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The Obligation to Release and Repatriate Prisoners of Wars: Revisiting the Arbitral Award of Eritrea–Ethiopia Claims Commission

Wubeshet Tiruneh*

Abstract

The Eritrea–Ethiopia Claims Commission hugely contributed to the development of IHL jurisprudence by interpreting, clarifying and applying IHL rules. However, the Commission's decision regarding the suspension and delay of repatriation of Eritrean POWs by Ethiopia, which was handed down nearly two decades ago, still draws much criticism. On the one hand, the date marking cessation of hostilities, which according to Article 118 of the Geneva Convention Relative to the Treatment of Prisoners of War (GC III) triggers the obligation of Ethiopia to repatriate Eritrean POWs, had not been properly determined. On the other hand, the decision suggested that the obligation of states to repatriate POWs is dependent on the behavior of the other party or subjected to reciprocity. According to the Commission, the repatriation of POWs can be delayed after cessation of hostilities unless the detaining powers get an assurance that their troops would similarly be released and repatriated. However, as I will argue in this article, the suspension and delaying of the repatriation of POWs on the ground of reciprocity runs counter to the unilateral and unconditional nature of the obligation to repatriate POWs under Article 118 of GC III. Nor can it be justified as a legitimate reprisal under IHL and countermeasure under the general rules of state responsibility.

1. Introduction

Eritrea–Ethiopia Claims Commission (EECC) was established to decide, through binding arbitral awards, on claims brought by parties related to the loss, damage and injury resulting from the violation of international humanitarian law during the 1998–2000 armed conflict.[1] Claims brought by the parties to

* Graduate Institute of International and Development Studies, Geneva, Switzerland. I wish to thank the anonymous reviewers for their comments on earlier version of this article. E-mail: wubeshet.tiruneh@graduateinstitute.ch.

[1] Agreement between the Government of the State of Eritrea and the Federal Democratic Republic of Ethiopia 12 December 2000 (Algiers agreement), art 5 <https://peacemaker.un.org/sites/peacemaker.un.org/files/ER%20ET_001212_AgreementEritreaEthiopia.pdf> accessed 5 October 2021.

the Claims Commission concern range of issues,[2] including the treatment and repatriation of POWs. In one of the claims brought by the State of Eritrea to the Commission, Eritrea alleged that Ethiopia failed to repatriate Eritrean POWs without delay after cessation of hostilities.[3] According to Eritrea's submission, despite the conclusion of cessation of hostilities agreements on 18 June 2000[4] and 12 December 2000,[5] Eritrean POWs were not released and repatriated until November 2002. As a defense, Ethiopia invoked Eritrea's own delay to repatriate Ethiopian POWs and its failure to explain the fate of one Ethiopian pilot and other 36 militias allegedly captured by Eritrea in 1998.[6] The Commission finally decided that:

> 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.[7]

Article 21 of the Geneva Convention Relative to the Treatment of Prisoners of War[8] (GC III), authorizes parties to the conflict to intern POWs. As indicated in the Pictet Commentary, the internment of captives is intended to prevent them from taking up arms and participate in hostilities against the captor state once again.[9] Indeed, the release and repatriation of POWs, who are still capable of serving the enemy, would strengthen the adversary and prolong the conflict if it happens before the end of active hostilities.[10] The authorization of detaining POWs will therefore enable the detaining powers to achieve the only legitimate aim of a conflict; ie weakening the military capabilities of the adversary.[11]

[2] Claims filled to the Claims Commission according to art 5 of the Agreement involved various issues, such as the initiation of the war (Ethiopia's Claims 1–8), diplomatic relations (Eritrea's Claim 20/Ethiopia's Claim 8), conduct of hostilities (Ethiopia's Claims 1 and 3 /Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 and 26), economic losses (Ethiopia's Claim 7), Civilian Claims (Eritrea's Claims 15, 16, 23, 17 and 32), Ports (Ethiopia Claim 6).

[3] Ethiopia–Eritrea Claims Commission, Partial Award Prisoner of War, Eritrea's Claim 17, Award of 1 July 2003 <https://legal.un.org/riaa/cases/vol_XXVI/23-72.pdf>

[4] Agreement on Cessation of Hostilities between the Government of the State of Eritrea and the Federal Democratic Republic of Ethiopia 18 June 2000 <https://peacemaker.un.org/sites/peacemaker.un.org/files/ER%20ET_000618_AgreementCessationofHostilitiesEthiopiaEritrea.pdf>

[5] Algiers agreement (n 1).

[6] Partial Award Prisoner of War (Eritrea's Claim 17) (n 3) para 153.

[7] ibid para 148.

[8] art 21, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135.

[9] J Pictet (ed), *Geneva Convention Relative to the Treatment of GC III Prisoners of War: Commentary* (ICRC1960).

[10] J Hickman, 'What Is a Prisoner of War for?' (2008) 36 *Scientia Militaria-South African Journal of Military Studies* 19, 20.

[11] M Sassòli, 'Release, Accommodation in Neutral Countries and Repatriation of Prisoners of War' in A Clapham and others (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 1039, 1040.

However, once the active hostilities have ceased, there is no legitimate reason under IHL justifying the detention of POWs. As Article 118 of GC III requires, POWs 'shall be released and repatriated without delay after the cessation of active hostilities'.[12]

However, as I argue in this article, the decision of the Claims Commission regarding this specific claim is contrary to the text, purpose and drafting history of Article 118 of GC III. In Section 1, the article sets the scene by giving a background about the armed conflict, the Commission, and claims brought by both parties concerning POWs. Section 2 discusses cessation of active hostilities as a triggering moment for the obligation to release and repatriate POWs. Section 3 argues that, in the case of Eritrea–Ethiopia IAC, the 18 June 2000 Agreement on Cessation of Hostilities, which was indeed implemented on the ground, should have been used as moment marking cessation of hostilities. Section 4 highlights how the decision of the Commission is contrary to the unilateral and unconditional nature of the obligation to release and repatriate POWs. As a unilateral and unconditional obligation, the material breach of one party does not permit the other party to suspend its obligation.[13] Section 5 argues that suspension and delaying of repatriation of POWs cannot be justified as a legitimate reprisal under IHL or as a countermeasure under general rules of state responsibility.

2. The Eritrea–Ethiopia claims commission and claims concerning POWs

In May 1998, skirmishes along Ethiopia and Eritrea borders spiraled into a large-scale armed conflict. After 2 years of devastating conflict, military hostilities between the two countries were formally ended following the conclusion of two successive agreements in 2000. The warring parties first met in Algiers and signed agreement on cessation of hostilities on 18 June 2000.[14] By signing this Agreement, Ethiopia and Eritrea agreed, *inter alia*, to cease all armed air and land attacks and to permit the deployment of peace keeping mission.[15] On 12 December 2000, the representatives of Ethiopia and Eritrea once again met in Algiers and signed what is commonly called the Algiers Agreement.[16] Under this Agreement, Ethiopia and Eritrea agreed, among others, to establish two neutral Commissions with separate mandates. First, they agreed to establish a neutral Boundary Commission with a mandate to delimit and demarcate the boundary between the two countries.[17] Second, a neutral Claims Commission

[12] Geneva Convention III, art 118.
[13] M Sassoli, *International Humanitarian Law: Rules, Solutions to Problems Arising in Warfare and Controversies* (Edward Elgar Publishing 2019).
[14] Agreement on Cessation of Hostilities (n 4).
[15] ibid arts 1–3.
[16] Algiers agreement (n 1).
[17] ibid art 4.

was also established to decide on all claims for loss, damage or injury by one Government against the other that 'result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law'.[18]

Between the start of the conflict in May 1998 and August 2002, Ethiopia interned a total of approximately 2600 Eritrean POWs,[19] while Eritrea interned 1100 Ethiopian POWs.[20] Accordingly, both parties to the conflict brought claims against each other concerning the treatment and repatriation of their respective POWs. Ethiopia's Claim 4, for instance, was related to the unlawful treatment and delayed repatriation of Ethiopian POWs by the State of Eritrea.[21] Regarding the unlawful treatment of Ethiopian POWs, the Commission found that Eritrea, among others, had failed to protect Ethiopian POWs from being killed; had permitted beatings or other physical abuse; had deprived all Ethiopian POWs of footwear during long walks; had permitted pervasive and continuous physical and mental abuse.[22] The Commission, however, dismissed Ethiopia's claim concerning delayed repatriation of Ethiopia's POWs for lack of temporal jurisdiction according to Article 5(8) of the Agreement, as it was filled after 12 December 2001.[23] According to Article 5(8) of the Algiers Agreement, '[a]ll claims submitted to the Commission shall be filed no later than one year from the effective date of the Agreement'.

Eritrea's Claim 17, which is the focus of this article, was similarly concerned with the unlawful treatment and delayed repatriation of Eritrean POWs.[24] Regarding the treatment of Eritrean POWs, Ethiopia was also found to be liable, among others, for failing to prevent incidents of beating or other unlawful abuses, for depriving footwear during long walks, for failing to protect the personal property of Eritrean POWs and for failing to provide the standard of medical care.[25] Unlike Ethiopia's Claim concerning delayed repatriation of POWs, the Commission also concluded that Eritrea's allegation that 'Ethiopia failed to release and repatriate POWs without delay after December 12, 2000' falls within the temporal jurisdiction of the Commission.[26]

Accordingly, the Commission proceeded to the consideration of the merit of this specific claim of Eritrea. The repatriation of POWs by both parties was started promptly after 12 December 2000.[27] However, in August 2001, Ethiopia

[18] ibid art 5.
[19] Partial Award on POWs (Eritrea's Claim 17) (n 3) para 3.
[20] Ethiopia–Eritrea Claims Commission, Partial Award Prisoner of War, Ethiopia's Claims 4, Award of 1 July 2003, para 3 <https://legal.un.org/riaa/cases/vol_XXVI/73-114.pdf>.
[21] ibid.
[22] ibid Findings of Liability for Violation of International Law.
[23] Eritrea–Ethiopia Claims Commission, Commission's Mandate/Temporal Scope of Jurisdiction, Decision No 1, August 2001 <https://legal.un.org/riaa/cases/vol_XXVI/1-22.pdf>.
[24] Partial Award on POWs (Eritrea's Claim 17) (n 3).
[25] ibid (n 22).
[26] ibid para 21.
[27] ibid para 150.

suspended the repatriation of Eritrean POWs until 'Eritrea clarified the situation of an Ethiopian pilot and thirty-six militia and police officers who it understood had been captured by Eritrea in 1998'.[28] Indeed, the remaining all Eritrean POWs had been released by Ethiopia shortly before the hearing regarding this specific claim was started.[29] Nevertheless, the Commission had to answer whether Ethiopia repatriated Eritrean POWs promptly as required by the law. Thus, in the course of deciding on this specific claim of Eritrea, the Commission had to answer two important legal issues. First, the Commission had to answer when Ethiopia should have repatriated Eritrean POWs according to Article 118 of Geneva Convention III. Second, it had to assess 'whether and to what extent each Party's obligation to repatriate depends upon the other's compliance with its repatriation obligations.'[30] However, as the following sections argue, part of the analysis of the Commission in answering these legal questions was not in line with the dictates of the law.

3. Cessation of active hostilities as a starting point of the obligation to repatriate POWs

The obligation of detaining powers to release and repatriate POWs will be triggered as soon as the reason for their internment ceases to exist. As indicated above, the internment of POWs has only a preventive purpose. It 'aims to ensure that captured enemy personnel are not able to participate again in the hostilities, which would pose a military threat to the Detaining Power.'[31] During the conflict, the reason of internment of POWs would cease to exist if POWs become unable to participate in hostilities due to physical or mental conditions. Accordingly, POWs who are incurably wounded or sick or unlikely to recover within 1 year according to medical opinion or whose physical or mental fitness is gravely and permanently diminished are required to be directly repatriated before the end of the conflict.[32] It would be pointless to wait until the end of hostilities if it becomes apparent that POWs, owing to their physical or mental condition, are unable to participate in hostilities any longer.[33] However,

[28] ibid para 153.
[29] ibid para 144.
[30] ibid para 148.
[31] ICRC Commentary of 2020 on Convention (III) Relative to the Treatment of Prisoners of War, para 1932.
[32] Geneva Convention III, arts 109 and 110. Regarding the 1-year period, Professor Marco Sassòli rightly argued that, given the brief nature of contemporary armed conflicts and advancement made by medical sciences, the period of 1 year should be reduced. See Sassòli (n 11) 1041.
[33] AJ Esgain and W A Solf, 'The Geneva Conventions Relative to the Treatment of Prisoners of War 1949: Its Principles, Innovations, and Deficiencies' (1963) 41 *North Carolina Law Review* 537, 537–97.

repatriation during the conflict is voluntary in nature; it cannot be enforced against the wishes of POWs.[34]

Irrespective of the individual condition of POWs, the reason of internment lasts only until the end of active hostilities. Pursuant to Article 118 of Geneva Convention III, POWs 'shall be released and repatriated without delay after the cessation of active hostilities'.[35] Paragraph 2 of the same article emphasizes that the obligation to release and repatriate POWs does not depend on the presence of any agreements between parties to the conflict.[36] It is worth noting that the repatriation of POWs under Article 75 of the 1929 Geneva Convention would take place as far as an agreement is concluded between the parties. Indeed, parties to the conflict often include stipulations concerning the repatriations of POWs in their armistice agreements. The Korean armistice agreement, for instance, had arrangements relating to prisoners of war.[37] The problem, however, is that this rule leaves open a possibility that POWs could be interned long after the end of the conflict if parties failed to reach an agreement. With a view to address this, Article 118 of the 1949 GC III requires parties to the conflict to release and repatriate POWs without delay after the cessation of active hostilities, regardless of whether there is an agreement for such effect.

The use of the term 'active hostilities' instead of 'military operation' or 'armed conflict' is intentional. Active hostilities, which only refers to acts of violence, is narrower than 'military operations' or 'armed conflict'.[38] The ICRC Commentary to AP I indicated that '[t]he general close of military operations may occur after the cessation of active hostilities',[39] as military operations can often continue after such a ceasefire, even without confrontations. The preference of the term active hostilities therefore aims to expedite the release and repatriation of POWs before the end of armed conflict. Once active hostilities ended, the release and repatriation of POWs should not wait until the closure of military operations or the end of armed conflict. The obligation of states under Article 118 of GC III does not, however, apply regarding POWs against whom

[34] Geneva Convention III, art 109(3). Pictet, however, argued that the prohibition against repatriation against the will of POWs shall also apply to repatriation of POWs during hostilities by analogy. See J Pictet (n 9) 512–13.

[35] Geneva Convention III, art 118.

[36] ibid art 118(2).

[37] Agreement Concerning Military Armistice in Korea, signed 27 July 1953, 4 UST 234, TIAS 2782.

[38] W Nathalie, 'The End of Active Hostilities Versus the End of Armed Conflict' (2015) <www.lawfareblog.com/end-active-hostilities-versus-end-armed-conflict-%C2%A0> accessed 13 December 2021.

[39] Y Sandoz and others (eds) Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC, Geneva, 1987, art 3(b) paras 152–53. One should, however, note that 'distinguishing between the cessation of hostilities and the end of armed conflict is admittedly often difficult from a factual perspective, and in some cases, the two may coincide'. See P Strauch and B Walton, 'Jus ex bello and International Humanitarian Law: States' Obligations when Withdrawing from Armed Conflict' (2020) 102 *International Review of the Red Cross* 914, 935.

criminal proceedings are instituted and those who are serving sentences after conviction.[40]

Cessation of active hostilities between parties to the conflict therefore serves as the starting point for determining the time of release and repatriation of POWs. Accordingly, in this specific context, when Ethiopia should have repatriated Eritrean POWs according to Article 118 of GC III depends on the moment of cessation of hostilities between the two countries. Eritrea claimed that Ethiopia delayed the repatriation of Eritrean POWs after 12 December 2000, because, according to Eritrea's view, 12 December 2000, the date of the conclusion of the Algiers Agreement, marked cessation of active hostilities between the two countries.[41] This does not mean that Eritrea dated the breach of obligation by Ethiopia on 12 December 2000. It rather means that it considered 12 December 2000 as a moment which brings Ethiopia's Obligation to repatriate Eritrean POWs into operation. Eritrea dated breach of obligation by Ethiopia in August 2001 when Ethiopia suspended further repatriation.

The Claims Commission applied Article 118 of GC III and used cessation of hostilities as a reference to determine the compliance or otherwise of Ethiopia with its obligation to repatriate POWs.[42] However, as the next section argues, the Claims Commission failed to properly determine what marks the beginning of cessation of active hostilities for the purpose of Article 118 of GC III.

4. Cessation of active hostilities in the case of Eritrea–Ethiopia IAC

Article 118 of Geneva Convention III does not give any guidance as to what marks cessation of active hostilities. However, it is obvious that the mere suspension of hostilities or silencing of guns is not sufficient to constitute cessation of active hostilities for the purpose of Article 118 of GC III. The silencing of guns alone does not guarantee that the fighting will not resume, and that the repatriated POWs will not once again take up arms against the captor state. This does not, however, mean that repatriation of POWs should wait until the condition 'render it out of the question for the defeated party to resume hostilities'.[43] It would be counterintuitive to require such condition, since the possibility that the defeated party will resume hostilities cannot even be excluded by the conclusion of peace treaties.[44] The purpose of Article 118 of GC III,

[40] Geneva Convention III, art 119(5).

[41] ibid para 144.

[42] ibid para 145.

[43] Y Dinstein, 'The Release of Prisoners of War, Studies and Essays on International Humanitarian Law and Red Cross Principles' in C Swinarski (ed), *Studies and Essays in International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (International Committee of the Red Cross 1984). (Quoting H Lauterpacht (ed), *Oppenheim's International Law* (7th edn, Longmans 1952) 613.)

[44] M El Zeidy and R Murphy, 'Prisoner War: A Comparative Study of the Principles of International Humanitarian Law and the Islamic Law of War' (2003) 9 *International Criminal Law Review* 623, 636.

expediting the release of POWs before the end of the armed conflict, would also be defeated if such high threshold is required.

Cessation of hostilities shall be deemed to exist whenever there is no reasonable or legitimate expectation that the fighting will recommence or resume.[45] The absence or otherwise of reasonable or legitimate expectation depends on facts on the ground, not on the subjective expectation of the parties to the conflict. The new ICRC Commentary to GC III clearly notes that '[u]nilateral or bilateral declarations by the Parties that they will stop fighting can serve as an indication of a cessation of active hostilities but are not sufficient on their own'.[46] Unless supported by facts on the ground, agreement for cessation of hostilities by the parties does not, by itself, mark cessation of active hostilities for the purpose of Article 118 of GC III. Marco Milanovic similarly noted that:

> Agreements concluded by the belligerent parties, however called – unilateral statements by either of them, or resolutions of relevant international organizations, such as those adopted by the UN Security Council – may provide evidence that the hostilities have ended with the needed degree of stability and permanence. But it is the fact that the hostilities have ended that ultimately matters, not the precise legal nature of the instrument in question depending on the political and military environment, a ceasefire agreement or an armistice may actually signify the point at which the hostilities have permanently ended, while a formal peace treaty might not be worth the paper it is written on if hostilities continue unabated.[47]

The Iran and Iraq war also provides instructive lesson concerning the determination of cessation of hostilities for the purpose of Article 118 of the GC III. Iran and Iraq agreed to a cease-fire in United Nations Security Council Resolution 598 of 20 July 1987.[48] They, however, disagreed as to whether the agreement marked cessation of hostilities for the purpose of Article 118 of the GC III and trigger their repatriation obligation. According to Iraq, the agreement marked cessation of hostilities within the meaning of Article 118 because both parties have observed a cease-fire since the agreement entered into force on 20 August 1988.[49] Iran, however, by invoking Iraq's failure to withdraw all its military forces from the internationally recognized borders, which raises the possibility of resumption of fighting between parties to the conflict, refused to repatriate POWs after the cease-fire agreement.[50] Their disagreement

[45] ICRC Commentary (n 31) para 445.

[46] ibid para 4457.

[47] M Milanovic, 'The End of Application of International Humanitarian Law' (2014) 96 *International Review of the Red Cross* 163, 172.

[48] See UN Doc S/RES/598 (20 July 1987) <www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Chap VII SRES 598.pdf>.

[49] Letter of 21 July 1989 from Iraq, UN Doc S/20744 (21 July 1989), for more discussion about the argument of the parties, see J Quigley, 'Iran and Iraq and the Obligation to Release and Repatriate POWs after the end of Hostilities' (1989) 5 *American University International Law Review* 73.

[50] Letter of 17 July 1989 from Iran, UN Doc S/20740 (19 July 1989).

notwithstanding, the argument of both parties tells us that they correctly understood that the agreement to cease-fire—unless supported by facts on the ground—cannot by itself mark cessation of active hostilities under the meaning of Article 118 of GC III.

The EECC did not, however, consider whether the facts on the ground create a reasonable expectation that a fight will not resume. Instead, the Claims Commission entirely relied on cessation of hostilities Agreements signed by the two Parties. First, the Commission considered whether the Agreement signed by Ethiopia and Eritrea on 18 June 2000 marks the end of hostilities. However, without assessing the facts on the ground, the Commission stated that it could not assess whether this agreement marked the end of active hostilities as it received no evidence regarding its implementation.[51] The Commission later considered whether the other agreement concluded by Ethiopia and Eritrea on 12 December 2000 marks the end of hostilities. Just because '[a]rticle 1 of the December 12, 2000, Agreement states that "[t]he parties shall permanently terminate military hostilities between themselves" ... and the establishment of Commission', the Commission concluded that 'as of December 12, 2000, hostilities ceased and the Article 118 obligation to repatriate "without delay" came into operation'.[52]

The Agreement concluded between Ethiopia and Eritrea on 18 June 2000 was indeed for cessation of active hostilities. However, it could not mark cessation of hostilities for the purpose of Article 118 of GC III unless implemented on the ground and created a reasonable expectation that the fighting between the parties will not resume. Instead of sidestepping the 18 June 2000 Agreement and moving to the 12 December 2000 Agreement, the Claims Commission should have assessed whether the 18 June 2000 Agreement was implemented on the ground and created a legitimate expectation that the fighting will not resume between the two parties.

Following the conclusion of the 18 June 2000 Agreement, a UN peacekeeping mission was established and deployed on the disputed territories, Ethiopian troops withdrew from the Eritrean territories which they had controlled during the conflict, and Temporary Security Zone was also established.[53] All these developments coupled with the absence of reports of clashes between the two

[51] See Partial Award Prisoner of War (Eritrea's Claim 17) (n 3) para 145.

[52] ibid para 146.

[53] Agreement on Cessation of Hostilities (n 4) art 2. As the Geneva Academy War Report documented, following the 18 June 2000 Agreement on cessation of hostilities, 'On 31 June 2000, the UNSC decided to establish the UN Mission in Ethiopia and Eritrea (UNMEE), consisting of up to 100 military observers and the necessary civilian support staff in anticipation of a peacekeeping operation subject to future authorization. On 15 September 2000, the UNSC authorized the deployment of 4,200 troops for the UNMEE.' See Geneva Academy, 'War Report 2018: The Eritrea-Ethiopia Armed Conflict', 37-53, <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20report%202018.pdf> accessed 15 September 2021. The Commission claimed that it received no evidence regarding the implementation of the 18 June 2000 Agreement. However, according to art 14(4) of the

parties after the 18 June 2000 Agreement could create a legitimate expectation that the fighting will not resume. Therefore, without a need to consider the 12 December 2000 Agreement, the Claims Commission should have concluded that the conflict between two parties ceased on 18 June 2000 and bring the repatriation obligation into operation. It must also be noted that the 12 December 2000 Agreement was only intended to reaffirm the 18 June 2000 Agreement on Cessation of Hostilities and to establish the Claims and Boundary Commissions.

However, the obligation to repatriate POWs is not instantaneous. This means that Ethiopia is not required to repatriate all Eritrean POWs a day after the 18 June 2000 Agreement. As noted in the ICRC commentary, the obligations of repatriation without delay should not affect the practical arrangements that should exist to make the repatriation consistent with the humanitarian rules.[54] The process of preparing and coordinating arrangements for safe and orderly repatriation of POWs may take time. As a result, according to the requirement of Article 118, Ethiopia should have repatriated all Eritrean POWs within a reasonable time, which is necessary to make practical arrangements, after the conclusion of the 18 June 2000 Agreement.

5. The unilateral nature of the obligation to repatriate POWs

Once active hostilities have ceased, the detaining powers are obliged to release and repatriate POWs. However, the issue that the Claims Commission confronted was whether the obligation of one party to release and repatriate POWs is dependent on the behavior of the other party. Initially, the Commission admitted that '[t]he language of Article 118 is absolute'.[55] It also went on to clearly state that 'the object and purpose of Geneva Convention III ... indicate that repatriation should occur at an early time and without unreasonable or unjustifiable restrictions or delays.'[56] However, the Commission later changed its tone and stated that '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.'[57]

Thus, according to the Commission, 'it is appropriate to consider the behavior of both Parties in assessing whether or when Ethiopia failed to meet its obligations under Article 118.'[58] The reasoning seems to imply that the Commission considered the obligation of repatriation is subjected to reciprocity. This

Commission's rules of procedure, it could have required parties to present evidence regarding developments following the 18 June 2000 Agreement.

54 J Pictet (n 9) 550.

55 See Partial Award Prisoner of War (Eritrea's Claim 17) (n 3) para 148.

56 ibid para 147.

57 ibid para 148.

58 ibid para 149.

contradicts what the Commission stated about the absolute nature of repatriation obligation at the onset. Finally, by ignoring Eritrea's argument that 'concerns about the fate of a relatively few missing persons cannot justify delaying for a year or more the release and repatriation of nearly 1,300 POWs,' the Commission concluded that:

> [T]the Commission is 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 .

The conclusion of the Commission is in blatant contradiction with the unilateral and unconditional nature of the obligation to release and repatriate POWs. The unilateral and unconditional nature of the repatriation obligation was highlighted during the conference of government experts drafting the Geneva Convention.[59] According to the Pictet commentary, 'the obligation of repatriation is unilateral so that it will not be hampered by the difficulty of obtaining the consent of both sides'.[60] In other words, the repatriation obligation under Article 118 of GC III is not dependent on the discharge of the corresponding duty by the other party.[61] The behavior of the other party to the conflict is immaterial in determining the compliance of a state with its obligation to release and repatriate POWs. Accordingly, detaining powers are required to 'proceed with release and repatriation as required under Articles 118 and 119 even if the other Party has not reciprocated.'[62]

Subjecting the obligation of repatriating POWs to reciprocity 'would sound the death knell for the repatriation of POWs'.[63] Any reciprocity consideration would prolong the repatriation of POWs and run counter to the protective purpose of Article 118 of GC III. It could even mean that POWs can be interned indefinitely unless the party to whom they belong reciprocates. This does not, however, mean that there are no historical practices whereby repatriation of POWs was delayed by states on the ground of reciprocity. Following the Iran–Iraq war, for example, both states were reluctant to unilaterally and unconditionally release and repatriate POWs unilaterally.[64] The repatriation of

[59] ICRC, Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims (1947) 244.

[60] J Pictet (n 9) 245.

[61] J Quigley (n 49) 80.

[62] ICRC Commentary (n 31) para 4448.

[63] Sassòli, 'The Approaches of Ethiopia Eritrea Claim towards the Treatment of Protected Persons in International Humanitarian Law' in A de Guttry and others (eds), *The 1998–2000 War between Eritrea and Ethiopia: An International Legal Perspective* (Asser Press 2009) 341, 344. See also Sassòli (n 11) 1050.

[64] S Lamar, 'The Treatment of Prisoners of War: The Role of the International Committee of the Red Cross in the War between Iran and Iraq' (1991) 5 *Emory International Law Review* 243, 279.

POWs was delayed by both parties for 2 years after cessation of active hostilities. However, fortunately, there is no 'general practice and *opinion juris* whereby POWs must, at the end of active hostilities only be exchanged and not be unilaterally repatriated.'[65] The Commission cannot therefore rely on these limited historical practices to drift away from the dictate of international law.

Of course, the Commission did not entirely find Ethiopia in compliance with its obligation to repatriate Eritrean POWs. According to the Commission, even if Ethiopia did not violate its repatriation obligation by suspending further repatriation POWs on August 2001, it should not have waited until 29 November 2002 to repatriate Eritrean POWs once Eritrea repatriated all Ethiopian POWs on August 2002.[66] After estimating the time necessary to make arrangements with ICRC, the Commission concluded that Ethiopia should have repatriated Eritrean POWs by 12 September 2002. The Commission in effect allowed Ethiopia to retain POWs for more than 2 years after the 18 June 2000 Agreement. However, according to Article 118 of GC III, the repatriation of POWs should not have waited until 12 December 2000, let alone until 12 September 2002.

6. Delaying repatriation of POWs cannot be justified as countermeasure

Indeed, under general rules of state responsibility, states are permitted to unilaterally take countermeasures to bring the violating state into compliance. This allows injured states to suspend performance of their international obligation toward the responsible state. By suspending performance of their obligation, the injured states put pressure on the violating state to comply with its obligations.[67] However, the right of states to resort to countermeasures in response to violations is not unlimited; it is subjected to various conditions.[68] One of the conditions, which is relevant in our context, is that countermeasures should not involve obligations of a humanitarian character prohibiting reprisal.[69] By relying on this prohibition, Eritrea argued that:

[65] Sassòli (n 63) 344.

[66] Partial Award Prisoner of War (Eritrea's Claim 17) (n 3) para 163.

[67] In the absence of organized machinery in the international legal system to coerce the delinquent state to comply with its obligation, countermeasure as a self-help measure will continue to be an option for the injured states. See A Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th edn, OUP 2012).

[68] arts 49–53, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001.

[69] ibid art 50 (1)(C).

> Ethiopia's suspension of POW exchanges cannot be justified as a non-forcible counter-measure under the law of state responsibility because, as Article 50 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts emphasizes, such measures may not affect 'obligations for the protection of fundamental human rights,' or 'obligations of a humanitarian character prohibiting reprisals.'[70]

As provided under Article 50 (1)(C) of the ILC Draft Articles on State Responsibility, the injured state cannot suspend obligations of a 'humanitarian character prohibiting reprisals' as a countermeasure. Put differently, obligations of a 'humanitarian character prohibiting reprisals' cannot be subject to countermeasures. The Commentary to the ILC Draft Articles indicated that Article 50 (1)(C) 'is modelled on article 60, paragraph 5, of the 1969 Vienna Convention'.[71] According to Article 60(5) of the Vienna Convention on the Law of Treaties, countermeasures in response to breach of treaty obligation should not apply to 'provisions relating to the protection of human person contained in treaties of humanitarian character, in particular to provisions prohibiting any form of reprisal against persons protected by such treaties'.[72] Article 60(5) is considered to cover human right treaties as well as those related to international humanitarian law.[73] The question therefore remains whether reprisals against POWs are prohibited under IHL.[74]

As rightly argued by Eritrea, acts of reprisals against POWs are not permitted.[75] Article 13(3) of GC III emphasizes that measures of reprisal against prisoners of war are prohibited. Similarly, acts of reprisals against POWs are prohibited under Article 2(3) of the 1929 GC II. These treaty rules on the prohibition of reprisals are reflections of a similar prohibition under customary law. As stated in rule 146 of the ICRC customary law study, '[b]elligerent reprisals against persons protected by the Geneva Conventions are prohibited'.[76] Reprisal consists of actions that would otherwise be unlawful under the rules of IHL but, in exceptional circumstance, considered to be lawful 'when used as an enforcement measure in reaction to unlawful acts of an adversary'.[77] Indeed, none of IHL conventions categorically prohibit acts of reprisals; however, acts which cause harm to protected objects and persons, including POWs, are prohibited reprisals.

[70] Partial Award Prisoner of War (Eritrea's Claim 17) (n 3) para 159.
[71] Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2008) 132.
[72] art 60(5), Vienna Convention on the Law of Treaties, 23 May 1969, 1153 UNTS 331.
[73] A Clapham (n 67) 375.
[74] For detailed discussion about reprisal under IHL, See J de Hemptinne, 'Prohibition of Reprisals' in A Clapham and others (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford Commentaries on International Law (OUP 2015) 575.
[75] Partial Award Prisoner of War (Eritrea's Claim 17) (n 3) para 159.
[76] ICRC CIHL Study, r 146.
[77] ibid r 145. See also J de Hemptinne (n 74) 578.

The prohibitions of reprisal against POWs under IHL also imply that obligations of states owed in relation to them cannot be subjected to countermeasures under general rules of state responsibility. Accordingly, the act of suspension and delaying the repatriation of POWs, who are protected under GC III, and against whom reprisal is prohibited, by Ethiopia cannot be justified as a lawful countermeasure. That would be the case even if Ethiopia is assumed to have done so in reaction to unlawful acts of Eritrea.

7. Conclusion

The purpose behind Article 118 of GC is to prevent the internment of POWs after the military reason necessitating their internment cease to exist.[78] Accordingly, like the rest of the provisions of GC III which aims at protecting POWs, Article 118 should be interpreted in light of its purpose. Any kind of interpretation that delays the repatriation of POWs after cessation of active hostilities will run counter to the purpose of Article 118. First, the determination of cessation of active hostilities should not be contingent on conclusion of an Agreement on cessation of hostilities. This is because hostilities could end without any agreement. Besides, not all concluded Agreements on cessation of hostilities will be respected or implemented on the ground. Accordingly, the determination of cessation of hostilities should rely on facts on the ground instead of, or in addition to, Agreements on cessation of hostilities. Second, once active hostilities ceased, detaining powers should unilaterally release and repatriate POWs. Subjecting the obligation to repatriate POWs to any kind of conditions and reciprocity would prolong, even indefinitely, the internment of POWs. This is contrary to the text, purpose and drafting history of 118 of GC III.

For the forgoing reasons, the decision of the EECC on this specific issue should not be used as a precedent in future situations. If taken as a precedent, it will not only unnecessarily prolong the internment of POWs, but also put their repatriation on the subjective will of the parties.

[78] JP Charmatz and HM Wit, 'Repatriation of Prisoners of War and the 1949 Geneva Convention' (1952) 62 *Yale Law Journal* 391, 398.