been appointed, informing the ICRC instead). Examples where the ICRC agreed to act in this regard, and took steps to inform the Power to which the internees owe allegiance, relief agencies and the internees' families of the measure taken by the Detaining Power.

Article 107 *Correspondence* (and 112 on *Censorship*)

Examples of how internees were enabled (or prevented from) to correspond with the outside world. Any examples that show that communication with the exterior improves internees' state of mind. Examples of condemnation of violations of the right to correspond with the outside world.

Examples of internees receiving photos of their families and paintings done by their children. Any examples where detaining authorities authorized such photos of internees to be forwarded to their families. Any measures taken to ensure that such photographs to no impermissibly undermine the internees' honor and dignity.

Examples of censorship as foreseen by Article 112. Examples of any issues that have arisen regarding the language internees have used in their correspondence and the consequent difficulties detaining authorities have had in carrying out the necessary censorship.

Article 120. *Escapes*

Any examples of authorities' reaction to escapes or attempted escapes by civilian internees, and whether these were consistent with requirements of Article 120. (For PoWs, we said: Disciplinary sanctions imposed for attempted escape often take the form of confinement of up to 30 days, confiscation against receipt of private items that could facilitate escape or of other personal comfort items, confiscation of radios and televisions, etc. There are, however, also examples in contemporary armed conflicts where unlawful sanctions were applied in the case of escape attempts. Among the most serious were torture, ill-treatment (including beatings), humiliation and even execution of PoWs or threats thereof. More rarely, PoWs have been subjected to judicial proceedings and sometimes sentenced to prison for escape attempts.

Any examples of whether and how authorities punished persons for "aiding or abetting" escapes.

Any examples of how authorities interpreted this term, including by looking at relevant laws and regulations in force. Do they, for instance, say that it is an office to help dig a tunnel, provide weapons or tools, conceal the escapee or make noise to cover up the escape attempt.

Any examples where someone was punished for aiding or abetting not only an escape, but also a connected crime (e.g. the stealing of the keys or murder). If such cases are found, did the person get punished only if they knew in advance that the escapee would commit the crime?

Article 122-125: *Disciplinary proceedings against civilian internees*

N.b. Here we are focused on disciplinary proceedings, not formal criminal charges or trials. Any examples of disciplinary proceedings against civilian internees. Details of interest: what procedures if any were in place? Were they followed in practice? Who made the decision about whether the person should be punished or not? If the internee had escaped, how quickly were they turned over to the competent authorities? What length of pre-trial confinement (detention in a cell or similar closed place), if any, was imposed. How long was it between the accusation and the trial, and how long between the trial and the carrying out any punishment? If the person was subjected to consecutive punishments, was there a break between them and how long? If the person was confined, whether in pre-trial or as a punishment, where were they confined (should not be in a criminal prison, etc.). And in what conditions (sanitary, bedding, hygiene, at least 2 hours daily outside, medical inspection, correspondence with outside world, were parcels or money withheld)? Were women separated from men? Were women supervised only by women? Could ICRC (and Protecting Power) visit them during their confinement and interview them without an interpreter?

Applied Research Project 2023 - ARP 2_06

Human Rights and Humanitarianism

Academic supervisor: Bugra Gungor

Tutor: Kudzai Tamuka Moyo

Partner: Matt Pollard, Legal Adviser at ICRC Legal Division;

Jean-Marie Henckaerts, Head of the ICRC Commentaries Update project

Execution of the Convention

Article 147, *Penal Sanctions, Grave Breaches*

Any examples where the ICRC reminded Parties to a conflict that forced recruitment [compelling a protected person to serve in the forces of a hostile Power] would amount to a grave breach under the Fourth Convention and that they should exercise utmost caution when assessing whether a protected person is genuinely being recruited voluntarily.