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**The protections afforded to transgender individuals under the Third Geneva  
Convention relative to the treatment of prisoners of war**

by

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## Summary

This dissertation examines the Third Geneva Convention and its updated Commentary released in 2020 by the ICRC. It evaluates its suitability to provide adequate protection to transgender prisoners of war. It offers recommendations to address the *lacuna* in the law arising from the limited academic research, knowledge, and practice regarding transgender individuals during international armed conflict by consulting multiple sources of international human rights law that provide a more robust framework concerning transgender individuals in detention.

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## CHAPTER 1: INTRODUCTION

### 1.1 Synopsis

This dissertation aims to examine the protections afforded to transgender individuals who become prisoners of war during an international armed conflict. The issue of gender identity and its effect on POWs has received relatively little attention from scholars and policymakers,<sup>1</sup> even though transgender individuals are among some of the most vulnerable members of society.<sup>2</sup>

It is crucial to gain a deeper understanding of the unique challenges faced by transgender POWs, as well as the protections that exist for these individuals under international humanitarian law (IHL). In particular, IHL experts must focus on how gender identity is treated within existing legal frameworks for prisoner of war treatment and consider whether specific, explicit regulatory provisions should be created to afford additional protection to this vulnerable group. By conducting a thorough analysis of the various sources of international law as defined in the Statute of the International Court of Justice, including existing laws and policies in the form of treaties, customary law, relevant case law and scholarly publications, an adequate understanding of the unique challenges faced by transgender POWs can be ascertained.<sup>3</sup> Only by understanding these issues can lawmakers identify gaps in our current protections and work to ensure that all individuals are treated with dignity and respect regardless of their gender identity.

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<sup>1</sup> Helen Durham, and Katie O'Byrne "The Dialogue of Difference: Gender Perspectives on International Humanitarian Law" (2010) 92(877) *International Review of the Red Cross*. 31–52.

<sup>2</sup> UN Office of the High Commissioner for Human Rights (OHCHR), *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, September 2012, HR/PUB/12/06. 11.

<sup>3</sup> United Nations, *Statute of the International Court of Justice*, 18 April 1946. Article 38: The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

## 1.2 Introduction

This chapter will introduce the research objective of this dissertation. The research question that will be addressed in this dissertation is whether the Third Geneva Convention (GC III)<sup>4</sup> provides adequate protection to transgender prisoners of war. This chapter is structured as follows: section 1 contextualises the topic; section 2 presents the research questions of the dissertation; section 3 sets out the proposed research aims and objectives; section 4 presents the research methodology; section 5 notes the delimitation of the study

## 1.3 Research questions

The following research questions will be addressed in the study:

1. Does GC III qualify transgender individuals as POWs?
2. Do the protections provided by GC III apply to transgender POWs?
3. Can international human rights law be concurrently applied to international humanitarian law to interpret provisions of GC III to provide maximum protection for transgender POWs?
4. What are the specific issues transgender POWs face that have to be considered when interpreting provisions of GC III?

## 1.4 Research objective

The overall objective of this study is to examine GC III and its subsequent Commentary released by the ICRC in 2020,<sup>5</sup> evaluate its suitability to provide adequate protection to transgender POWs and provide recommendations to address the *lacuna* in the law arising from the limited academic research, knowledge, and practice regarding transgender individuals in international humanitarian law.

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<sup>4</sup> Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (hereafter GC III).

<sup>5</sup> ICRC, Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III).



## **1.5 Delimitation**

While the dangers facing the entire LGBTQIA+ community during armed conflict is particularly worrying, due to a spatial limitation coupled with risks unique to the transgender identity meriting particular attention, this dissertation specifically focuses on the dangers facing transgender individuals who fall into the power of the enemy during international armed conflict.

## **1.6 Research methodology**

The writer will conduct academic, desk-based research using the traditional sources of international law as the point of departure. Traditional sources are the sources of international law listed in art 38(1) of the ICJ Statute. The research will include a critical evaluation of relevant international law, including, as primary sources, relevant articles of GC III and various international human rights treaties. The sources of customary international law will further be considered. Secondary resources will include views expressed by authoritative writers on international humanitarian and human rights law as set out in various publications.

## **1.7 Chapter breakdown**

Chapter 2 will discuss the reality of transgender POWs and what protections they are entitled to under GC III. The chapter will start by explaining what the GC III entails and how the ICRC's Commentary has evolved to become the foremost guide for interpreting and implementing the Convention. Next, the possibility of transgender individuals becoming POWs will be established by examining the categories of persons who may acquire such a status according to Article 4 of the Convention. Following the confirmation of transgender individuals qualifying as POWs per the ordinary meaning of the term and subsequent state practice, the chapter will examine the fundamental provisions of the Convention in order to confirm that the overall object and purpose of the Convention is to protect all POWs, including transgender individuals who attain such a status.

Chapter 3 will consider the relationship between international human rights law and international humanitarian law by assessing the converging development of these two legal regimes, examining the continued applicability of international human rights law during international armed conflict and critically assessing the principle of complementarity to determine whether international human rights law is well suited to fill the gaps of GC III as it pertains to specific protections of transgender POWs.

Chapter 4 examines the position of international human rights law regarding the protection of the transgender identity by consulting various sources of international law, including international and regional human rights treaties, courts and committees. The Yogyakarta Principles is then discussed as a vital non-treaty standard providing for the protection of transgender human rights.

Chapter 5 assesses the following issues in consultancy with international human rights law where transgender POWs may benefit most from explicit guidance to fill the gap left by GC III: risk assessment, training of detention personnel, placement, searches, protective solitary confinement and oversight by the ICRC.

Chapter 6 concludes that the dissertation shows that while the GC III does apply to transgender POWs, it does not include any explicit protections for these individuals. However, by relying on the principle of complementarity to fill the gap left by the GC III and its Commentaries, international human rights law must be relied upon to provide explicit and substantive protections to transgender POWs.

## CHAPTER 2: THE APPLICATION OF THE THIRD GENEVA CONVENTION TO TRANSGENDER PRISONERS OF WAR

### 2.1 Introduction

This chapter discusses the reality of transgender prisoners of war and what protections they are entitled to under the Third Geneva Convention (GC III).<sup>6</sup> The chapter starts by explaining what the GC III entails and how the ICRC's Commentary has evolved to become the foremost guide for interpreting and implementing the Geneva Conventions.<sup>7</sup> Next, the possibility of transgender individuals becoming POWs is established by examining the categories of persons who may acquire such a status according to Article 4 of the Convention.<sup>8</sup> Following the confirmation of transgender individuals qualifying as POWs per the ordinary meaning of the term and subsequent state practice, the chapter examines the fundamental provisions of the Convention in order to confirm that the overall object and purpose of the Convention is to protect all POWs, including transgender individuals who attain such a status.

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<sup>6</sup> Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III).

<sup>7</sup> Sandesh Sivakumaran, "The influence of teachings of publicists on the development of international law" (2016) 66(1) *International and Comparative Law Quarterly*.

<sup>8</sup> Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (A)(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war. (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model. (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law. (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

## 2.2 The Third Geneva Convention

The Geneva Convention relative to the Treatment of Prisoners of War is the third of four Conventions adopted at the 1949 Geneva Diplomatic Conference.<sup>9</sup> It establishes a comprehensive framework for the treatment of POWs, defined as members of the armed forces and other designated categories of persons who fall into enemy hands during an international armed conflict.<sup>10</sup> The Convention establishes a collection of fundamental rights for all POWs, including humane treatment with regard to their person and honour and equal treatment without discrimination<sup>11</sup> which will be discussed in more detail below. These fundamental principles are then strengthened by specific provisions governing the treatment of POWs.<sup>12</sup> After more than 70 years, the GC III remains the cornerstone of humanitarian law and the primary instrument governing the protection of POWs.<sup>13</sup> It is commonly included in military manuals worldwide and is typically regarded as part of customary law.<sup>14</sup> The GC III is still applicable today, as POWs continue to exist.<sup>15</sup>

## 2.3 The ICRC's Commentary on the Third Geneva Convention

A treaty clause is frequently fairly brief, and its meaning is difficult to determine.<sup>16</sup> Additional sources that elucidate the meaning of the provision by examining its intent and purpose, placing it in context, taking into account how it was written, examining subsequent usage, and surveying pertinent literature has proven to be especially effective.<sup>17</sup> In this regard, Commentaries have proven useful in the interpretation of the law.<sup>18</sup> The most prominent example of this is the ICRC Commentaries on the

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<sup>9</sup> *Final Record of The Diplomatic Conference Of Geneva Of 1949* (Federal Political Department 1949) 243-296.

<sup>10</sup> GC III, Art 4.

<sup>11</sup> GC III, Arts 13, 14, 16.

<sup>12</sup> GC III, Part III.

<sup>13</sup> ICRC, *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III) para 1.

<sup>14</sup> *ibid.*, para 3.

<sup>15</sup> Jemma Arman and others, "The Updated ICRC Commentary on The Third Geneva Convention: A New Tool To Protect Prisoners Of War In The Twenty-First Century" (2020) 102 *International Review of the Red Cross*. 391.

<sup>16</sup> Sandesh Sivakumaran (note 7 above) 15.

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

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

Geneva Conventions, with courts and tribunals referring to them as "particularly valuable" and "authoritative."<sup>19</sup>

Following GC III's adoption, ICRC specialists involved in the formulation and negotiation set out to produce a comprehensive commentary on its provisions.<sup>20</sup> This ultimately resulted in a Commentary on GC III in 1960.<sup>21</sup> Since their publication, the Commentary has served as a primary source of guidance for the treaty's implementation and interpretation.<sup>22</sup> However, as time passed and practice evolved, an actual need to update the Commentary became apparent.<sup>23</sup> A significant milestone was achieved in 2020 when the ICRC published the revised Commentary on GC III relative to the Treatment of Prisoners of War.<sup>24</sup>

In its introduction, the Commentary states that the update aims to reflect the practice of applying and interpreting the Convention that has developed since its adoption while keeping the components of the original Commentary that remain applicable.<sup>25</sup> The goal is for the new edition to represent modern practice and legal interpretations accurately.<sup>26</sup> As a result, the revised edition is more thorough, having benefited from more than 70 years of implementation and interpretation of the Conventions by States, courts, and academics.<sup>27</sup> The Commentary will be considered below when evaluating transgender individuals a POWs.

## **2.4 Transgender individuals as prisoners of war**

The purpose of this section is to affirm that transgender individuals can attain POW status according to the definition provided by GC III. By relying on Article 31 of the VCLT, the ordinary meaning of "prisoner of war" is determined, followed by concrete

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<sup>19</sup> *Prosecutor v Tadić*, Appeals Chamber, Judgment, IT-94-1, 15 July 1999, para. 93.

<sup>20</sup> ICRC Commentary on GC III, para 67.

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

<sup>22</sup> Jemma Arman and others (note 15 above) 389.

<sup>23</sup> ICRC Commentary on GC III, para 68.

<sup>24</sup> ICRC Commentary on GC III.

<sup>25</sup> *ibid.*, para 68.

<sup>26</sup> *ibid.*, para 69.

<sup>27</sup> Jemma Arman and others (note 15 above) 391.

examples of state practice confirming that transgender individuals fulfil the definition of a "prisoner of war".

#### *2.4.1 Ordinary meaning of "prisoner of war"*

To qualify transgender individuals as POWs, it must be proven that they meet the definitional requirements set out in GC III. The definition of a POW is found in Article 4 of the GC III, which defines prisoners of war as "persons belonging to one of the following categories who have fallen into the power of the enemy."<sup>28</sup>

The first definitional element qualifying a transgender individual as a POW is simply being considered a "person". According to the Oxford English Dictionary the ordinary meaning of a "person" is "a human being regarded as an individual", while being "transgender" denotes "a person whose sense of personal identity and gender does not correspond with their birth sex."<sup>29</sup> From these definitions, it is clear that transgender individuals qualify as "persons" according to its ordinary meaning.

The second qualifying element of a POW is the inclusion in one of the categories set out in Article 4(A) of the GC III.<sup>30</sup> Of all the qualitative categories, "members of the armed forces" set out in Article 4(A)(1) quantitatively make out the largest number of individuals who may become POWs.<sup>31</sup> An encompassing definition of "members of the armed forces" is found in Rule 4 of customary international humanitarian law.<sup>32</sup> It states that "the armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates."<sup>33</sup>

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<sup>28</sup> GC III, Article 4.

<sup>29</sup> "human", *oed.com* (2022) Oxford English Dictionary; "transgender" *oed.com* (2022) Oxford English Dictionary.

<sup>30</sup> GC III, Article 4.

<sup>31</sup> Jemma Arman and others (note 15 above) 395.

<sup>32</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, vol. I, Rules* (Cambridge University Press, 2005) 14-17.

<sup>33</sup> *ibid.*

#### 2.4.2 State practice

Article 31(3)(b) of the VCLT holds that subsequent practice must be taken into account when interpreting a treaty.<sup>34</sup> The subsequent practice taken by the parties in carrying out the treaty serve as tangible proof of their comprehension of its meaning and are therefore crucial to its interpretation.<sup>35</sup>

As of 2022, there are at least twenty-two States allowing transgender individuals to serve openly, including Australia, Austria, Belgium, Bolivia, Brazil, Canada, Chile, Cuba, Czechia, Denmark, Estonia, Finland, France, Germany, Ireland, Israel, Netherlands, New Zealand, Norway, South Africa, Spain, Sweden, Thailand, the United Kingdom and the United States of America.<sup>36</sup>

The Royal Australian Air Force has issued a manual titled "Air Force Diversity Handbook: Transitioning Gender in the Air Force for transgender troops and their supervisors".<sup>37</sup> The Canadian Armed Forces released "Military Personnel Instruction 01/11: Management of CF Transsexual Members."<sup>38</sup> The United Kingdom has issued official military guidance entitled "Recruitment and management of transgender personnel in the armed forces".<sup>39</sup>

Israel is another noteworthy example of transgender individuals serving in the armed forces. The State requires all citizens above the age of 18, regardless of their gender, to serve in the Israeli Armed Forces and has explicitly stated that being transgender does not disqualify the individual from conscription.<sup>40</sup>

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<sup>34</sup> VCLT, Article 31(3)(b).

<sup>35</sup> Oliver Dörr and Kirsten Schmalenbach, "Article 31. General Rule of Interpretation", *Vienna Convention on the Law of Treaties* (Springer 2011) para 76.

<sup>36</sup> 'I'm Still Here': Transgender Troops Begin New Era of Open Military Service' (ABC News, 2021) <<https://abcnews.go.com/Politics/im-transgender-troops-begin-era-open-military-service/story?id=76046328>> accessed 6 March 2022.

<sup>37</sup> Australia, *Air Force Diversity Handbook: Transitioning Gender in the Air Force for transgender troops and their supervisors*, Australian Defence Headquarters, April 2013.

<sup>38</sup> Canada, *Military Personnel Instruction 01/11: Management of CF Transsexual Members*, Office of the Judge Advocate General, February 2012.

<sup>39</sup> United Kingdom, *JSP 889 Policy for the Recruitment and Management of Transgender Personnel in the Armed Forces*, Ministry of Defence, August 2020.

<sup>40</sup> 'Open Service By Transgender Members Of Israel Defense Forces' (Palm Center 2015).

The United States Department of Defense released instructions for "In-service transition for transgender service members" and has also prepared a "Transgender Implementation Handbook".<sup>41</sup> The United States of America constitutes the largest number of transgender individuals actively serving.<sup>42</sup> In 2018, the Department of Defence estimated that more than 14 700 transgender troops were serving in the United States military.<sup>43</sup> This number can reasonably be expected to increase in the coming years due to President Joe Biden's 2021 "Executive Order on Enabling All Qualified Americans to Serve Their Country in Uniform"; the order allows all transgender individuals to serve openly and free from discrimination.<sup>44</sup>

By systematically unpacking Article 4 of the GC III by implementing Article 31 of the VCLT, it has been proven that transgender individuals satisfy the definitional requirements of a POW, backed up by sufficient state practice to merit the inclusion of transgender individuals as "members of the armed forces".

## **2.5 The protection of transgender prisoners of war**

While it has been proven that transgender members of the armed forces do attain POW status when they fall into enemy hands during an international armed conflict, the true meaning of GC III's provisions and whether and to what extent they apply to transgender POWs must yet be determined.

According to Article 31(1) of the Vienna Convention on the Law of Treaties, the true meaning of a treaty's terms must be determined in light of the treaty's 'object and purpose'. 'Object and purpose' serve to include the functional aspect of the treaty into the general rule of interpretation and, in doing so, to incorporate the concept of

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<sup>41</sup> United States, *Department of Defense Instruction 1300.28: Military Service by Transgender Persons and Persons with Gender Dysphoria*, June 2020; *Military Service by Transgender Persons and Persons with Gender Dysphoria: An Implementation Handbook*, September 2020.

<sup>42</sup> Aaron Belkin and Diane H Mazur, 'Department Of Defence Issues First-Ever Official Count Of Active Duty Transgender Service Members' (Palm Center 2018).

<sup>43</sup> *ibid.*

<sup>44</sup> 'Executive Order On Enabling All Qualified Americans To Serve Their Country In Uniform' (The White House, 2022) <<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-enabling-all-qualified-americans-to-serve-their-country-in-uniform/>> accessed 25 January 2022.



effectiveness: the provisions of a treaty must be construed in a manner that promotes the terms of the treaty.<sup>45</sup> Any interpretation that might obviate the need for certain treaty provisions or minimize their practical effect is to be avoided.<sup>46</sup> The object of a treaty relates to the rights and duties established in the treaty. In contrast, the purpose refers to the objective the treaty provisions intend to accomplish.<sup>47</sup> The phrase 'object and purpose' refers to an integrated whole. Thus, the term 'object and purpose' refers to a treaty's reason for existence.<sup>48</sup>

There are several approaches to ascertaining a treaty's object and purpose.<sup>49</sup> Referring to the treaty's title may be beneficial.<sup>50</sup> The preamble of a treaty is often a section in which the parties outline the objectives of their agreement.<sup>51</sup> In other instances, the nature of the treaty may elicit a presumption of a certain object and purpose.<sup>52</sup> Generally, however, a thorough study of the whole treaty, including all substantive provisions, will be necessary to ascertain the object and purpose.<sup>53</sup> The preamble to the GC III is relatively brief and gives only rudimentary instructions.<sup>54</sup> Beyond the preamble, however, the entire language of the Convention, including the title and annexes, is considered for determining the Convention's object and purpose.

The Geneva Convention relative to the Treatment of Prisoners of War, is a set of rules that balances the principle of humanity with military necessity. It guarantees that all POWs are to be treated humanely at all times while still permitting belligerents to intern captured enemy combatants to prevent their return to the battlefield.<sup>55</sup> Regarding the principle of humanity, GC III sets out fundamental protections for POWs that lay out standards of treatment and conditions.<sup>56</sup> These fundamental provisions provide a minimum standard of treatment that all POWs are entitled to under GC III.

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<sup>45</sup> Oliver Dörr and Kirsten Schmalenbach (note 35 above) para 53.

<sup>46</sup> *ibid.*

<sup>47</sup> ICRC Commentary on GC III, para 87.

<sup>48</sup> *ibid.*

<sup>49</sup> Oliver Dörr and Kirsten Schmalenbach (note 35 above), para 56.

<sup>50</sup> *ibid.*

<sup>51</sup> ICRC Commentary on GC III, para 88.

<sup>52</sup> Oliver Dörr and Kirsten Schmalenbach (note 35 above), para 56.

<sup>53</sup> *ibid.*

<sup>54</sup> ICRC Commentary on GC III, para 88.

<sup>55</sup> ICRC Commentary on GC III, para 89.

<sup>56</sup> GC III, Part III.

According to Article 13, POWs must be treated humanely. The provision requires respecting the prisoner's inherent human dignity.<sup>57</sup> Article 13 provides certain express requirements, including the prohibition of violence, intimidation and insults. The obligation of humane treatment cannot be divorced from the duty to respect a prisoner's person and honour set out in Article 14. Respect for the person of the POW encompasses not just guards refraining from violence or physical torture but also ensuring their moral integrity remains intact.<sup>58</sup> Respect for the moral integrity of a POW means respecting the value that every person has of themselves.<sup>59</sup>

The Commentary notes that various categories of individuals have unique needs and perspectives, and risks, which must be considered when assuring their sufficient protection.<sup>60</sup> To ensure that all POWs get humane treatment, their unique requirements and risks must be recognized, evaluated, and addressed.<sup>61</sup> This obligation is set out in Article 16 of GC III and provides for equality of treatment of POWs, prohibiting "adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria".<sup>62</sup> It must be noted that this list is not comprehensive and should be interpreted in the context of social and legal developments.<sup>63</sup> The catch-all phrase "any other distinction based on similar criteria" expresses this concept explicitly.<sup>64</sup>

The overarching 'object and purpose' of GC III is to guarantee that *all* POWs, including transgender prisoners, are always treated humanely. Flowing from its 'object and purpose', GC III covers an extensive range of topics, with many articles in the Convention being more specific provisions of the abovementioned fundamental obligations, many of which include express protections for vulnerable categories of prisoners.<sup>65</sup>

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<sup>57</sup> ICRC Commentary on GC III, Article 13, para 1570.

<sup>58</sup> ICRC Commentary on GC III, Article 14, para 1665.

<sup>59</sup> ICRC Commentary on GC III, Article 14, para 1659.

<sup>60</sup> ICRC Commentary on GC III, para 22.

<sup>61</sup> ICRC Commentary on GC III, Article 16, para 1742.

<sup>62</sup> GC III, Article 16.

<sup>63</sup> Jemma Arman and others (note 15 above) 401.

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

<sup>65</sup> *ibid.* 402.

## 2.6 Conclusion

This chapter asked whether GC III qualifies transgender individuals as POWs and whether the protections provided by the Convention apply to transgender POWs. It showed that transgender individuals indeed satisfy the definitional requirements of a "prisoner of war" according to Article 4 of the Convention, with sufficient state practice qualifying the reality of transgender individuals attaining POW status. Furthermore, by determining the object and purpose of the Convention, it was shown that the Convention seeks to protect *all* POWs, which as a matter of course, includes transgender POWs.

## **CHAPTER 3: THE CO-APPLICABILITY AND COMPLEMENTARITY OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW**

### **3.1 Introduction**

This chapter considers the relationship between international human rights law and international humanitarian law by examining the continued applicability of international human rights law during international armed conflict by consulting various sources of international law, including the United Nations, the ICRC, international and regional human rights treaties and case law.

While it has been proven that Third Geneva Convention, does indeed provide fundamental protections to transgender POWs, these individuals face unique requirements and risks that are not recognized, evaluated, and addressed by the Convention, its Commentaries, nor, in fact, the entire legal regime of international humanitarian law.

### **3.2 The co-applicability of international human rights law and international humanitarian law**

At their creation, international human rights law and international humanitarian law had few similarities beyond their shared goal of serving humanity - the motivations and reasoning behind the two sets of laws were different.<sup>66</sup> The priority of humanitarian law was based on the two warring parties' reciprocal expectations and ideas of civilized behaviour.<sup>67</sup> It did not come from a struggle of those claiming rights but originated from a charitable principle - "*inter arma caritas*".<sup>68</sup> The main motivation behind it was humanistic, and due to the idea of reciprocity between states in how they treat each

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<sup>66</sup> Cordula Droege, "Elective Affinities? Human Rights and Humanitarian Law" (2008) 90 International Review of the Red Cross 503.

<sup>67</sup> Lieber Code: United States War Department, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, 24 April 1863.

<sup>68</sup> Statutes of the International Committee of the Red Cross 1973, Article 3(2).

other's troops, its legal development became possible.<sup>69</sup> Reciprocity and military strategy have always been vital in its development.<sup>70</sup> Humanitarian law is based on the relationships between states.<sup>71</sup>

The basic idea behind human rights is to establish a balance of power between the State and its citizens so that the State does not have complete control over individuals.<sup>72</sup> In the past, human rights were seen as only applied within a State and international interference in this area would not have been appropriate.<sup>73</sup> Human rights were a national issue until after WWII when they became international. The first step in this transition was the Universal Declaration of Human Rights in 1948.<sup>74</sup>

### 3.2.1 *The United Nations*

At the United Nations, human rights became a greater focus in armed conflict. In 1953, the General Assembly mentioned human rights concerning the Korean conflict.<sup>75</sup> After Soviet troops invaded Hungary in 1956, the UN Security Council demanded that "the Hungarian people's enjoyment of fundamental human rights and freedoms" be respected by both the Soviet Union and Hungary.<sup>76</sup> The Security Council made it known in 1967, regarding the territories occupied by Israel after the Six-Day War, that "essential and inalienable human rights should be respected even during the vicissitudes of war".<sup>77</sup>

The following year, the United Nations held the Tehran International Conference on Human Rights, officially accepting that human rights should be enforced during armed conflict.<sup>78</sup> The first resolution passed at the conference was titled "Respect and

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<sup>69</sup> Theodor Meron, "On the inadequate reach of humanitarian and human rights law and the need for a new instrument", *American Journal of International Law*, Vol. 77 (1983), 592.

<sup>70</sup> Cordula Droege (note 66 above) 503.

<sup>71</sup> *ibid.*

<sup>72</sup> Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law", *International Review of the Red Cross*, No. 293 (March–April 1993) 94–119.

<sup>73</sup> Cordula Droege (note 66 above) 503.

<sup>74</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>75</sup> Questions of atrocities committed by the North Korean and Chinese Communist forces against United Nations prisoners of war in Korea. GA Res. 804 (VIII), UN Doc. A/804/VIII, 3 December 1953 (on the treatment of captured soldiers and civilians in Korea by North Korean and Chinese forces).

<sup>76</sup> GA Res. 1312 (XIII), UN Doc. A/38/49, 12 December 1958.

<sup>77</sup> SC Res. 237, preambular para. 1(b), UN Doc. A/237/1967, 14 June 1967.

<sup>78</sup> Cordula Droege (note 66 above) 505.

enforcement of human rights in the occupied territories" and demanded that Israel uphold the Universal Declaration of Human Rights and Geneva Conventions in Palestinian territory under its control.<sup>79</sup>

General Assembly Resolution 2444, entitled "Respect for human rights in armed conflict", noted that "even during the periods of armed conflicts, humanitarian principles must prevail".<sup>80</sup> It reaffirmed the importance of this issue and requested the Secretary-General to draft a report on measures that could be adopted to protect individuals in times of armed conflict.<sup>81</sup> His two reports concluded that human rights instruments afforded greater protection to persons in times of armed conflict than the Geneva Conventions on their own.<sup>82</sup> In line with the two reports, the UN General Assembly reconfirmed in its resolution on "Basic principles for the protection of civilian populations in armed conflict" that "fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict".<sup>83</sup>

### 3.2.2 *The ICRC*

Following the work of the UN, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law aimed to reaffirm existing humanitarian law while also modernizing it.<sup>84</sup> It was here that the ICRC agreed that human rights still apply during times of armed conflict, stating that "human rights continue to apply concurrently with IHL in time of armed conflict".<sup>85</sup>

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<sup>79</sup> Final Act of the International Conference on Human Rights, UN Doc. A/Conf.32/41, 22 April–13 May 1968.

<sup>80</sup> UNGA Res. 2444, "Respect for Human Rights in Armed Conflict", UN Doc. A/RES/2444, 19 December 1968; see also United Nations, Final Act of the International Conference on Human Rights, Tehran, UN Doc. A/CONF.32/41, 22 April–13 May 1968, p. 18.

<sup>81</sup> *ibid.*

<sup>82</sup> Report on Respect for Human Rights in Armed Conflict, UN Doc. A/7720, 20 November 1969, esp. ch. 3 ; Report on Respect for Human Rights in Armed Conflict, paras. 20–29, annex 1, UN Doc. A/8052, 18 September 1970.

<sup>83</sup> GA Res. 2675 (XXV), Basic Principles for the Protection of Civilian Populations in Armed Conflict (9 December 1970).

<sup>84</sup> Cordula Droege (note 66 above) 506.

<sup>85</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva 1987, see esp. para. 4429.

### 3.3.3 Human rights bodies

Universal and regional human rights bodies have issued many rulings supporting the idea that human rights law applies to armed conflict situations.<sup>86</sup> The UN Human Rights Committee has acknowledged the ICCPR's applicability to international armed conflict, as seen in its observational writings and opinions on individual cases.<sup>87</sup> This is also consistent with other committees, such as the Committee on the Elimination of Discrimination against Women<sup>88</sup> The European Court of Human Rights has acknowledged the applicability of the European Convention in international armed conflict situations.<sup>89</sup> The Inter-American Commission and Court have also agreed that the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights are both applicable to armed conflict cases.<sup>90</sup>

Additional proof that human rights treaties are still applicable during armed conflict can be gleaned from derogation clauses allowing some human rights to be disregarded in emergencies, including armed conflict.<sup>91</sup> For example, the International Covenant on

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<sup>86</sup> Cordula Droege (note 66 above) 507.

<sup>87</sup> Concluding Observations: Democratic Republic of Congo, UN Doc. CCPR/C/COD/CO/3, 26 April 2006 ; Belgium, UN Doc. CCPR/CO/81/BEL, 12 August 2004 ; Colombia, UN Doc. CCPR/CO/80/COL, 26 May 2004 ; Sri Lanka, UN Doc. CCPR/CO/79/LKA, 1 December 2003 ; Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003 ; Guatemala, UN Doc. CCPR/CO/72/GTM, 27 August 2001 ; Netherlands, UN Doc. CCPR/CO/72/NET, 27 August 2001; Belgium, 14, UN Doc. CCPR/C/79/Add.99, 19 November 1998; Israel, UN Doc. CCPR/C/79/Add.93, 18 August 1998 ; United States of America, UN Doc. CCPR/C/USA/CO/3/Rev1, 18 December 2006 ; United Kingdom, UN Doc. CCPR/C/GBR/CO/6, 30 July 2008 ; Sarma v. Sri Lanka, UN Doc. CCPR/C/78/D/950/2000, 31 July 2003 ; Bautista v. Colombia, UN Doc. CCPR/C/55/D/563/1993, 13 November 1995; Guerrero v. Colombia, Communication No. R.11/45, UN Doc. Supp. No. 40(A/37/40), 31 March 1982.

<sup>88</sup> Committee on the Elimination of Discrimination against Women, Concluding Observations : Sri Lanka, paras. 256–302, UN Doc. A/57/38 (Part I), 7 May 2002 ; Democratic Republic of the Congo, paras. 194–238, UN Doc. A/55/381, February 2000 ; Colombia, paras. 337–401, UN Doc. A/54/38, 4 February 1999.

<sup>89</sup> ECtHR, Isayeva, Yusupova and Bazayeva v. Russia, Judgment of 24 February 2005 ; Isayeva v. Russia, Judgment of 24 February 2005; Ergi v. Turkey, Judgment of 28 July 1998, Reports 1998-IV; Ahmet O'zkan and others v. Turkey, Judgment of April 6, 2004.

<sup>90</sup> Inter-American Court of Human Rights (hereinafter I/A Ct HR), *Bámaca Velásquez v. Guatemala*, Judgment of 25 November 2000, Series C No. 70, para. 209; Inter-American Commission on Human Rights (hereinafter I/A Cm HR) *Coard v. the United States of America*, Case 10.951, OEA Doc. OEA/Ser.L/V/II.106.doc.3rev, 1999, para. 37 ; *Alejandro v. Cuba*, Case 11.589, Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev, 1999; *Victor Saldano v. Argentina*, Report No. 38/99, OEA/Ser.L/V/II.95, Doc. 7 rev at 289, 1998, para. 18 ; *Rafael Ferrer-Matorra and others v. the United States*, Case No. 9903, Report No. 51/01, OEA/Ser.L/V/II.111, Doc. 20 rev 289, 1980, para. 179 ; *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba*, Decision of 12 March 2002, 41 ILM 532.

<sup>91</sup> Joan F. Hartman, "Derogation from Human Rights Treaties in Public Emergencies", 22(1) *Harv. Int'l L. J.* 1 (1981).

Civil and Political Rights Article 4 allows states parties to derogate from specified provisions of the covenant in times of war or other national emergencies.<sup>92</sup> The provision lists certain rights, such as the prohibition against torture, that may never be derogated from.<sup>93</sup> The ILC has clarified that the presence of a derogation clause in a treaty confirms the ongoing validity of the treaty during times of armed conflict.<sup>94</sup> The competence to derogate during wartime reinforces that an armed conflict cannot lead to automatic suspension or termination of the relevant IHRL treaty.<sup>95</sup>

Even if a particular IHRL treaty does not contain a derogation provision, its language may make it clear that the agreement does not cease to apply in times of armed conflict.<sup>96</sup> For example, the UN Convention against Torture states that "no exceptional circumstances whatsoever," such as a state of war, can be used as an excuse for torture.<sup>97</sup> This phrasing indicates that the UN Convention against Torture applies to situations of those specified kinds of exceptional circumstances, including an armed conflict.<sup>98</sup>

### 3.3.4 Case law

The ICJ's consistent line of case law, which includes the Nuclear Weapons and Wall advisory opinions, has confirmed this has reiterated the applicability of human rights law in times of armed conflict.<sup>99</sup> In its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court referenced the ICCPR to emphasize that human rights still apply during wartime:

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.<sup>100</sup>

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<sup>92</sup> ICCPR Article 4(2).

<sup>93</sup> *ibid.*

<sup>94</sup> ILC Draft Articles on the Effects of Armed Conflicts on Treaties (2011), at 127, para. 50.

<sup>95</sup> Kubo Mačák, 'The Role Of International Human Rights Law In The Interpretation Of The Fourth Geneva Convention' (2022) Israel Yearbook on Human Rights. 4.

<sup>96</sup> *Ibid.*, 7.

<sup>97</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by UN General Assembly Res. 39/46, 10 Dec. 1984, 1465 UNTS 24841, at Art. 2(2).

<sup>98</sup> Kubo Mačák (note 95 above) 7.

<sup>99</sup> Kubo Mačák (note 95 above) 7.

<sup>100</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, para. 25.



The Court's Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory broadened this idea to human rights violations during armed conflict where it stated:

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.<sup>101</sup>

### **3.4 The complementarity of international human rights law and international humanitarian law**

The following section critically assesses the principle of complementarity to determine whether international human rights law is well suited to fill the gaps of GC III as it pertains to specific protections of transgender POWs.

The potential for increased protection of transgender POWs exists when human rights and humanitarian law are applied concurrently. A review of the relevant international rules and interpretive principles governing human rights and humanitarian must be conducted to correctly analyse the relationship between these two legal regimes before considering its application to GC III and transgender POWs.

Complementarity can be defined as the juncture of standards that actively interact and communicate with one another to produce a mutual effect.<sup>102</sup> This type of interpretation is recognized in Article 31(3)(c) of the VCLT Convention on the Law of Treaties, stating that when interpreting a norm, "any relevant rules of international law applicable in the relations between the parties" shall be considered.<sup>103</sup>

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<sup>101</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 106.

<sup>102</sup> Cordula Droege (note 66 above) 521-522.

<sup>103</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (VCLT), Article 31(3)(c).

If another norm is used to interpret a given norm in context, it is said to invoke the principle of complementarity.<sup>104</sup> In other words, "complementarity" is an interpretive tool that can be used to ascertain what the provision intends.<sup>105</sup> This principle is more about creating consistency and filling gaps than it is about establishing which norm takes precedence in a given situation.<sup>106</sup>

For the purposes of this paper, the principle of complementarity refers to the compatibility of human rights law and humanitarian law. These two legal regimes are based on similar principles and values; therefore, they can reinforce each other.<sup>107</sup> Because of this, human rights can be interpreted from the perspective of international humanitarian law and vice versa.<sup>108</sup> In other words, human rights and humanitarian law join forces to accomplish a shared objective: protecting all human beings.<sup>109</sup>

However, some key differences between the two sets of laws should be remembered before discussing the practical feasibility of interpreting them together.<sup>110</sup> Humanitarian law only applies during wartime, whereas human rights law is always in effect.<sup>111</sup> Human rights law and humanitarian law have always held different bindings for various parties. Humanitarian law applies to "parties of the conflict", while, traditionally, international human rights understandings indicated that it applied to states.<sup>112</sup> Most international human rights are, with a few exceptions, subject to derogation.<sup>113</sup> In contrast, humanitarian law can never be derogated. Because of these differences, the two bodies of law cannot merge completely.<sup>114</sup>

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<sup>104</sup> Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 107.

<sup>105</sup> *ibid.*

<sup>106</sup> Cordula Droege, "The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict" (2007) 40(2) *Israel Law Review* 341.

<sup>107</sup> Gerd Oberleitner (note 104 above) 106.

<sup>108</sup> Cordula Droege (note 106 above) 342.

<sup>109</sup> *ibid.*

<sup>110</sup> Cordula Droege (note 66 above) 521.

<sup>111</sup> Gerd Oberleitner (note 104 above) 84.

<sup>112</sup> ICCPR Article 2; ECHR Article 1; ACHR Article 1.

<sup>113</sup> ICCPR Article 4; ECHR Article 15; ACHR Article 27.

<sup>114</sup> Cordula Droege (note 106 above) 342-343.

While the two are different, they are still connected and share some fundamental commonalities.<sup>115</sup> Those in agreement of the complementarity of human rights and humanitarian law argue that these two areas of law work together "in a way that no other two branches do".<sup>116</sup> Complementarity explains how the two legal regimes can work side-by-side without losing their individual purpose or meaning.<sup>117</sup>

The European Union Guidelines on Promoting Compliance with International Humanitarian Law, for example, states that:

International humanitarian law is applicable in times of armed conflict. Conversely, human rights law is applicable to everyone within the jurisdiction of the State concerned in times of peace as well as in times of armed conflict. Thus while distinct, the two sets of rules may both be applicable to a particular situation and it is therefore sometimes necessary to consider the relationship between them.<sup>118</sup>

The position has gained much support. Bodies like the UN Human Rights Committee<sup>119</sup> have spoken out in its defence. At the same time, cases like that of the ICJ's Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory demonstrate how these two areas of law can work together to produce a more comprehensive outcome.<sup>120</sup> Even the father of the Geneva Conventions, Jean Pictet, stated that human rights and humanitarian law are "mutually complementary, and admirably so".<sup>121</sup>

The ICRC has also advocated for this approach in its Study on Customary International Humanitarian Law, where it talks about using human rights instruments to "support, strengthen and clarify analogous principles of humanitarian law" in the

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<sup>115</sup> Gerd Oberleitner (note 104 above) 105.

<sup>116</sup> Medard R. Rwelamira, "Human Rights and International Humanitarian Law: The Link or Common Ground Revisited" (1992) 3(3) Stellenbosch Law Review 346.

<sup>117</sup> Gerd Oberleitner (note 104 above) 106.

<sup>118</sup> Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL) [2009] OJ C303/12, para. 12.

<sup>119</sup> Human Rights Committee, General Comment No. 31 (Article 2) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. E/CCPR/C/21/Rev.1/Add.3 (26 May 2004), para. 11.

<sup>120</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 106.

<sup>121</sup> Jean Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht: Nijhoff, 1985) 3.

section on "Fundamental Guarantees" means that harmonizing norms of human rights and humanitarian law would be beneficial.<sup>122</sup> Understanding complementarity from this point of reference is understood as working towards common goals for both sets of laws.<sup>123</sup>

The compatibility of human rights and humanitarian standards allows for the use of standards from human rights law to make up for areas lacking in humanitarian law, to add or stack norms from both systems to increase protection levels overall, or to understand norms by considering each one alongside the other.<sup>124</sup> Such a collaborative interpretation, application and "filling of gaps" has been widely endorsed, and there has been sufficient practice illustrating its viability.<sup>125</sup>

### **3.5 Applying the principle of complementarity to protect transgender prisoners of war**

The treatment of detainees during an international armed conflict is particularly receptive to the complementary interpretation of international humanitarian and international human rights law.<sup>126</sup> Such a complementary interpretation, application and "filling of gaps" has been widely endorsed, and there has been sufficient practice illustrating its viability.<sup>127</sup> The fundamental guarantee of humane treatment is exemplary of a principle important to both international humanitarian law and international human rights law regarding detainees.<sup>128</sup> It is commonly accepted that, where appropriate, it is possible to read Article 13 of GC III obliging that "prisoners of war must at all times be humanely treated", where appropriate, together with Article 3

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<sup>122</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, vol. I, Rules* (Cambridge University Press, 2005) 299.

<sup>123</sup> Ruona Iguyovwe, "The Interplay between International Humanitarian Law and International Human Rights Law" *International Humanitarian Law and the International Red Cross and Red Crescent Movement* (Routledge, 2010) 41.

<sup>124</sup> Gerd Oberleitner (note 104 above) 108.

<sup>125</sup> Hans-Joachim Heintze, "On the Relationship between Human Rights Law Protection and International Humanitarian Law (2004) 86(856) *International Review of the Red Cross* 793.

<sup>126</sup> International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Report to the 31st International Conference of the Red Cross and Red Crescent* (2011) 16; Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press, 2006) 153–156.

<sup>127</sup> Hans-Joachim Heintze (note 125 above) 794.

<sup>128</sup> See GC III Article 13; Customary Rule 87; ECHR Article 3.

from the European Convention on Human Rights prohibiting inhuman or degrading treatment or punishment.<sup>129</sup>

The ICRC has noted that women and other vulnerable groups deprived of their liberty in armed conflict especially lack sufficient protection under international humanitarian law.<sup>130</sup> Although GC III has numerous protective provisions surrounding the treatment of POWs, it is generally agreed upon that the level of protection these offer is insufficient.<sup>131</sup> This is certainly the case concerning transgender POWs, where GC III and international humanitarian law are wholly silent. The ICRC sees the object and purpose of international human rights law rules on the treatment of detainees as largely consistent with international humanitarian law.<sup>132</sup> As a result, international human rights law can be called upon to supplement this area.<sup>133</sup>

### 3.6 Conclusion

By examining various sources of international law, this chapter has found international human rights law and international humanitarian law apply concurrently during an armed conflict. The chapter then turned to the principle of complementarity, to assess the mutually reinforcing nature of the two branches of international law and how both must be relied upon to interpret the provisions of GC III to ensure maximum protections for transgender POWs.

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<sup>129</sup> Gerd Oberleitner (note 104 above) 111.

<sup>130</sup> International Committee of the Red Cross, *Strengthening Legal Protection for Victims of Armed Conflict, International Conference of the Red Cross and Red Crescent Societies (28 November–1 December 2011)*, ICRC Doc. 311C/11/5.1.1 (October 2011) 9–10.

<sup>131</sup> Jelena Pejic, “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence”, *Custom as a Source of International Humanitarian Law* (International Committee of the Red Cross and Asian African Legal Consultative Organisation, 2005) 378.

<sup>132</sup> International Committee of the Red Cross (note 130 above) 16.

<sup>133</sup> Gerd Oberleitner (note 104 above) 110.

## **CHAPTER 4: INTERNATIONAL HUMAN RIGHTS LAW AND THE PROTECTION OF THE TRANSGENDER IDENTITY**

### **4.1 Introduction**

This chapter will establish the position of international human rights law regarding the protection of the transgender identity. The views of international and regional human rights bodies, as well as valuable non-treaty standards is discussed before considering specific issues transgender POWs face and how international human rights law can fill the gaps left by GC III.

### **4.2 International human rights bodies**

The Human Rights Committee has repeatedly stated that international human rights law must be interpreted and applied to transgender individuals on the basis of their gender identity.<sup>134</sup> Concurrently, United Nations treaty bodies have also stated that transgender individuals are entitled to humane treatment and to be protected against discrimination. The Human Rights Committee has repeatedly urged States Parties to guarantee equal rights for all people, as defined in the Convention, regardless of their gender identity, and to combat violence and prejudice against transgender individuals.<sup>135</sup> The Committee against Torture has also noted that a State's responsibilities under the Convention against Torture apply to everyone, regardless of

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<sup>134</sup> Human Rights Council, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (A/HRC/7/3) 2008; Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights (A/HRC/19/41) 2011; Discrimination and violence against individuals based on their sexual orientation and gender identity: Report of the Office of the United Nations High Commissioner for Human Rights (A/HRC/29/23) 2015; Human Rights Council, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment" (A/HRC/31/57) 2016; Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (A/HRC/38/43) 2018; The law of inclusion: Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz (A/HRC/47/27) 2021.

<sup>135</sup> Human Rights Committee, Concluding Observations on Ecuador (CCPR/C/EQU/CO/6) 2016, paras. 11-12; Venezuela (CCPR/C/VEN/CO/4), 2015, para. 8; Austria (CCPR/C/AUT/CO/5), 2015, paras. 11-12; Republic of Korea (CCPR/C/KOR/CO/4), 2015, para. 13; Iraq (CCPR/C/IRQ/CO/5), 2013, para. 12(d); Chile (CCPR/C/CHL/CO/5), 2009, para. 16.

gender identity.<sup>136</sup> The Committee on the Elimination of Discrimination against Women also recognizes that various forms of discrimination are interconnected and has addressed human rights violations faced by transgender women.<sup>137</sup>

### 4.3 Regional human rights bodies

In the same way, gender identity is also included in the legal field by regional human rights bodies. For example, the European Court of Human Rights has accepted gender identity as a deeply intimate part of an individual.<sup>138</sup> Because of this, the Council of Europe created suggestions to member states that would help end discrimination based on gender identity, one significant suggestion being CM/Rec(2010)5 of the Committee Of Ministers.<sup>139</sup>

The Inter-American Court of Human Rights adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women to address violence against women throughout Latin America.<sup>140</sup> In its advisory opinion OC-24/17, the Court recognized that the Convention applies to trans-women who self-identify as such.<sup>141</sup> The case of *Atala Riffo* in Chile set a precedent by recognizing that the core State obligation of non-discrimination outlined in Article 1.1 of the American Convention on Human Rights covers transgender identity.<sup>142</sup>

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<sup>136</sup> Committee against Torture, General Comment No. 2 (CAT/C/GC/2), 2008, para. 21; and General Comment No.3 (CAT/C/GC/3), 2012, paras. 32 – 39; Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/57/4) 2016.

<sup>137</sup> Committee on the Elimination of Discrimination against Women, General Recommendations No. 28 (CEDAW/C/GC/28), 2010, para. 18; No. 30 (CEDAW/C/GC/30), No. 33 (CEDAW/C/GC/33), 2015, para. 8; No. 35 (CEDAW/C/GC/35); Concluding Observations on Kyrgyzstan (CEDAW/C/ KGZ/CO/4), 2015; on Ecuador (CEDAW/C/ECU/CO/8-9), 2015; on Denmark (CEDAW/C/DNK/CO/8), 2015; on India (CEDAW/C/IND/CO/4-5), 2014; on Cameroon (CEDAW/C/CMR/CO/4-5), 2014.

<sup>138</sup> *Van Kück v. Germany* (application No. 35968/97).

<sup>139</sup> Council of Europe: Committee of Ministers, *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, 31 March 2010, CM/Rec(2010)5.

<sup>140</sup> Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para")*, 9 June 1994.

<sup>141</sup> State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017).

<sup>142</sup> *Caso Atala Riffo y Niñas vs. Chile*, Inter-American Court of Human Rights (IACrHR), 24 February 2012.

The African Charter on Human and Peoples' Rights declares that every person is entitled to the same rights regardless of gender identity. Furthermore, Resolution 275 of the African Commission on Human and People's Rights supports this conclusion by stating that the transgender identity cannot be used as a reason for discrimination.<sup>143</sup>

#### **4.4 Non-treaty standards**

Although non-treaty principles are not legally binding, they have the advantage of providing practical guidance for transgender prisoners' rights.<sup>144</sup> They reflect norms mandated by international law and are equally applicable to all States, not only those who have signed treaties.<sup>145</sup> The Yogyakarta Principles described below are especially important for detainees who are transgender.

##### *4.4.1 The Yogyakarta Principles*

Perhaps the most significant contribution to the protection of transgender individuals in international human rights law flows from the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.<sup>146</sup> The Yogyakarta Principles do not create new rights but affirm the binding international legal standards that all states must comply with to fully accomplish their human rights obligations. These principles provide guidance on how to apply these fundamental human rights principles to issues related to gender identity. Specific recommendations for states accompany each principle. While not a binding document, all of the mentioned treaty monitoring bodies, a multitude of UN human

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<sup>143</sup> African Charter on Human and Peoples' Rights, Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity (ACHPR/Res.275(LV)) 2014.

<sup>144</sup> Julie Ashdown and Mel James, "Women in detention" (2010), 92(877) *International Review of the Red Cross*. 123-141.

<sup>145</sup> *ibid.*

<sup>146</sup> International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007; *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, 10 November 2017.



rights experts and numerous states have emphasized the usefulness and importance of the Yogyakarta Principles.<sup>147</sup>

The following four principles are particularly relevant when using international human rights law to fill in the gaps in GC III regarding protecting transgender POWs. These principles provide specific guidance on applying these fundamental human rights standards to issues related to gender identity and closely mirror the fundamental principles of GC III. In the following chapter, the specific provisions of each of these principles are examined when considering specific issues and regulatory gaps regarding the protection of transgender POWs in GC III.

Principle 2 (The rights to equality and non-discrimination) closely mirrors Article 16 of GC III (Equality of treatment) and reaffirms that the fundamental principles of equality and non-discrimination are applicable to transgender individuals. It holds that everyone has the right to exercise all human rights without discrimination based on their gender identity and that the law must ban such discrimination and provide equal and effective protection to all individuals.<sup>148</sup>

Principle 9 (The right to treatment with humanity while in detention) is co-applicable with Article 13 of GC III (Humane treatment of prisoners), as well as Article 14 (Respect for the person of prisoners), and explicitly deals with the protections to be afforded to transgender detainees. It holds that every detainee must be treated with humanity and with regard for the inherent dignity of their human being noting that gender identity is an essential component of a person's dignity.<sup>149</sup>

Principle 10 (The right to freedom from torture and cruel, inhuman or degrading treatment or punishment) confirms that the prohibition of torture, a concrete pillar of

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<sup>147</sup> UN Office of the High Commissioner for Human Rights (OHCHR), *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, September 2012, HR/PUB/12/06. 11.

<sup>148</sup> Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and equal protection of the law without any such discrimination, whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

<sup>149</sup> Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.

both IHRL and IHL, applies to transgender detainees. It states that everyone has the right not to be tortured or subjected to cruel, inhuman, or degrading treatment or punishment, including for grounds related to their gender identity.<sup>150</sup>

Similarly, Principle 32 (The right to bodily and mental integrity) holds that everyone, regardless of their gender identity, has the right to bodily and mental integrity, autonomy, and self-determination and that everyone has the right not to be tortured or subjected to cruel, inhuman, or degrading treatment or punishment because of their gender identity.<sup>151</sup>

The Yogyakarta Principles is a soft-law document that asserts that human rights protections must apply completely to persons who are marginalized because of their gender identity. The document is not binding, but rather stems from commonly acknowledged commitments that states are required to respect under international law, including the fundamental rights mirrored in GC III as mentioned above. The Principles can be used as effective guidance in the interpretative process of GC III when attempting to reconcile the protections provided therein to transgender POWs.

#### **4.5 Conclusion**

In this chapter, it was shown that international human rights law has developed a robust body of work concerning the protection of transgender prisoners based on the shared fundamental principles of humanity, respect and non-discrimination it shares with international humanitarian law and provides substantive and practical guidance on the specific issues transgender prisoners face. States' legal duties to protect the human rights of transgender individuals are firmly established by international human rights law, and there is a well-established framework prescribing respect for the transgender identity.<sup>152</sup>

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<sup>150</sup> Everyone has the right to be free from torture and from cruel, inhuman or degrading treatment or punishment, including for reasons relating to sexual orientation or gender identity.

<sup>151</sup> Everyone has the right to bodily and mental integrity, autonomy and self-determination irrespective of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to be free from torture and cruel, inhuman and degrading treatment or punishment on the basis of sexual orientation, gender identity, gender expression and sex characteristics.

<sup>152</sup> *Born Free and Equal* (note 2 above) 13-15.

## CHAPTER 5: RELYING ON INTERNATIONAL HUMAN RIGHTS LAW FOR EXPLICIT GUIDANCE ON ISSUES AFFECTING THE ADEQUATE PROTECTION OF TRANSGENDER PRISONERS OF WAR

### 5.1 Introduction

The Third Geneva Convention imposes an obligation on the Detaining Party to protect all prisoners of war against violence, sexual assault and humiliation, including those abuses based on their gender identity, by considering the specific risks these individuals face when planning and running POW camps.<sup>153</sup> Yet, while the Commentary acknowledges the vulnerability of "gender minorities," it provides no further guidance on the specific risks that must be considered in said planning and running of camps.<sup>154</sup> This is where IHRL may be consulted to fill in the gaps left by GC III concerning specific instances where transgender POWs require explicit regulatory protections.

In consultancy with international human rights law, this chapter assesses the following issues where transgender POWs may benefit most from explicit guidance to fill the gap left by GC III: risk assessment, training of detention personnel, placement, searches, protective solitary confinement and oversight by the ICRC.

### 5.2 The vulnerability of transgender prisoners of war

During times of peace, transgender individuals face immense hardships solely because their gender identity does not fit into the prevailing social norms of their society.<sup>155</sup> During international armed conflict, this pressure exponentially increases, where they are even more susceptible to violence in an environment where hegemonic masculinity runs rampant and pre-existing gender inequalities are exacerbated.<sup>156</sup>

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<sup>153</sup> ICRC Commentary on GC III, Article 14, para. 1664.

<sup>154</sup> *ibid.* para. 1667

<sup>155</sup> Alon Margalit. "Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence," *International Review of the Red Cross*, 100(907-909) 2018.

<sup>156</sup> Committee on the Elimination of Discrimination against Women, General Recommendations No. 28 (CEDAW/C/GC/30), 2013 ; Human Rights Committee, Human rights, sexual orientation and gender

The vulnerability of transgender individuals is exponentially increased when they become POWs.<sup>157</sup> POWs have always been more likely to be abused than others during international armed conflict due to their association with the enemy and capture during wartime animosity where they are at the mercy of the Detaining Party.<sup>158</sup> On top of their status as POWs, the ICRC has emphasized that women and "gender minorities" face an even greater risk.<sup>159</sup>

Even in contexts outside of armed conflict, transgender individuals deprived of their liberty are at particular risk of discrimination, torture and ill-treatment. They are vulnerable to sexual, physical and psychological violence solely based on their gender identity and are frequently beaten, raped, harassed, intimidated and humiliated.<sup>160</sup> One study found that transgender persons were 13 times more likely to be sexually assaulted by a guard or fellow inmate than cisgender persons.<sup>161</sup>

Extreme wartime animosity coupled with latent transphobia and the heightened risk of abuse in detention means that transgender POWs face a risk of discrimination, torture and other cruel, inhuman, or degrading treatment or punishment that is unprecedented in international armed conflicts.<sup>162</sup> Explicit regulatory measures and practical guidance on the specific risks transgender POWs face are imperative to ensure that they are treated in accordance with GC III.

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identity (A/HRC/RES/27/32) 2014; Human Rights Committee, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (A/HRC/19/41) 2011.

<sup>157</sup> A/HRC/31/57 (note 134 above)

<sup>158</sup> 'Prisoners Of War: What You Need To Know' (ICRC, 2022) <<https://www.icrc.org/en/document/prisoners-war-what-you-need-know>> accessed 18 October 2022.

<sup>159</sup> ICRC Commentary on GC III, Article 14, para. 1664

<sup>160</sup> A/HRC/31/57 (note 134 above); Committee against Torture, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/OP/C/57/4) 2016. para. 76

<sup>161</sup> CAT/OP/C/57/4, para 35.

<sup>162</sup> A/HRC/31/57 (note 134 above)

### 5.3 Risk assessment of transgender prisoners

Yogyakarta Principles 9 and 10 provide valuable guidance when determining which distinct issues facing transgender prisoners must be considered in formal policies or other regulatory measures. It holds that states must create and implement measures to fight violence and discrimination based on gender identity experienced by people deprived of their liberty, including matters such as placement, body searches and "protective" solitary confinement and take all necessary legal, administrative, and other measures to safeguard and protect detainees from torture and cruel, inhuman, or degrading treatment or punishment based on their gender identity.<sup>163</sup>

The Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment explicitly considers these principles and applies them to specific policies regarding the placement of transgender prisoners.<sup>164</sup> It holds that in cases where transgender persons are deprived of liberty, the Detaining Power must, at the outset, note their specific risks and determine the appropriate actions to protect them with methods that will not leave them feeling isolated.<sup>165</sup> To protect these prisoners from risks to their health and safety, the Detaining Power should have a screening procedure to assess the risks and identify the causes, forms and consequences of violence and discrimination against transgender inmates.<sup>166</sup>

Considering the overlap of Articles 13, 14 and 16 of GC III and Yogyakarta Principles 9 and 10 relating to the procedural safeguarding of prisoners, these principles can be relied upon to provide interpretative guidance when considering the binding protective measures of transgender individuals according to their status as POWs.

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<sup>163</sup> 9H. Adopt and implement policies to combat violence, discrimination and other harm on grounds of gender identity faced by persons who are deprived of their liberty, including with respect to such issues as placement, body or other searches... and "protective" solitary confinement; 10A. take all necessary legislative, administrative and other measures to prevent and provide protection from torture and cruel, inhuman or degrading treatment or punishment perpetrated for reasons relating to the sexual orientation or gender identity of the victim, as well as the incitement of such acts.

<sup>164</sup> CAT/OP/C/57/4 (note 136 above).

<sup>165</sup> *ibid*, para 66.

<sup>166</sup> *ibid*, para 67.

## 5.4 Training of guards

Guards should be trained on how to properly interact with transgender prisoners, including how to prevent and address discrimination, torture and other cruel, inhuman, or degrading treatment or punishment of these prisoners.<sup>167</sup> This training should take place before a conflict erupts so that detention staff are prepared in the event they have to detain a transgender POW.<sup>168</sup> This sentiment has a complementary provision in GC III. Article 127 of GC III holds that all States are responsible for teaching international humanitarian law to their armed forces, regardless of whether there is an ongoing armed conflict.<sup>169</sup> Several military manuals reinforce these sentiments by requiring combatants to receive instruction in international humanitarian law while specifying that the obligation applies even during peacetime.<sup>170</sup>

Furthermore, numerous official statements stress the importance of providing this instruction or promising to do so in the future.<sup>171</sup> On many occasions, the UN Security Council, UN General Assembly, and UN Commission on Human Rights have insisted that States are obliged to educate their armed forces about international humanitarian law.<sup>172</sup> In addition, at several different international conferences, multiple resolutions were passed, reaffirming this obligation.<sup>173</sup> The extensive practice has resulted in this obligation attaining customary law status. Rule 142 holds that States and parties to

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<sup>167</sup> Alon Margalit (note 159 above) 255.

<sup>168</sup> *ibid.* 256.

<sup>169</sup> Dissemination of the Convention: (1) The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population; (2) Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions.

<sup>170</sup> Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001, section 319; Netherlands, *Humanitair Oorlogsrecht: Handleiding*, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, section 337; United Kingdom, *The Manual of the Law of Armed Conflict*, Ministry of Defence, 1 July 2004, section 350

<sup>171</sup> Jean-Marie Henckaerts and Louise (note x above) 502.

<sup>172</sup> UN Security Council, Res. 1265 (*ibid.*, § 485) and Res. 1296 (*ibid.*, § 486); UN General Assembly, Res. 2852 (XXVI) (*ibid.*, § 487), Res. 3032 (XXVII) (*ibid.*, § 488), Res. 3102 (XXVIII) (*ibid.*, § 489) and Res. 47/37 (*ibid.*, § 492); UN Commission on Human Rights, Res. 1994/85, 1995/72 and 1996/80 (*ibid.*, § 496), Res. 1995/73 (*ibid.*, § 497) and Res. 2000/58 (*ibid.*, § 498).

<sup>173</sup> 4th International Conference of the Red Cross, Res. VIII; 20th International Conference of the Red Cross, Res. XXI and XXV; 22nd International Conference of the Red Cross, Res. XII

the conflict must provide instruction in international humanitarian law to their armed forces.<sup>174</sup>

There is no specified method for High Contracting Parties to comply with their obligation of incorporating the study of the Third Convention into their programmes of military instruction, but there are many options available.<sup>175</sup> Many States have developed materials and courses to teach their armed forces about international humanitarian law; moreover, states issue military manuals containing reference material.<sup>176</sup> Additionally, include it regularly in practical training and exercises so that following the rules becomes an automatic reflex.<sup>177</sup>

When consulting international human rights law to fill the gap in GC III, Yogyakarta Principles 9 and 10 provide guidance on how prison personnel may receive training on how to treat transgender prisoners. It holds that

States shall:

9G. Undertake programmes of training and awareness-raising for prison personnel who are engaged in detention facilities regarding international human rights standards and principles of equality and non-discrimination, including in relation to gender identity.<sup>178</sup>

10C. undertake programmes of training and awareness-raising for prison personnel who are in a position to perpetrate or to prevent such acts [of torture].<sup>179</sup>

It might be difficult, at times impossible, to carry out such training in States that malign or even criminalize any gender identity that is considered to not fit into the social norms of society.<sup>180</sup> This does not negate the Detaining Power's responsibility to implement the fundamental protections set out in GC III that apply to all POWs.<sup>181</sup>

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<sup>174</sup> Jean-Marie Henckaerts and Louise (note x above) 501-505.

<sup>175</sup> ICRC Commentary on GC III, Article 127, para. 5042.

<sup>176</sup> *ibid.* para 5043.

<sup>177</sup> *ibid.*

<sup>178</sup> *Yogyakarta Principles*, Principle 9(G).

<sup>179</sup> *Yogyakarta Principles*, Principle 10(C).

<sup>180</sup> Alon Margalit (note 159 above) 256.

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

In these cases, the ICRC can play a valuable role in training staff on how to treat transgender POWs. Though it primarily falls on States to do so, the International Committee of the Red Cross is also responsible for disseminating international humanitarian law.<sup>182</sup> In 1977, the Diplomatic Conference affirmed that "the ICRC should participate actively in the effort to disseminate knowledge of international humanitarian law".<sup>183</sup> The ICRC actively promotes and raises awareness of the Geneva Conventions and employs specialists who liaise with different regions for this very purpose.<sup>184</sup> The ICRC plays an essential role in protecting these individuals by employing gender experts to develop programmes and teaching materials for military personnel who may work with transgender POWs.<sup>185</sup>

## 5.5 Placement

Allocation of sleeping quarters and sanitary facilities are the first practical considerations to be made when a combatant attains POW status.<sup>186</sup> The prisoner's gender plays a pivotal role in this process and has far-reaching consequences.<sup>187</sup> Indeed, whether a transgender POW is allocated to their self-identified gender-correspondent estate of the camp goes to the very heart of whether they are afforded the appropriate treatment dictated by GC III. International humanitarian law dictates that men and women be separated while detained.<sup>188</sup> During international armed conflicts, specifically regarding POWs, the rule is present in GC III and military manuals around the world.<sup>189</sup>

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<sup>182</sup> ICRC Commentary on GC III, Article 127, para. 5030.

<sup>183</sup> Diplomatic Conference, Geneva, 1974–1977, Res. 21, Dissemination of knowledge of international humanitarian law applicable in armed conflicts, para. 4: Invites the International Committee of the Red Cross to participate actively in the effort to disseminate knowledge of international humanitarian law by, *inter alia*: (a) publishing material that will assist in teaching international humanitarian law, and circulating appropriate information for the dissemination of the Geneva Conventions and the Protocols, (b) organizing, on its own initiative or when requested by Governments or National Societies, seminars and courses on international humanitarian law, and co-operating for that purpose with States and appropriate institutions.

<sup>184</sup> ICRC Commentary on GC III, Article 127, para. 5030.

<sup>185</sup> Alon Margalit (note 159 above) 257.

<sup>186</sup> GC III, Arts 25, 29.

<sup>187</sup> *ibid.*

<sup>188</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume II: Practice* (International Committee of the Red Cross 2005) 2790 - 2795.

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



The foremost authority on the separation of men and women detainees who qualify as POWs is found in GC III. The obligation is explicitly set out in the fourth paragraph of Article 25 and the second paragraph of Article 29, requiring that women be allocated separate dormitories and sanitation facilities inaccessible to men.<sup>190</sup> The purpose of such a separation is chiefly aimed at protecting each POW's physical and mental integrity.<sup>191</sup> The notion can best be understood in light of Article 14 of GC III, holding that all prisoners must be treated with respect for their person and honour, and explicitly singles out that all regard must be given to women POWs.<sup>192</sup>

Flowing from the obligations set out in Articles 14, 25, and 29 of GC III, dozens of states' military manuals across the globe hold that women must be held separately from men in POW camps, with specific consideration given to sleeping quarters and sanitary facilities.<sup>193</sup> Australia's Law of Armed Conflict Manual states that "women arrested, detained or interned for reasons connected with the armed conflict must be kept in separate quarters from men and under the immediate supervision of women".<sup>194</sup> Mirroring this provision, Canada's Law of Armed Conflict Manual provides in its chapter on the treatment of POWs that "their gender must also be taken into account in the allocation of labour and in the provision of sleeping and sanitary facilities".<sup>195</sup> The United States Department of Defense Law of War Manual also holds "in any camps in which women POWs, as well as men, are accommodated, separate dormitories shall be provided for women POWs".<sup>196</sup>

In Europe, Germany's Law of Armed Conflict Manual states, "[i]n camps accommodating both women and men, separate dormitories and conveniences must be provided."<sup>197</sup> The Military Manual of the Netherlands states that an account should

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<sup>190</sup> GC III, Arts 25, 29.

<sup>191</sup> ICRC Commentary on GC III, para 1660.

<sup>192</sup> GC III, Art 14.

<sup>193</sup> Jean-Marie Henckaerts and Louise Doswald-Beck (note 197 above) 2792 - 2793.

<sup>194</sup> Australia, *The Manual of the Law of Armed Conflict*, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006, section 9.49.

<sup>195</sup> Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001, section 1017.

<sup>196</sup> United States of America, *Department of Defense Law of War Manual*, General Counsel of the Department of Defense, 31 May 2016. 9.11.5.2.

<sup>197</sup> Germany, *Law of Armed Conflict Manual*, Joint Service Regulation (ZDv) 15/2, Federal Ministry of Defence, 1 May 2013, section 831.

be taken of a POW's sex when allocating dormitory and sanitary facilities.<sup>198</sup> Spain's Law of Armed Conflict Manual provides that detained women shall be housed separately in POW camps.<sup>199</sup> The United Kingdom's Law of Armed Conflict Manual similarly states that "women must have separate sleeping quarters from men".<sup>200</sup> The manual goes on to State that "hygienic conveniences, which must be separate for men and women, must be provided".<sup>201</sup>

Flowing from widespread state practice, the separation of men and women while detained has attained the status of customary international humanitarian law and has been codified in Rule 119. It states, "Women who are deprived of their liberty must be held in quarters separate from those of men and must be under the immediate supervision of women."<sup>202</sup>

Although the separation of men and women in detention is a fundamental guarantee in international humanitarian law, the placement of transgender detainees based on their gender identity is wholly undealt with. Indeed, not even the States that currently allow transgender individuals to serve in the military have broached the issue of the placement of transgender detainees.

Grave risks arise due to the lack of procedures to respect a POW's gender identity. There may be cases where the prisoners' gender identity and biological characteristics, including their genitalia, may not correspond or fit into the binary of what it means to be a man or a woman according to the prevailing cultural views of the Detaining Power.<sup>203</sup> Without formal policies or procedures to deal with self-identification, classification, risk assessment and placement, transgender prisoners

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<sup>198</sup> Netherlands, *Humanitair Oorlogsrecht: Handleiding*, Voorschrift No. 27-412, Koninklike Landmacht, Militair Juridische Dienst, 2005, section 0719.

<sup>199</sup> Spain, *Orientaciones. El Derecho de los Conflictos Armados*, Tomo 1, Publicación OR7- 004, (Edición Segunda), Mando de Adiestramiento y Doctrina, Dirección de Doctrina, Orgánica y Materiales, 2 November 2007, sections 6.4.b.(1) and & 6.4.f(1).

<sup>200</sup> United Kingdom, *The Manual of the Law of Armed Conflict*, Ministry of Defence, 1 July 2004, section 8.49.

<sup>201</sup> *ibid.* section 8.54.

<sup>202</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (International Committee of the Red Cross 2005) 431- 432.

<sup>203</sup> Robyn Emerton. *Transgender prisoners: Law, prison administration, and the emerging tension between human rights and risk.* (2018) 173-174.

are wrongly placed in either male or female sections of the detention facility based on their biological characteristics rather than their gender identity.<sup>204</sup>

Such an incorrect placement based on the ignorance of the prisoner's self-identified gender subjects transgender POWs to physical, sexual and psychological violence that amounts to a grave breach of the fundamental protections of GC III, including humane treatment, respect for their person and honour, and the prohibition of adverse discrimination.<sup>205</sup> International human rights law, however, has dealt with the placement of transgender detainees on multiple occasions and provides appropriate guidance to 'fill the gap' left by GC III.

The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, submitted a report in accordance with Human Rights Council resolution 32/2 titled "Protection against violence and discrimination based on sexual orientation and gender identity," which similarly urges States to take individuals' gender identity and choice into account before placement and offer opportunities to appeal placement decisions while ensuring that protective measures for transgender prisoners do not include stricter restrictions than what is imposed on other prisoners.<sup>206</sup>

The Committee against Torture, in its ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Decisions, held that the determination of where to house transgender prisoners should be considered carefully and on an individual basis, taking into account their views about safety and, whenever possible, done with their consent.<sup>207</sup> The Detaining Power must take into account the prisoner's appearance and transition stage, as well as any risks or views they may have, to decide whether it would be best to place them in the male or female estate.<sup>208</sup>

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<sup>204</sup> A/HRC/31/57 (note 134 above), para 34.

<sup>205</sup> UN General Assembly, Protection against violence and discrimination based on sexual orientation and gender identity (A/73/152) 2018; CAT/OP/C/57/4 (note 136 above), para 66.

<sup>206</sup> A/HRC/31/57 (note 134 above), para 34.

<sup>207</sup> CAT/OP/C/57/4 (note 136 above), para 66.

<sup>208</sup> *ibid.*

Yogyakarta Principle 9 succinctly states international human rights law's position regarding the placement of detainees based on their gender identity. The Principle holds that States must ensure that the placement of the detainee based on their gender identity does not further marginalize them, or expose them to violence, ill-treatment, or physical, mental, or sexual abuse and to ensure to the greatest degree feasible that all detainees participate in choices about where they will be housed.<sup>209</sup>

In order to fully comply with Article 25 of GC III while continuously respecting the fundamental principles set out in Articles 13, 14 and 16, the Detaining Power, in the case of transgender POWs, must adopt and implement policies on the placement of POWs that reflect the needs and rights of people of all gender identities and ensure that prisoners can participate in decisions about where they are placed.

## 5.6 Searches

Unnecessary touching and handling, which amounts to sexual harassment during searches, is widespread, where transgender prisoners are often patted down by officers of the opposite gender and are sometimes groped under the pretence of determining their genitalia.<sup>210</sup> These strip and invasive body searches based on prejudice are demeaning and invasive, particularly for transgender people, and amount to torture or ill-treatment.<sup>211</sup>

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<sup>209</sup> States shall: A. Ensure that placement in detention avoids further marginalizing persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse; C. Ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity; I. Adopt and implement policies on placement and treatment of persons who are deprived of their liberty that reflect the needs and rights of persons of all sexual orientations, gender identities, gender expressions, and sex characteristics and ensure that persons are able to participate in decisions regarding the facilities in which they are placed;

<sup>210</sup> CAT/OP/C/57/4 (note 136 above), para 66.

<sup>211</sup> A/HRC/31/57 (note 134 above), para 23.

Yogyakarta Principle 32(G) provides clear guidelines on searches based on the gender identity of the detainee. It holds that

States shall:

"prohibit the use of anal and genital examinations... unless required by law, as relevant, reasonable, and necessary for a legitimate purpose".<sup>212</sup>

Although there is no section in GC III that says explicitly when or how prison searches should be conducted, the Commentary does note that they should be done by someone of the same gender whenever possible.<sup>213</sup> This would help to reduce any chance of humiliating the prisoner during the search process.<sup>214</sup> By applying Principle 32(G) to the guidance provided in the Commentary, the issue of searches of transgender POWs is addressed.

## 5.7 Solitary confinement as a form of protection

Even though some safety precautions may appear helpful, they often work against individuals. For example, it is not uncommon to depend on extended periods of protective custody, isolation or solitary confinement as general forms of protection. However, those practices can be extremely distressing for the person involved.<sup>215</sup> Keeping people in solitary confinement or administrative segregation for their own "protection" can be a form of torture and ill-treatment.<sup>216</sup>

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<sup>212</sup> *Yogyakarta Principles*, Principle 32(G).

<sup>213</sup> ICRC Commentary on GC III. Article 14 para. 1667.

<sup>214</sup> Durham/O'Byrne, pp. 39–40. On the question of intimate body searches of prisoners, see World Medical Assembly, Statement on Body Searches of Prisoners, adopted by the 45th World Medical Assembly (WMA), Budapest, October 1993, and last revised by the 67th WMA General Assembly, Taipei, Taiwan, October 2016, and Hernán Reyes, 'Comments on the 1993 WMA Statement on Body Searches of Prisoners', in *Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture*, Vol. 4, No. 2, 1994.

<sup>215</sup> A/HRC/31/57 (note 134 above), para. 34.

<sup>216</sup> UN Human Rights Committee, General Comment No. 20 (Article 7 of the International Covenant on Civil and Political Rights), *Gomez de Voituret v. Uruguay* and *Espinoza de Polay v. Peru*; European Committee for the Prevention of Torture, Second General Report; Inter-American Court of Human Rights, *Velasquez Rodriguez case*; Inter-American Court of Human Rights, *Castillo Petruzzi and Others case*.

In its Second General Report in 1992, the European Committee for the Prevention of Torture stated that.

the principle of proportionality requires that a balance be struck between the requirements of the case and the application of a solitary confinement-type regime, which is a step that can have very harmful consequences for the person concerned. Solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible.<sup>217</sup>

Appropriate regulatory guidance concerning protective solitary-confinement is found in Yogyakarta Principle 9(J). It holds that

States shall:

"put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population".

Solitary confinement, isolation and administrative segregation are not appropriate methods of managing the security of persons, including transgender prisoners, and can be justified only if used as a last resort, under exceptional circumstances, for the shortest possible time and with adequate procedural safeguards.<sup>218</sup>

## **5.8 Monitoring and oversight of the prisoner of war camp**

Article 126 is a key part of GC III that ensures POWs are respected. It checks to see if people are following the rules about how POWs should be treated. It dictates that the International Committee of the Red Cross has the right to visit detainees during international armed conflict, where it can choose which places to visit and interview detainees without witnesses present. Additionally, there cannot be any restrictions on how often or long these visits can last. The ICRC is legally allowed to visit prisoners based on numerous military manuals, treaties, and instruments. This right has been

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<sup>217</sup> European Committee for the Prevention of Torture, Second General Report, Doc. CP/Inf. (92)3, 13 April 1992, para. 56.

<sup>218</sup> CAT/OP/C/57/4 (note 136 above), para 78.

supported by countless official statements and visits that the organization carries out in war-ridden areas around the world.

Today, it is seen as customary law that the ICRC has the right to talk with anyone detained because of an international armed conflict. Rule 124 states that "in international armed conflicts, the ICRC must be granted regular access to all persons deprived of their liberty in order to verify the conditions of their detention and to restore contacts between those persons and their families".

The Yogyakarta Principles expressly state in Principle 9 that oversight of the treatment of transgender detainees is of the utmost importance. It holds that

States shall:

9F. "Provide for the independent monitoring of detention facilities by the State as well as by non-governmental organizations, including organizations working in the spheres of sexual orientation and gender identity;

9J. "Provide for effective oversight of detention facilities, both with regard to public and private custodial care, with a view to ensuring the safety and security of all persons, and addressing the specific vulnerabilities associated with sexual orientation, gender identity, gender expression and sex characteristics."

If Article 126 and customary Rule 124 is to be effectively implemented, visits by the ICRC are crucial in measuring the safety and welfare of transgender detainees. The ICRC is well positioned to rely on gender experts where it is aware of any transgender POWs.

## **5.9 Conclusion**

International human rights law is the body of law that provides regulatory guidance to fill the gap left by GC III on the application of the Convention's provisions to issues where transgender POWs need explicit protections. By relying on the principle of complementarity, regulatory guidance regarding risk assessment, training of detention personnel, placement, searches, protective solitary confinement and oversight by the ICRC is found in IHRL and sufficiently fills the gap left by GC III.

## CHAPTER 6: CONCLUSION

The question this dissertation sought to answer was whether the Third Geneva Convention provides adequate protection to transgender prisoners of war. The rationale behind this question was the increasing number of transgender individuals who serve in the armed forces of States across the globe and can be deployed during international armed conflicts. The author embarked on this project to determine whether the protections GC III and its Commentary by the ICRC, as the primary instruments prescribing the treatment of POWs, provide include transgender POWs.

The second chapter answers the question of whether transgender individuals can become POWs and whether they are entitled to all the protections set out in GC III. The chapter starts by explaining that the protection of the Convention applies to persons who acquire POW status according to Article 4 of the Convention, chiefly those who serve in the armed forces of States during an international armed conflict. It was then shown that there is an increasing number of transgender troops across the globe, including in the United States where there are almost 15 000 transgender service members. The next step was determining whether the protections set out in the Convention apply to transgender POWs. By considering the object and purpose of the Convention according to Article 31(1) of the VCLT Convention of the Law of Treaties, it was determined that the Convention aims to protect all POWs, including transgender ones.

As discussed earlier, GC III imposes an obligation on the Detaining Party to protect all POWs. Transgender individuals are at an increased risk of abuse during international armed conflict and are particularly vulnerable when they become POWs. Yet, the Convention and the ICRC's Commentary is silent concerning the specific risks transgender POWs face because of their gender identity. Chapter 3 set out to determine whether international human rights law can be used to fill the gap in the Convention as it relates to transgender POWs. By consulting Article 31(3)(c) of the VCLT Convention of the Law of Treaties, it was proved that international human rights law continues to apply during international armed conflicts and, by using the principle of complementarity, can fill the gap in GC III relating to transgender POWs.



The fourth chapter examined the *corpus juris* of international human rights law and found that it has an extensive legal framework concerning transgender identity. States' legal duties to protect the human rights of transgender individuals are firmly established by international human rights law and UN and regional treaty bodies have repeatedly stated that international human rights law must be interpreted and applied to transgender individuals on the basis of their gender identity. The most significant contribution to the protection of transgender individuals in international human rights law flows from the Yogyakarta Principles, which provide specific guidance on applying human rights standards to issues of gender identity.

Chapter five finally turns to the robust body of work of international human rights law concerning the protection of transgender prisoners. The chapter found that transgender POWs may benefit most from explicit guidance from international human rights law by relying on the principle of complementarity to fill the gap left by GC III regarding specific issues of training of detention personnel, placement, searches, protective solitary confinement and oversight by the ICRC.

This dissertation showed that while GC III does apply to transgender POWs, it does not include any explicit protections for these individuals. However, by relying on the principle of complementarity to fill the gap left by the Convention and its Commentaries, international human rights law must be relied upon to provide explicit and substantive protections to transgender POWs.

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