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Chapter 18
Some Critical Comments on the Approach of the Eritrea-Ethiopia Claims Commission towards the Treatment of Protected Persons in International Humanitarian Law

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Abstract The Eritrea-Ethiopia Claims Commission did an admirable job of interpreting, applying and clarifying International Humanitarian Law (IHL) on the protection of persons. However, some of its legal findings may be criticised, which include: the repatriation of prisoners of war, which was considered as subject to reciprocity considerations; the Commission holding admissible the denial of civilians' right to return to their home countries and even their internment, merely because they were of military age; the conclusion that IHL of military occupation is inapplicable to the invasion phase; and, the impression given that isolated IHL violations do not give rise to State responsibility or that a State only has a due diligence obligation to hinder its soldiers from committing rape. In addition to criticism of the foregoing findings, this contribution finally questions the International Committee of the Red Cross' (ICRC) rejection of the requests of both parties, to submit to the Commission reports each received from the ICRC – on its visits to persons deprived of their liberty.

Keywords International Humanitarian Law; International Committee of the Red Cross; Prisoner of War; Repatriation; Reciprocity; Right to Leave; Internment; Confidentiality; Report; Rape; Standard of Proof; State responsibility; Occupation

Contents

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18.1 Introduction

This contribution is complementary to that of Silvia Sanna in Chap. 17. I agree with everything what she aptly writes. Therefore, I am in the privileged position not to comment on her work, but to criticise certain aspects of the awards of the Eritrea-Ethiopia Claims Commission, dealing with the treatment of protected persons under International Humanitarian Law (IHL). I will comment as well, on a few developments that have occurred since the awards, after stressing as she does, the importance of these awards for IHL.

18.2 Importance for International Humanitarian Law

Before criticising the Awards, it is important to stress that, in general, they correctly restate the law and demonstrate that, despite it having been a very bloody conflict between two of the world's poorest countries, IHL was mostly respected. This contradicts the widely held belief of those exposed to NGO and media reports and images, that IHL is almost never respected. The perception that IHL is systematically violated is inaccurate and extremely damaging to the credibility of IHL and dangerous for war victims. Very few people would be ready to respect rules protecting those they perceive as enemies if they were convinced that their enemies would not respect the same rules. Therefore, this vicious circle of non-respect has to be broken. Firstly, well-organised, powerful, democratic States must adopt an attitude of respect. Secondly, States accused of violations – often falsely – should undertake serious enquiries into the alleged violations. Despite concerns about revealing military secrets, they should make their results public, at least after some time has lapsed. Indeed, such information would serve to convince those who consider them as the enemy, of their willingness to respect IHL, and their honest endeavours to ensure such respect by their armed forces. As international public opinion and victims are rightly or wrongly suspicious of the impartiality of domestic enquiries, an international enquiry is preferable. However, that the International Humanitarian Fact-Finding Commission set up by Article 90 of Additional Protocol I to the Geneva Conventions (Additional Protocol I)[1] has been used on only one marginal occasion – in the 30 years of its existence – is discouraging in this respect.

Adjudication is obviously even better from the point of view of IHL, than mere fact-finding, as it also applies the law to the facts, settles any legal controversies, and sets precedents for the future. Ethiopia and Eritrea can serve as an example to many other States, showing that third party establishment of the facts and impartial arbitration can

[1] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977, entered into force 7 December 1979 (Additional Protocol I).

demonstrate widespread respect of IHL. This prevents storytelling of violations, which may cause future non-respect. In my view, adopting such an approach would contribute, for example in the Middle East, much more to victory than any doubtful intelligence information extracted from suspected terrorists. Thirdly, all of us should show that IHL is most often respected, whenever possible and whenever it is a true reflection of reality. This is not an easy task. It is not easy to get the facts of real-life examples of respect. The Eritrea-Ethiopia Awards have provided me with invaluable, recent, real-life examples to recount to my students. The cases were discussed impartially by a tribunal and in the most part apply the law correctly and even when this is in my view not the case, they give me the opportunity to discuss my differing opinion, as I will do below, allowing my students to acquire a deeper understanding of IHL.[2] Although the Commission has not been successful in its ostensible task, because the compensation it determined in the damages phase was never paid, it has been successful in interpreting IHL and upholding its credibility. Its truth finding may also have contributed to the announcement in 2018, that the two States were ending 'the state of war'.[3]

18.3 Repatriation of Prisoners of War

Under Article 118 of Geneva Convention III,[4] prisoners of war (POWs) must be repatriated 'without delay after the cessation of active hostilities'. On 18 June 2000, Ethiopia and Eritrea concluded an Agreement on the Cessation of Hostilities. The Commission correctly did not consider that date as the starting point of the repatriation obligation, because what counts are the facts on the ground, not agreements.[5] If hostilities cease without any agreement, POWs must be repatriated. If a cessation of hostilities is agreed upon, but the agreement is not respected, POWs may be retained. The Commission did not however enquire into the facts on the ground, but simply wrote that it 'received no evidence regarding implementation of that agreement.'[6] It then considered the Agreement of 12 December 2000 as the starting point of the repatriation obligation, as it stated that it was to 'permanently terminate military hostilities', yet again failing to enquire into whether this agreement had actually been implemented on the ground.[7]

Ethiopia failed to repatriate most Eritrean POWs until November 2002, invoking as the reason for this delays in the repatriation of Ethiopian POWs by Eritrea. At a later stage, it added as a further reason the failure by Eritrea to clarify the fate of an Ethiopian pilot and 36 militia and police officers 'who it understood had been captured by Eritrea in 1998, but

[2] We have therefore included excerpts from seven partial awards of the Commission in the database published by the ICRC *How Does Law Protect in War?* I regularly update with Antoine Bouvier, Anne Quintin and Julia Grignon. https://casebook.icrc.org/ Accessed 15 April 2020.
[3] Joint Declaration of Peace and Friendship between Eritrea and Ethiopia, Eritrea – Ethiopia, 9 July 2018 (Joint Declaration). http://www.shabait.com/news/local-news/26639-joint-declaration-of-peace-and-friendship-between-eritrea-and-ethiopia Accessed 6 May 2020.
[4] Article 118 of Geneva Convention relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, entered into force 21 October 1950 (Convention III).
[5] Thus also ICRC 2020, para 4452.
[6] EECC, *Partial Award: Prisoners of War, Eritrea's Claim 17*, Decision, 1 July 2003, PCA Case No. 2001-02, para 145.
[7] Ibid., para 146.

whose names were not included in the lists of POWs held by Eritrea that it had received from the ICRC.'[8] Ethiopia therefore invoked reciprocity in repatriation of known POWs and reciprocity between the repatriation of known POWs and the clarification of the fate of missing persons. The Commission accepted both arguments to a certain extent.[9] It first recalled correctly: 'The language of Article 118 is absolute'. However it then went on to add: 'Nevertheless, as a practical matter, and as indicated by state practice, any state that has not been totally defeated is unlikely to release all the POWs it holds without assurance that its own personnel held by its enemy will also be released, and it is unreasonable to expect otherwise.'[10] Regarding the law, the Commission then considered 'that, given the character of the repatriation obligation and state practice, it is appropriate to consider the behavior of both Parties …. [I]t is proper to expect that each Party's conduct with respect to the repatriation of POWs will be reasonable and broadly commensurate with the conduct of the other.'[11]

On the character of the repatriation obligation, Eritrea had correctly invoked the general exclusion of countermeasures affecting 'obligations of a humanitarian character prohibiting reprisals'[12] and the specific prohibition of reprisals against POWs.[13] It could have added reference to the provision's drafting history,[14] and to a UN Security Council Resolution requiring both Eritrea and Ethiopia to repatriate POWs 'unconditionally'.[15] Moreover, it could have also mentioned that under the law of treaties, a treaty's operation may not be suspended because of a material breach, if the provision to be suspended relates to 'the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.'[16] The Commission admitted that 'Eritrea's arguments are well founded in law.' It was nevertheless 'not prepared to conclude that Ethiopia violated its obligation under Article 118 of Geneva Convention III by suspending temporarily further repatriations pending a response to a seemingly reasonable request for clarification of the fate of a number of missing combatants it believed captured by Eritrea who were not listed as POWs.'[17] The Commission gave no legal explanation for this conclusion. It simply mentioned that the International Committee of the Red Cross (ICRC), which 'presumably had a much fuller appreciation of the reasons for the delay' (but which, as will be discussed later, did not provide any information to the Commission), had declared on 8 May 2002, according to BBC reports, that 'Ethiopia was not in violation of the four Geneva Conventions by failing to repatriate POWs.'[18] Where the law has been clearly violated,

[8] Ibid., para 153.
[9] It merely found that a delay by Ethiopia in repatriating Eritrean POWs for three months for which it had no explanation violated the obligation under Article 118 to repatriate 'without delay'. Ibid., paras 157-158.
[10] Ibid., para 148.
[11] Ibid., para 149.
[12] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, A/56/10, Article 50(1)(c).
[13] Convention III (above n 4) Article 13.
[14] ICRC 2020, para 4448.
[15] UNSC Res 1369 (2001), 14 September 2001, S/RES/1369, para 5(f).
[16] Article 60(5) of the Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, entered into force 27 January 1980.
[17] *Prisoners of War, Eritrea* 2003 (above n 6) para 160.
[18] Ibid., para 155.

ICRC statements cannot preclude unlawfulness.[19] The mysterious reference to State practice could only be relevant if it referred to a *desuetudo* of the clear treaty norms. Indeed, in some recent conflicts, such as the war between Iraq and Iran, the obligation to repatriate POWs has not been respected unilaterally. In other conflicts, such as the 1991 and 2003 wars against Iraq, the question did not arise, because one side was completely defeated. What is important is, however, that we are fortunately still far away from having a general practice and *opinio juris* whereby POWs must, at the end of active hostilities, only be exchanged and not be unilaterally repatriated.[20]

What is worse than the acceptance that repatriation obligations are subject to reciprocity, contrary to the letter, object and purpose of IHL, is that the Commission accepted to link them to the clarification of the fate of missing persons. First, on a theoretical level, it is delicate to link an obligation of result of one side (the obligation to release and repatriate POWs) with an obligation of means of the other side (the obligation to clarify the fate of missing persons). Second, and more importantly, in practice, if accepted as a precedent, the approach of the Commission would sound the death knell for the repatriation of POWs. Unfortunately, after every armed conflict, the fate of many combatants, civilians and POWs remains unclear, and the former belligerents do not undertake everything in their power to clarify the fate of such persons.[21] Even today, there are still missing service members from World War II, from the Korea War, the Vietnam War, the Israeli-Arab Wars, the conflict in Cyprus, from the Iraqi invasion of Kuwait in 1990 and from the Conflicts in the Former Yugoslavia.[22] Indeed, up till now – 20 years after the close of active hostilities and after having concluded a peace treaty, Eritrea and Ethiopia have not yet clarified the fate of all POWs, and they still refer to them as 'POWs'.[23] Under the theory of the Commission, the hundreds of thousands of POWs from those wars would have risked being retained until today. Fortunately, State practice, to which the Commission refers without analysing it, is more humane and more law-abiding.

18.4 Denial of the Right to Leave and Internment

In general, the Commission correctly applied the rules on internment of enemy civilians, which is admissible under Article 42 of Geneva Convention IV only 'if the security of the Detaining power makes it absolutely necessary.'[24] However, in one instance it adopted an interpretation, which, in my view, blurs two distinct standards and too easily justifies the internment of civilians of enemy nationality. It accepted that 85 Eritrean university students of military age could be interned by Ethiopia under Article 35 of Convention IV since they

[19] Today the ICRC adopts the same interpretation as that adopted here, see ICRC 2020, paras 4448-4451.
[20] See, however, US Law of War Manual, para 9.37.1., approving the approach of the Commission.
[21] Sassòli and Tougas 2002, pp 727-750.
[22] See, for the refusal of the ICRC at the end of the conflict in Bosnia and Herzegovina to link the repatriation problem and the missing problem, Girod 1996, p 388.
[23] Kebebew 2019, pp 37-53.
[24] Geneva Convention relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, entered into force 21 October 1950 (Convention IV). See, e.g., the holding in EECC, *Partial Award: Civilians Claims, Eritrea's Claims 15, 16, 23, 27-32*, Decision, 17 December 2004, PCA Case No. 2001-02, para 104 on mass detentions of Ethiopians in Eritrea.

'might have returned to Eritrea and joined the Eritrean forces if left at large.'[25] This is in line with the ICRC Commentary, which accepts in a footnote that a 'man … of military age' may be interned if 'there is a danger of him being able to join the enemy armed forces.'[26] An increasing number of States also incorporate women into their armed forces. It is physically possible to join territory controlled by the enemy (if necessary through third States) in nearly all international armed conflicts. Therefore, such an interpretation would authorise the internment of most adults of enemy nationality in wartime, which would be contrary to the aim of Convention IV, which makes the internment of civilians an exception. The Commission's interpretation is also contrary to the text and context of the applicable provisions of Convention IV. The fact that an enemy civilian is of military age may be a reason not to let such a person leave the country, because Article 35 allows a State to refuse an enemy national permission to leave if the 'departure is contrary to the national interest of the State'. Even this is controversial, because it would turn the exception in Article 35 into the rule, granting the right to leave only to children and the elderly.[27] In my view, military age is not sufficient for a person without military training and who is not incorporated.[28] Indeed, Article 35 requires an individual decision, and such a decision may not be based upon general categories.

However, in any case, contrary to what the Commission seems to indicate, Article 35 does not go as far as justifying internment.[29] The pertinent provision justifying internment is Article 42, which allows an internment only if 'the security of the detaining power makes it absolutely necessary.' A Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) decided that 'the mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living,' adding that '[t]he fact that an individual is male and of military age should not necessarily be considered as justifying the application of these measures.'[30] Indeed, as evidenced by the individual procedure prescribed, the security reasons relate to the individual and not simply to his or her belonging to a certain category of persons.

18.5 The Law of Occupation

The Commission also applied the law of military occupation meaningfully, *e.g.* when it held that Eritrea occupied for IHL purposes even territory to which it had a valid claim according to the Boundary Commission, if it invaded such territory during the war.[31] This is a necessary consequence of the applicability of IHL; based on the facts, independent of

[25] *Civilians Claims, Eritrea* 2004 (above n 24) para 117.
[26] Pictet 1958, p 258, n 1.
[27] Hylton 2015, pp 1174-1176.
[28] Sassòli 2019, p 297; Pictet 1958, p 258.
[29] Olson 2015, pp 1327-1334.
[30] ICTY, *The Prosecutor v. Zejnil Delalic and others*, Judgment, 16 November 1998, Case No. IT-96-21-T, para 577.
[31] EECC, *Partial Award: Central Front, Ethiopia's Claim 2*, Decision, 28 April 2004, PCA Case No. 2001-02, paras 28-29.

any legitimacy consideration, and premised on the strict separation between *jus ad bellum* and *jus in bello*.[32]

Although the Commission could naturally not deal with this, it is interesting to note that different considerations apply – in my view – to ending an occupation by a peace treaty. In 2002, the Eritrea-Ethiopia Boundary Commission decided that the area of Badme, controlled by Ethiopia, belonged to Eritrea. Ethiopia rejected this decision and refused to withdraw. Eritrea therefore, understandably, accused Ethiopia of occupying its territory. As Ethiopia had gained control over Badme during the conflict, this remained an occupied territory under IHL.[33] However, on 5 June 2018, Ethiopia and Eritrea released a Joint Declaration of Peace and Friendship that indicated that 'the State of war between Ethiopia and Eritrea ha[d] come to an end', and that 'the decision on the boundary between the two countries [would] be implemented'.[34] Ethiopia did not withdraw from Badme. Nevertheless, the agreement has put an end to the 'state of war' in all its forms – including occupation. Substantively, it constitutes a peace treaty. Peace treaties – in my view – end the applicability of IHL, including the law of occupation. If parts of such treaties are not implemented, this violates international law, but does not revive the applicability of IHL (except if a new international armed conflict breaks out as a result).[35] In this respect and in a certain sense, *jus ad bellum* – for once – trumps *jus in bello*.

The Commission made a distinction between invasion and occupation.[36] Despite correctly giving a very large scope to the latter term, it held that 'clearly an area where combat is ongoing and the attacking forces have not yet established control cannot normally be considered occupied within the meaning of the Geneva Conventions of 1949.'[37] The ICJ, the US,[38] and Terry D. Gill in Chap. 19 agree. Andrea Gioia in Chap. 18 even criticises the Commission, for having not distinguished strictly enough between occupation and the invasion phase.

I disagree with all of them. The Geneva Conventions do not define occupation. However Article 42 of the Hague Regulations[39] does. It reads: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established, and in a position to assert itself.'

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[32] Sassòli 2007, p 242.
[33] See for this case of Badme, Kebebew 2019, pp 37-44 and 49.
[34] Joint Declaration (above n 3).
[35] Apparently of another opinion Geneva Academy of International Humanitarian Law and Human Rights 2020.
[36] For a debate on whether and to what extent such a distinction is appropriate for IHL, see Sassòli 2012; Zwanenburg 2012; Bothe 2012.
[37] EECC, *Partial Award: Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22*, Decision, 28 April 2004, PCA Case No. 2001-02, para 57.
[38] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Rep 2005, p 168, paras 172-173 and 219; US Law of War Manual, para 11.1.3.1.
[39] Article 42 of the Regulations concerning the Laws and Customs of War on Land annexed to Convention (IV) respecting the Laws and Customs of War on Land, opened for signature 18 October 1907, entered into force 26 January 1910 (Hague Regulations).

The ICRC Pictet Commentary of 1952[40] and an ICTY decision[41] argue that the concept of occupation under Convention IV is broader than under the Hague Regulations. The 2016 Updated ICRC Commentary abandoned this position.[42] I agree that the dividing line between the broader and the narrower concept cannot correspond to the distinction between the Hague Regulations and Convention IV.[43] However, in my view, the applicability of at least some rules of IHL of military occupation during the invasion phase can be justified by different and alternative arguments. The first argument is systematic. Convention IV only contains rules on the treatment of persons who have fallen into the hands of the enemy in sections applicable on a party's own territory,[44] on occupied territory,[45] or on both.[46] If there were such a thing as invaded but not yet occupied locations in Eritrea, according to the wording of Convention IV, no provision of IHL of international armed conflicts would state how Ethiopian forces should treat Eritreans falling into their power in such locations, although such Eritreans would clearly have been 'protected persons' as defined in Article 4 of Convention IV. Prohibitions such as that of torture or of hostage taking apply under the wording of that Convention only in a State's own and occupied territories.[47] Other rules of international law obviously outlaw such behaviour everywhere. The prohibition on forcible transfers, however, only applies in occupied territories.[48] Such an interpretation, admitting the existence of 'protected persons' who do not benefit from any substantive protection, would be contrary to the object, purpose and context of Convention IV. Pictet therefore argues that control over a person in a territory, which is not the invader's own, must be sufficient to trigger the application of Convention IV to that particular person.[49] Alternatively, one may consider that everyone who is in the hands of a belligerent that acts in an international armed conflict outside its own national territory must be considered to be on a piece of earth 'occupied' by that belligerent.[50] In my view, the concept of occupation and the obligations of an occupying power must then be understood functionally, requiring different thresholds for the applicability of different rules, both of

[40] Pictet 1952, p 60.
[41] ICTY, *Prosecutor v. Naletilić and Martinović*, Judgment, 31 March 2003, Case No. IT-98-34-T, para 218 ff.
[42] ICRC 2016a, paras 294-300.
[43] Some of the provisions of Convention IV (above n 24) too, such as Article 50 on education and Article 64 on criminal legislation presuppose actual control by the occupying power, while Article 44 of the Hague Regulations that prohibits a belligerent from forcing 'the inhabitants of territory occupied by it to furnish information about the army of the other belligerent' must be respected by a belligerent already during the invasion phase.
[44] See Section II of Part II of Convention IV (above n 24).
[45] See ibid., Section III.
[46] See ibid., Sections I and IV.
[47] See ibid., Articles 27, 31 and 34.
[48] See ibid., Article 49.
[49] Pictet 1958, pp 60-61; *Naletilić* (above n 41) para 221.
[50] This may be one of the few fields in which Convention IV (above n 24) needs an update i.e. to cover the protection of civilians who are in the power of a belligerent, but are neither on a territory occupied by that belligerent nor on that belligerent's own territory. The reality elsewhere, e.g. in Iraq, Afghanistan and in peace operations, contradicts the assumption of Convention IV that every civilian affected by an international armed conflict is perforce either on the territory of the belligerent in whose power he or she is or in occupied territory.

the Geneva Conventions and of the Hague Regulations.[51] In any case, most rules of IHL of military occupation are not strict obligations of result.

18.6 Standard of Proof and State Responsibility for Isolated Violations

The Commission correctly required 'clear and convincing evidence' and it thus required claimants to provide proof of a *prima facie* case, yet still allowing a respondent to rebut the claimant's proof. In cases of alleged rape, the Commission rightly lowered the requirements for evidence.

More concerning is the fact that the Commission dismissed several claims not due to evidentiary issues, but for reasons that could be understood as relating to the liability of a party – and not simply to its mandate.[52] Thus it dismissed claims, e.g. for killing POWs upon capture,[53] coercive interrogation,[54] physical abuses,[55] isolated rapes,[56] treatment of civilians during short-term detention pending deportation,[57] or separation of families,[58] simply because the violations were not frequent or recurring. This is not the standard IHL requires for violations, which need, contrary to crimes against humanity, neither to be widespread nor systematic. As for the secondary rule on responsibility, a State is responsible for every single act committed by members of its armed forces.

The Commission introduced this general requirement of frequent or recurring violations into its award on damages, which could have been justified by the limited time and means, both of the Commission and the parties.[59] However, it also applied this requirement in its partial awards determining substantive responsibility, without clarifying – except in rape cases – that this was only because of implicit jurisdictional limitations.[60] This is conceptually wrong. Acts of soldiers are the prime example of conduct attributable to a State.[61] The State is the first and original subject of international law, while individuals

[51] See Sassòli 2015, pp 1411-1413; and for a detailed analysis of the provisions of the Convention IV and the Hague Regulations from this perspective, Siegrist 2011, pp 66-67, and Grignon 2014, pp 133-143. Even the Commission goes in another Award into this direction when it 'recognizes that not *all* of the obligations of Section III of Part III of Convention IV (the section that deals with occupied territories) can reasonably be applied to an armed force anticipating combat and present in an area for only a few days.' EECC, *Partial Award: Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26*, Decision, 19 December 2005, PCA Case No. 2001-02, para 27 (my emphasis).
[52] As Murphy 2012, pp 239-240, argues.
[53] *Prisoners of War, Eritrea* 2003 (above n 6) para 61.
[54] Ibid., para 71.
[55] Ibid., paras 81-82.
[56] *Central Front, Ethiopia* 2004 (above n 31) para 40; *Western Front, Aerial Bombardment* 2005 (above n 51) para 84.
[57] *Civilians Claims, Eritrea* 2004 (above n 24) para 110.
[58] Ibid., para 157 (while explicitly admitting that the 'record is not devoid of troubling instances of forcible separation').
[59] Matheson 2010, pp 5-14.
[60] As Murphy 2012, pp 238-239, and Snider and Nair 2018, p 22, argue.
[61] See Draft Articles on Responsibility of States (above n 12) Article 4, and, specifically for IHL obligations, Article 3 of the Convention (IV) respecting the Laws and Customs of War on Land, opened for signature 18 October 1907, entered into force 26 January 1910 (Hague Convention IV), and Article 91 of

have become limited addressees of international criminal law much more recently. How then can a soldier be responsible for every single rape, when the State to whom his conduct is attributable is only responsible when several rapes are committed?

I fully appreciate that, with its limited time and resources,[62] the Commission could not deal with every individual violation of IHL. This raises doubts as to whether using arbitration for claims on behalf of affected individuals for their injury is a suitable method for achieving redress for violations of IHL. Some have argued that by giving the Commission three years for its work, the parties expected the Commission not to approach the claims on an incident-by-incident basis.[63] However, as the parties did not limit the jurisdiction of the Commission to frequent and recurring violations (as they could well have done),[64] the Commission should have clearly stated that a violation of IHL occurred in every individual proven case, but that it was unfortunately unable to deal with the reparation due in every such case.[65] It could then have held each party responsible for establishing national procedures in which a victim would be able to seek redress for such violations.[66]

18.7 The Special Case of Rapes

Unlike in many other armed conflicts, rapes fortunately did not occur systematically in the conflict between Eritrea and Ethiopia – but only occasionally.[67] In this instance, the Commission has another – in my view – correct approach to responsibility for occasional violations, without justifying why it only applies to rapes. However, it gives the erroneous impression that States only have a due diligence obligation, in relation to rapes committed by their soldiers. On the one hand, it does not require 'evidence of a pattern of frequent or pervasive rapes', adding correctly that '[r]ape need not be frequent to support State responsibility'. [68] This is, however, correct for every violation of IHL. On the other hand, it explicitly declares that:

> '[t]his is not to say that the Commission … could or has assessed government liability for isolated rapes …. What the Commission has done is look for clear and

Additional Protocol I (above n 1). For arguments that this *lex specialis* goes further than the general rule, also covering acts committed beyond the official capacity of the soldier, see Sassòli 2002, pp 405-406.

[62] See, for a hint at this, EECC, *Partial Award: Civilians Claims – Ethiopia's Claim 5*, Decision, 17 December 2004, PCA Case No. 2001-02, para 90.

[63] Murphy 2012, p 238.

[64] See Article 5(1) of the Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Ethiopia – Eritrea, opened for signature 12 December 2000, entered into force 12 December 2000; EECC, *Partial Award: Jus Ad Bellum, Ethiopia's Claims 1-8*, Decision, 19 December 2005, PCA Case No. 2001-02.

[65] See also the criticism by Weeramantry 2005, p 472.

[66] A hint in this direction appears in *Civilians Claims, Ethiopia* 2004 (above n 62) para 90, where the Commission mentions that those individual cases merit criminal investigation.

[67] For a general description of the jurisprudence of the Commission in relation with rapes, see Reed 2011, pp 594-599.

[68] *Central Front, Ethiopia* 2004 (above n 31) paras 37-38; *Central Front, Eritrea* 2004 (above n 37) paras 40-41; *Western Front, Aerial Bombardment* 2005 (above n 51) paras 78-79.

> convincing evidence of several rapes in specific geographic areas under specific circumstances.'[69]

The only explanation given for this limitation is that the Commission 'is not a criminal tribunal.'[70] In one case, it even explicitly states that its rejection of rape claims, 'cannot be read to suggest that the Commission did not believe the evidence it received or that the Commission does not consider individual alleged incidents of rape to merit criminal investigation.'[71]

Even where several rapes were committed, the Commission apparently did not attribute direct responsibility to the State of which the individual soldiers depended, but only a violation of a kind of due diligence obligation. Indeed, it found cases in which:

> 'large numbers of opposing troops were in closest contact to civilian populations. … Knowing, as they must, that such areas pose the greatest risk of opportunistic sexual violence by troops, Ethiopia and Eritrea were obligated to impose effective measures … to *prevent* rape of civilian women.'[72]

In my opinion, a State is responsible for rapes committed by its soldiers, even if it took all feasible preventive measures.

18.8 ICRC Visits and Reports

In particular regarding the treatment of POWs, the ICRC could have greatly facilitated the gathering of evidence by the Commission if it had allowed the Commission to access the reports it made following its visits to POWs held by both parties. The Commission therefore requested both parties to hand in such reports. Both parties agreed and asked the ICRC for permission, but the ICRC objected. The parties therefore withheld the reports from the Commission.[73] Politically, one may understand the ICRC near obsessive fear of having its reports made public. They could be exploited for propaganda purposes. Parties accused of violations in the reports who were subsequently found responsible by the Commission could, despite their initial agreement to produce the reports before the Commission, end up resenting the ICRC. All this could lead to the ICRC being denied access to POWs in future conflicts. However, impartial arbitration, based upon the agreement of both parties, on disputes arising over the application of IHL, is certainly an ideal, yet rare opportunity to achieve a better implementation of IHL, the improvement of which the ICRC is constantly advocating. If both parties to such a dispute want to submit the ICRC reports *they* received – and the respective (former) adverse parties agree, it is astonishing that the ICRC could prohibit them from doing so. These reports no longer

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[69] Ibid.
[70] Ibid.
[71] *Civilians Claims, Ethiopia* 2004 (above n 62) para 90.
[72] *Central Front, Ethiopia* 2004 (above n 31) para 39 (my emphasis); *Central Front, Eritrea* 2004 (above n 37) para 42. See also *Western Front, Aerial Bombardment* 2005 (above n 51) para 83, and *Central Front, Ethiopia* 2004 (above n 31) para 84.
[73] EECC, *Partial Award: Prisoners of War – Ethiopia's Claim 4*, Decision, 1 July 2003, PCA Case No. 2001-02, paras 46-48; *Prisoners of War, Eritrea* 2003 (above n 6) paras 50-53.

belong to the ICRC. This is, however, the official position of the ICRC.[74] It has succeeded to introduce it to some of its bilateral status agreements,[75] and into the Rules of Procedure and Evidence of the Mechanism for International Criminal Tribunals, which add to the usual very wide-ranging exemptions for the ICRC permitting *it* to refuse to disclose evidence in national and international criminal proceedings.[76] Indeed, those Rules prescribe that 'such information acquired by a third party on a confidential basis from the ICRC … [shall not] be subject to disclosure or to witness testimony without the consent of the ICRC.'[77] However, I doubt that an accused party before an international criminal tribunal would be denied the right to use an ICRC report he received, as exculpatory evidence in his trial.

In this case, I would go as far as arguing that the parties could and should have made the reports available to the Commission despite objections by the ICRC. Hypothetically speaking, if a party had been absolved of an accusation of violations of IHL for lack of evidence when such evidence was contained in an ICRC report, the outcome would not have contributed to the implementation of IHL or to reconciliation between the former belligerents. The same would be true, were the Commission to have found a party responsible for a violation based upon *prima facie* evidence, when the ICRC reports would have rebutted this evidence. I therefore fully agree with the very moderate criticism made by the Commission in this respect.[78] Though having a pivotal role for the implementation of IHL, even the ICRC cannot be, in this respect, as it claims,[79] the final judge on whether or not information it has transmitted to a party may be used in a judicial procedure.[80] Under the rule of law – considering that the ICRC fights for the rule of IHL – no one can be '*legibus solutus*' (unbound by law), and be judge and party simultaneously. When the ICRC transmits a report to a State, it cannot limit such transmission to the executive power. This may work in dictatorships; yet, even dictators may be overthrown. The new government then has access to ICRC reports. According to the ICRC reasoning, this possibility would discourage dictators from giving it access. Should the ICRC therefore require the recipients of its reports to destroy them after reading them, and not to archive them? As for democracies, their constitutions guarantee the rule of law and the separation

[74] ICRC 2016b, pp 434 and 440.
[75] Ibid., p 440.
[76] See, on the exemptions, in particular ICC, Rules of Procedure and Evidence, 2002, ICC-ASP/1/3 and Corr.1, Rule 73; ICTY, *Prosecutor v. Simić*, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, Case No. IT-95-9, paras 72–74; Sanna 2001; Rona 2002.
[77] MICT, Rules of Procedure and Evidence, 8 June 2012, MICT/1, Rule 10. Special Tribunal for Lebanon, Rules of Procedure and Evidence, 20 March 2009, STL-BD-2009-01-Rev.6-Corr.1, Rule 164, can be understood in a similar sense.
[78] *Prisoners of War, Ethiopia* 2003 (above n 73) para 48; *Prisoners of War, Eritrea* 2003 (above n 6) para 53.
[79] ICRC 2015, p 443.
[80] Critical also Mc Dowell 2002 and, applying a very nuanced test, Military Comissions Trial Judiciary Guantanamo Bay (Cuba), *United States of America v. Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin Attash, Ali Abdul Aziz Ali, Mustafa Ahmed Adam Al Hawsawi*, AE 013BBB/108T, Order, Defense Motion to Compel Discovery in Support of Defense Motion For Appropriate Relief to Compel Defense Examination of Accused's Conditions of Confinement, 6 November 2013. http://media.miamiherald.com/smedia/2013/11/06/16/25/16cpHS.So.56.pdf Accessed 23 May 2020

of powers. The ICRC cannot oblige them not to respect their constitutions. Parliamentary and judicial oversight can, and has, often ensured that governments comply with IHL. In my view, the ICRC should rather require parliaments and judiciaries to apply to its reports the same precautions against disclosure that they apply to national security secrets[81] – rather than equating the executive power with the State. Such arrangements are also possible in international judicial proceedings,[82] especially if, as in our case, both parties cooperate.

While not having access to its reports, the Commission nevertheless relied on the fact that the ICRC visited a certain place,[83] was involved in an operation, such as departure and transport of civilians to the border[84] or, as mentioned above,[85] that the ICRC did not criticise the delay in repatriation of POWs as a violation. In all these cases of ICRC involvement one gets the impression that the Commission found that IHL conditions were respected, while where the ICRC was not involved, the Commission more easily concluded that the conditions of detention, transfer etc. were not acceptable.

18.9 Conclusion

Generally, as shown in the contribution of Silvia Sanna in Chap. 17, the Commission did an admirable job of interpreting, applying and clarifying IHL on the protection of persons, taking into account the limited resources and time and the difficulties experienced in establishing the facts. The few mistakes made had no impact on the impartiality of the Commission's findings in the cases, but are dangerous if considered as precedents for the future.

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[81] See for the practice of EU member States Bigo et al 2015 and for the UK and the US Ambos 2009, pp 556-566.
[82] See for the ICC Kuschnik 2009 and for the WTO Akande 2003.
[83] The medical care provided to Ethiopian POWs in Eritrean camps was held to have been worse before the ICRC got access to Eritrean POW camps in August 2000 (*Prisoners of War, Ethiopia* 2003 (above n 73) paras 118-119).
[84] *Civilians Claims, Eritrea* (above n 24) para 105; *Civilians Claims, Ethiopia* 2004 (above n 62) paras 130-131.
[85] Above n 18, and accompanying text.

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