The Approach of the Eritrea-Ethiopia Claims Commission towards the Treatment of Protected Persons in International Humanitarian Law

Sassòli, Marco

THE APPROACH OF THE ERITREA-ETHIOPIA CLAIMS COMMISSION TOWARDS THE TREATMENT OF PROTECTED PERSONS IN INTERNATIONAL HUMANITARIAN LAW

Marco Sassòli

1. Introduction

As I agree with everything Silvia Sanna aptly writes in her chapter in this book, I am in the privileged position not to comment on her work, but to criticize certain aspects of the Awards dealing with the treatment of protected persons under International Humanitarian Law (IHL), in particular the Partial Awards on Prisoners of War (Ethiopia's Claim 4 and Eritrea's Claim 17) and on Civilian Claims (Ethiopia's Claim 5 and Eritrea's Claims 15, 16, 23 and 27-32).

2. Importance for International Humanitarian Law

Before criticizing 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 non-governmental organizations' (NGOs) 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.

A. de Guttry, H.H.G. Post and G. Venturini (eds.), The 1998-2000 War between Eritrea and Ethiopia

So, this vicious circle of non-respect has to be broken. Firstly, well-organized, powerful, democratic States must adopt an attitude of respect. Secondly, States accused of violations – often falsely – should undertake serious enquiries into the alleged violations. They should make their results public in every instance, in order to convince those who consider them as the enemy of their willingness to respect IHL and their honest endeavors to ensure such respect by their armed forces. Ethiopia and Eritrea can serve as an example to many other States, showing that third party establishment of the facts and impartial arbitration can show up wide-spread respect of IHL. This would prevent stories telling of violations, which may cause future non-respect, being created. In my view, adopting such an approach would contribute, for example in the Middle East, much more to winning the 'war on terror' than any doubtful intelligence information which can be extracted from suspected terrorists. Thirdly, all of us should, whenever possible and whenever it is a true reflection of reality, show that IHL is most often respected. 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 the law was correctly applied. 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.[1]

3. Repatriation of Prisoners of War

Under Article 118 of Geneva Convention III,[2] 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 is the factual situation on the ground, not agreements. If hostilities cease without any agreement being made, 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'.[3] 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.[4]

---

[1] We have therefore included excerpts from the decisions on POWs, with a discussion, in our coursebook M. Sassòli and A. Bouvier, *How Does Law Protect in War?*, 2nd edn. (Geneva, ICRC 2006, at pp. 1423-1465.

[2] Convention [No. III] relative to the Treatment of Prisoners of War, 12 August 1949, 75 *UNTS* 135-285.

[3] EECC, Partial Award, Prisoners of War – Eritrea's Claim 17 (July 1, 2003) para. 145.

[4] Ibid., para. 146.

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 whose names were not included in the lists of POWs held by Eritrea that it had received from the ICRC'.[5] 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. It first recalled correctly that: '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.'[6]

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.'[7]

On the character of the repatriation obligation, Eritrea had correctly invoked the general exclusion of countermeasures affecting 'obligations of a humanitarian character prohibiting reprisals'[8] and the specific prohibition of reprisals against POWs.[9] It could have added that under the law of treaties, a party to a treaty may not suspend the operation of a treaty because of a material breach of that treaty which affects it 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'.[10] 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'.[11]

---

[5] Ibid., para. 153.

[6] Ibid., para. 148.

[7] Ibid., para. 149.

[8] ILC *Draft Articles on Responsibility of States for internationally wrongful acts*, United Nations, International Law Commission, Report on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001), *GAOR*, 56th Sess., Supp. No. 10, UN Doc. A/56/10. Online: <www.un.org/law/ilc/reports/2001/2001report.htm>, Art. 50 (1)(c).

[9] Art. 13 of Convention III, *supra* n. 2.

[10] Art. 60(5) of the Vienna Convention on the Law of Treaties.

[11] Partial Award, Prisoners of War, Eritrea's Claim 17, para. 160.

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 open its archives 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'.[12] Where the law has been clearly violated, ICRC statements cannot preclude unlawfulness. 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.

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.[13] Even today, there are still missing servicemen 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.[14] 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 analyzing it, is more humane and more law-abiding.

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

[12] Ibid., para. 155.

[13] See M. Sassòli and M.-L. Tougas, 'The ICRC and the Missing', 848 *IRRC* (2002) pp. 727-750.

[14] 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, C. Girod, 'Bosnia and Herzegovina: Tracing Missing Persons', 312 *IRRC* (1996) at p. 388.

the security of the Detaining power makes it absolutely necessary'.[15] 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 'might have returned to Eritrea and joined the Eritrean forces if left at large'.[16] 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'.[17] As an increasing number of States also incorporate women into their armed forces and as it is physically possible to join territory controlled by the enemy (if necessary through third States) in nearly all international armed conflicts, such an interpretation would mean that most adults of enemy nationality could be interned 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'. This Article does not however go as far as justifying internment. 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'.[18] Indeed, as evidenced by the individual procedure prescribed, the security reason must be related to the individual and not simply to his or her belonging to a certain category of persons.

5. Distinction between Invasion and Occupation

The law of military occupation was also applied meaningfully, e.g., when the Commission held that even territory to which Eritrea had a valid claim according to the Boundary Commission, was occupied for the purposes of IHL if it had been invaded during the war.[19]

---

[15] Convention [No. IV] relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 *UNTS* 287-417. See, e.g., the holding in Partial Award on Eritrea's Claims 15, 16, 23, 27-32, para. 104 on mass detentions of Ethiopians in Eritrea.

[16] Partial Award, Civilian Claims, Eritrea's Claims 15, 16, 23, 27-32, para. 117.

[17] See J.S. Pictet, *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilians in Time of War* (Geneva, ICRC 1958) [hereinafter: *ICRC Commentary*] at p. 258, n. 1.

[18] *Prosecutor* v. *Mucic* ICTY-96-21 (1998) para. 577.

[19] Partial Award, Central Front – Ethiopia's Claim No. 2, paras. 28 and 29.

However, in a different context, the Commission made a distinction between invasion and occupation. 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'.[20] The Geneva Conventions do not define occupation. However Article 42 of the Hague Regulations[21] 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.' However, the ICRC Commentary[22] and an ICTY decision[23] argue correctly that the concept of occupation under Convention IV is broader than under the Hague Regulations. 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,[24] on occupied territory,[25] or on both.[26] 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' under 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.[27] Other rules of international law obviously outlaw such behavior everywhere. The prohibition on forcible transfers, however, only applies in occupied territories.[28] 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; therefore, the concept of occupation must be understood functionally. 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.[29]

---

[20] Partial Award, Central Front – Eritrea's Claims 2, 4, 6, 7, 8 and 22, para. 57.

[21] Regulations concerning the Laws and Customs of War on Land (hereinafter: Hague Regulations) annexed to Convention (IV) respecting the Laws and Customs of War on Land (hereinafter: Hague Convention No. IV), The Hague, 18 October 1907, reproduced in J.B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd edn. (New York, Oxford University Press 1918) pp. 100-132.

[22] See *ICRC Commentary*, *supra* n. 17, at 60.

[23] *Prosecutor* v. *Naletilić and Martinović* Case No. IT-98-34-T, Judgment, paras. 218 et seq. (ICTY Trial Chamber 31st March 2003)

[24] See Section II of Part II of Convention IV*, supra* n. 15.

[25] Ibid., Section III.

[26] Ibid., Sections I and IV.

[27] Ibid., Arts. 27, 31 and 34.

[28] Ibid., Art. 49.

[29] This may be one of the few fields in which Convention IV 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. This assumption could only be maintained by adopting and pushing

6. Standard of Proof and State Responsibility for Isolated Violations, in Particular in Cases of Rapes

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 relate, in my view, to the understanding of substantive rules. Thus it dismissed claims, e.g., for killing POWs upon capture,[30] coercive interrogation,[31] physical abuses,[32] isolated rapes,[33] treatment of civilians during short-term detention pending deportation,[34] or separation of families,[35] 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.

With regard to rape, the Commission is particularly ambiguous in this respect. On the one hand it does not require 'evidence of a pattern of frequent or pervasive rapes,' adding that '[r]ape need not be frequent to support State responsibility'. [36] 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 convincing evidence of several rapes in specific geographic areas under specific circumstances.'[37]

The only explanation given for this limitation is that the Commission 'is not a criminal tribunal.'[38]

---

further, for the purposes of Convention IV, the functional and flexible concept of occupation advocated here. Such a concept would, however, probably be opposed by States not wishing to be labeled as occupying powers where they have no effective overall control over a territory. In any case, the dividing line between the broader and the narrower concept defined in Art. 42 of the Hague Regulations cannot in my view correspond to the distinction between the Hague Regulations and Convention IV. Some of the provisions of the latter too, such as Art. 50 on education and Art. 64 on criminal legislation presuppose actual control. See, also the contributions by Gioia and Gill here.

[30] Partial Award, Prisoners of War, Eritrea's Claim 17, para. 61.

[31] Ibid., para. 71.

[32] Ibid., paras. 81 and 82.

[33] Partial Award, Central Front – Ethiopia's Claim No. 2, para. 40; Partial Award, Western Front, Aerial Bombardment and Related Claims – Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 and 26, para. 84.

[34] Partial Award on Eritrea's Claims 15, 16, 23, 27-32 at para. 110.

[35] Ibid., para. 157 (while explicitly admitting that the 'record is not devoid of troubling instances of forcible separation').

[36] Partial Award, Central Front – Ethiopia's Claim. 2, paras. 37 and 38; Partial Award, Central Front – Eritrea's Claims 2, 4, 6, 7, 8 and 22, paras. 40 and 41; Partial Award, Western Front, Aerial Bombardment and Related Claims – Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 and 26, paras. 78 and 79.

[37] Ibid.

[38] Ibid.

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'.[39]

In addition, 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.'[40]

I would object to this. In my opinion, a State is responsible for rapes committed by its soldiers even if all preventive measures had been taken.

By introducing this general requirement of frequent or recurring violations, which the Commission applied despite protests, *inter alia*, in rape cases, the Commission turns the whole basis of IHL upside down. Acts of soldiers are the prime example of conduct attributable to a State.[41] The State is the first and original subject of international law, while individuals 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?

It is fully appreciated that, with its limited time and resources,[42] 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. As the parties did not limit the jurisdiction of the Commission to frequent and recurring violations (as they could well have done),[43] the Commission should have clearly stated that a violation of IHL occurred in every individual proven case, but that it was

---

[39] Partial Award, Civilian Claims – Ethiopia's Claim 5, para. 90.

[40] Partial Award, Central Front – Ethiopia's Claim 2, para. 39 [emphasis added]; Partial Award, Central Front – Eritrea's Claims 2, 4, 6, 7, 8 and 22, para. 42. See also Partial Award, Western Front, Aerial Bombardment and Related Claims – Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 and 26, para. 83, and Partial Award, Central Front – Ethiopia's Claim 2, para. 84.

[41] See *Draft Articles on Responsibility of States*, *supra* n. 8, Art. 4, and, specifically for IHL obligations, Art. 3 of Hague Convention IV, *supra*, n. 21, and Art. 91 of Protocol [No. I] Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 *UNTS* 3-434. For arguments that this *lex specialis* goes further than the general rule, also covering acts committed beyond the official capacity of the soldier, see M. Sassòli, 'State Responsibility for Violations of International Humanitarian Law', 846 *IRRC* (2002) p. 401 at pp. 405-406.

[42] See, for a hint at this, Partial Award, Civilian Claims, Ethiopia's Claim 5, para. 90.

[43] See Art. 5(1) of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (Algiers Agreement); Partial Award, *Jus Ad Bellum* – Ethiopia's Claims 1-8 (19 December 2005), para. 5.

unfortunately unable to deal with the reparation due in every such case.[44] 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.[45]

7. ICRC Visits and Reports

In particular regarding the treatment of POWs, the gathering of evidence by the Commission would have been greatly facilitated if the Commission had had access to the reports the ICRC made following its visits to POWs held by both parties. The Commission therefore requested both parties to hand it 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.[46] Politically, one may understand the ICRC's 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. Legally however, the ICRC position is untenable. 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, I do not see how the ICRC can prohibit them from doing so. These reports no longer belong to the ICRC. I disagree with Silvia Sanna who believes that this situation is covered by the very wide-ranging exemptions for the ICRC permitting it to refuse to disclose evidence in national and international criminal proceedings.[47] I moreover 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

---

[44] See also the criticism by J.R. Weeramantry, 'Prisoners of War (*Eritrea* v. *Ethiopia*); Central Front (*Eritrea* v. *Ethiopia*): Eritrea Ethiopia Claims Commission decisions on treatment of prisoners of war and attacks on civilians and civilian objects,' 99 *AJIL* (2005) p. 465, at p. 472.

[45] A hint in this direction appears in Partial Award, Civilian Claims – Ethiopia's Claim 5, para. 90, where the Commission mentions that those individual cases merit criminal investigation.

[46] Partial Award, Prisoners of War – Ethiopia's Claim 4, paras. 46-48; Partial Award, Prisoners of War, Eritrea's Claim 17, paras. 50-53.

[47] See, on the exemptions S. Sanna, 'La testimonianza dei delegati del Comitato internazionale della Croce Rossa davanti ai tribunali penali internazionali,' 84 *Rivista di diritto internazionale* (2001) p. 394; G. Rona, 'The ICRC Privilege not to Testify: Confidentiality in Action', 845 *IRRC* (2002) p. 207.

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.[48]

While not having access to its reports, the Commission nevertheless relied on the fact that the ICRC visited a certain place,[49] was involved in an operation, such as departure and transport of civilians to the border[50] or, as mentioned above,[51] that the ICRC did not criticize 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.

8. Conclusion

Generally, as shown in the contribution of Silvia Sanna, 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.

---

[48] Partial Award, Prisoners of War – Ethiopia's Claim 4, para. 48; Partial Award, Prisoners of War – Eritrea's Claim 17, para. 53.

[49] 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 (Partial Award, Prisoners of War – Ethiopia's Claim 4, paras. 118 and 119).

[50] Partial Award on Eritrea's Claims 15, 16, 23, 27-32, para. 105; Partial Award, Civilians Claims – Ethiopia's Claim 5, paras. 130 and 131.

[51] *Supra* n. 12, and accompanying text.