IMPLANTANDO A LEI HUMANITÁRIA INTERNACIONAL POR MEIO DA ARBITRAGEM INTERNACIONAL

Enforcing International Humanitarian Law Through International Arbitration

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Contents: Introduction; 1. International arbitration as a peaceful means for the settlement of inter-State disputes; 2. Effectiveness of inter-State arbitration; 3. Challenges in enforcing international humanitarian law; 4. Why arbitration can be an effective mean to enforce IHL; Conclusion

Sumário: Introdução; 1. Arbitragem internacional como um meio pacífico para a resolução de disputas entre Estados; 2. Efetividade da arbitragem entre Estados; 3. Desafios na aplicação do direito internacional humanitário; 4. Por que a arbitragem pode ser um meio efetivo de aplicar o direito internacional humanitário; Conclusão

Abstract: The enforcement of International Humanitarian Law (IHL) remains a persistent challenge in the global legal landscape. Traditional mechanisms, such as international criminal tribunals, either *ad hoc*, as the former International Criminal Tribunal for the Former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR), or permanent, as the International Criminal Court (ICC), and domestic courts, often face limitations in scope, jurisdiction, and enforcement mechanisms, as well as political constraints. Our work explores an alternative approach to address this challenge, which is the use of international arbitration to enforce IHL.

Keywords: International Arbitration; State Responsibility; International Humanitarian Law; Enforcement; Reparations

Resumo: A aplicação do Direito Internacional Humanitário (DIH) continua a ser um desafio persistente no panorama jurídico global. Mecanismos tradicionais, como os tribunais penais internacionais, quer *ad hoc*, como o antigo Tribunal Penal Internacional para a Ex-Iugoslávia (ICTY,

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na sigla em inglês) ou o Tribunal Penal Internacional para o Ruanda (ICTR, na sigla em inglês), quer permanentes, como o Tribunal Penal Internacional (TPI) e os tribunais nacionais, enfrentam frequentemente limitações em termos de escopo, competência e mecanismos de aplicação, bem como restrições políticas. O nosso trabalho explora uma abordagem alternativa para enfrentar este desafio, que é a utilização da arbitragem internacional para fazer cumprir o DIH.

Palavras-chave: Arbitragem Internacional; Responsabilidade Internacional do Estado; Direito Internacional Humanitário; Aplicação; Reparações

Introduction

The enforcement of International Humanitarian Law (IHL) remains a persistent challenge in the global legal landscape. Traditional mechanisms, such as international criminal tribunals, either *ad hoc*, as the former International Criminal Tribunal for the Former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR), or permanent, as the International Criminal Court (ICC), and domestic courts, often face limitations in scope, jurisdiction, and enforcement mechanisms, as well as political constraints. Our work explores an alternative approach to address this challenge, which is the use of international arbitration to enforce IHL.

By focusing on the established legal framework on state responsibility and reparations for violations under international law, we examine the theoretical underpinnings and practical applications of international arbitration as an alternative to hold states accountable for breaches of IHL. By analyzing the mechanisms of international arbitration, we elucidate how they can complement existing judicial frameworks, offering a flexible and effective avenue for redress. The Ethiopia-Eritrea Claims Tribunal serves as a pivotal case study in our discussion. This arbitral tribunal, established to resolve claims arising from the armed conflict between Ethiopia and Eritrea, provides a compelling example of how arbitration can successfully address state responsibility for IHL violations. We scrutinize its procedural innovations, decisions, and impact on the development of IHL enforcement.

Our analysis highlights the tribunal's role in clarifying legal principles related to state liability and the reparation of victims for internationally wrongful acts committed in violation of IHL. We also discuss the broader implications for the international legal system, considering the potential of international arbitration to enhance compliance with IHL and contribute to the peaceful resolution of international disputes.

By drawing on this case study and broader theoretical perspectives, we aim to demonstrate that, regardless of the many obstacles international arbitration is subject to, including the

requirement that consent shall be unequivocally given by the parties to the dispute, which is widely considered as a cornerstone of international arbitration, it may serve – in addition to the abovementioned traditional mechanisms, particularly the permanent international courts and tribunals which might have jurisdiction over the same matters – as a viable, effective and potent mechanism for enforcing IHL, thereby advancing justice and accountability on a global scale. Our work does not intend to argue that international arbitration shall be the only, primary or even preferred mechanism for the peaceful settlement of international disputes concerning violations of IHL, as it was envisaged to argue that international arbitration shall be considered as an additional means for enforcing IHL.

1. International arbitration as a peaceful means for the settlement of inter-State disputes

Inter-state arbitration dates back to the arbitral proceedings under the 1794 General Treaty of Friendship, Commerce and Navigation between the United States and the United Kingdom, commonly known as the Jay Treaty.[3] Since the Jay Treaty, arbitration has been chosen and included in various international treaties as a means for the settlement of disputes among states.[4]

Article 15 of the 1899 Convention for the Pacific Settlement of International Disputes established that the object of international arbitration was the settlement of disputes between States by judges of their own choice, based on the respect for the law.[5] This understanding was confirmed on Article 37 of the 1907 Convention for the Pacific Settlement of International Disputes[6], which added that recourse to international arbitration implied an engagement between the parties to submit to the arbitral award in good faith.[7]

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[3] GRAY, Christine; KINGSBURY, Benedict. Developments in Dispute Settlement: Inter-State Arbitration since 1945, The British Year Book of International Law, 1992, p. 97.

[4] As Vidmar points out: "One of the issues settled by arbitration under the Jay Treaty was the boundary line between the remaining British possessions and the United States". VIDMAR, Srecko. Compulsory Inter-State Arbitration of Territorial Disputes, Denver Journal of International Law, Vol. 31, No. 1, January 2002, p. 91.

[5] Article 15 of the 1899 Convention for the Pacific Settlement of International Disputes. Full text of the Convention available at https://docs.pca-cpa.org/2016/01/1899-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf. [all web resources cited in this paper were last accessed 10 September 2024].

6 A new Convention for the Pacific Settlement of International Disputes was adopted in 1907 to revise, providing clearness and completeness, and ultimately replace the 1899 Convention between the contracting powers. TRYON, James L. The Hague Conferences, Yale Law Journal, Vol. 20, No. 6, April 1911, p. 479.

[7] Article 37 of the 1907 Convention for the Pacific Settlement of International Disputes reads as follows: "International arbitration has for its object the settlement of disputes between States by Judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the Award". Full text of

Articles 16 of the 1899 Convention for the Pacific Settlement of International Disputes stated that arbitration was recognised by States as the most effective means for settling disputes concerning the interpretation or application of international treaties, whenever diplomacy failed. Article 38 of the 1907 Convention for the Pacific Settlement of International Disputes not only reaffirmed this understanding but went further to call on the contracting parties to settle their disputes by arbitration, as long as the circumstances permit.[8]

The establishment of the Permanent Court of Arbitration (PCA), as a permanent forum for the resolution of international disputes through arbitration, has been the most concrete achievement of the 1899 Convention for the Pacific Settlement of International Disputes.[9] Many landmark inter-State cases settled by arbitration, such as the South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)[10] and the Eritrea-Ethiopia Claims Commission[11] have been administered by the PCA.[12]

International arbitration precedes judicial settlement of inter-State disputes by permanent international courts, as the establishment of the Permanent Court of International Justice (PCIJ), the predecessor of the International Court of Justice (ICJ), only took place in the twentieth century, more specifically in 1922.[13]

Arbitration clauses have been inserted in several multilateral and bilateral treaties.[14] Through these clauses, States establish arbitration as the means for the settlement of disputes in case they arise out of differences over the interpretation and application of treaty provisions.[15]

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the Convention available at https://docs.pca-cpa.org/2016/01/bd7626f1-1907-convention-for-the-pacific-settlement-of-international-disputes.pdf.

[8] Articles 16 and 37 of the 1899 and 1907 Conventions for the Pacific Settlement of International Disputes, respectively.

[9] VIDMAR, Srecko. Compulsory Inter-State Arbitration of Territorial Disputes, Denver Journal of International Law, Vol. 31, No. 1, January 2002, p. 92. More information on the history of the Permanent Court of Arbitration is available at https://pca-cpa.org/en/about/introduction/history/.

[10] More information about the inter-State arbitral proceedings may be found at https://pca-cpa.org/en/cases/7/.

[11] More information about the inter-State arbitral proceedings may be found at https://pca-cpa.org/en/cases/71/.

[12] As Aust highlights: "(the PCA) is not a court, but a permanent facility (including a courtroom, chambers, offices, library, secretariat services and a list of potential arbitrators) available to states and international organisations to help them conduct arbitrations (...)". AUST, Anthony. Handbook of International Law, Cambridge University Press, Cambridge, 2005, p. 444.

[13] As Gray and Kingsbury pointed out: "In international law, unlike municipal law, arbitration was the norm until the twentieth century; that is, it preceded judicial settlement". GRAY, KINGSBURY, supra n. 3, p. 102. For more information about the history of the PCIJ see https://www.icj-cij.org/pcij.

[14] VIDMAR, supra n. 4, p. 93.

[15] AUST, supra n. 12, p. 443.

International arbitration plays an important role in inter-State dispute settlement, being listed as one of the peaceful means for the settlement of international disputes on Article 33 of the United Nations Charter.[16]

2. Effectiveness of inter-State arbitration

A key feature of international arbitration is that the arbitral award is final and binding between the parties of the dispute.[17]

The effectiveness of international arbitration lies – among others – upon the respect and enforcement of the agreement entered between the parties to arbitrate their disputes, the participation of the parties in the constitution of the arbitral tribunal and core due process guarantees such as the equal, fair and impartial treatment of the parties by the arbitrators. Furthermore, the award rendered by the arbitral tribunal must be recognized and enforced by the parties to the dispute.[18]

Even though inter-state arbitration and judicial settlement of inter-state disputes by international courts have similarities, there are some significant distinctions. On the one hand, both arbitral tribunals and international courts require State consent as the basis for the exercise of jurisdiction. Moreover, both arbitral tribunals and international courts have the authority to determine whether they are competent to hear a case brought before it, according to the competence-competence principle.[19] On the other hand, differences include the freedom of the parties to choose the composition of the arbitral tribunal by appointing the arbitrators, secrecy of the arbitral proceedings,[20] the inexistence of third-party intervention in international arbitration,

[16] Article 33.1 of the United Nations Charter states that: "(t)he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice". Available at https://www.un.org/en/about-us/un-charter/full-text.
[17] FORTESE, Fabricio; HEMMI, Lotta. Procedural Fairness and Efficiency in International Arbitration, Groningen Journal of International Law, vol. 3 (1), 2015, p. 112.
[18] Ibid.
[19] As Bantekas points out: "Courts and entities exercising a judicial function, as is the case with arbitral tribunals, possess an inherent power to determine whether or not they possess authority to examine their authority as well as the breadth and scope of such authority in any given case". BANTEKAS, Ilias. An Introduction to International Arbitration, Cambridge University Press, Cambridge, 2015, p.109.
[20] While in inter-State arbitration confidentiality of the written and oral proceedings may be the norm, and only the arbitral award is usually made available to the public, in proceedings before international tribunals the confidentiality of the oral and written proceedings is the exemption. GRAY, KINGSBURY, supra n. 3, p. 110.

and closer control of the questions addressed by the arbitral tribunal, as opposed to judicial adjudication.[21]

Territorial disputes, such as land and maritime boundary delimitation, have been commonly referred to – and settled by – arbitration.[22] The territorial disputes settled by arbitration include, among others, the case on the sovereignty and maritime boundary delimitation in the Red Sea, decided by an inter-state arbitration between Eritrea and Yemen under the auspices of the Permanent Court of Arbitration.[23]

Disputes arising out of the interpretation or application of the 1982 United Nations Convention on the Law of the Sea have also commonly been referred to and settled by inter-State arbitration. Arbitrations under Annex VII of UNCLOS 1982 have frequently been administered by the Permanent Court of Arbitration.[24]

As it will be addressed in a further section of this paper, though rare, the settlement of disputes concerning violations of international humanitarian law may also be referred to international arbitration, which was the case of the Eritrea-Ethiopia Claims Commission, administered by the Permanent Court of Arbitration.[25]

3. Challenges in enforcing international humanitarian law

3.1. Respect and ensure respect of IHL

Article 1, common to all four Geneva Conventions (GCs), imposes an obligation on all Parties to respect and ensure respect for international humanitarian law.[26] This rule, a norm of customary international law, applies in both international (IAC) and non-international (NIAC) armed conflicts.[27] The duty to ensure respect includes both negative and positive obligations. Under

[21] VIDMAR, supra n. 4, p. 95. GRAY, KINGSBURY, supra n. 3, p. 109.
[22] States have relied on international arbitration for settling their territorial disputes, and it proved to be a successful method for solving these disputes. VIDMAR, supra n. 4, p. 89.
[23] VIDMAR, supra n. 4, pp. 93-94. More information about the inter-state proceedings between Eritrea and Yemen may be found at the PCA's website at https://pca-cpa.org/en/cases/81/.
[24] According to the Permanent Court of Arbitration: "(t)he PCA has acted as registry in 14 of the 15 arbitrations conducted pursuant to Annex VII of the 1982 United Nations Convention on the Law of the Sea". PCA, 2024 Contribution of the Permanent Court of Arbitration to the Report of the United Nations Secretary-General on Oceans and the Law of the Sea, p. 1.
[25] For more information about this case, see https://pca-cpa.org/en/cases/71/.
[26] Article 1 common to the 1949 Geneva Conventions (GCs).
[27] Study on Customary IHL by the International Committee of the Red Cross 'Customary IHL Database' (ICRC, first published in 2005) (CIHL), rule 144.

the negative obligation, High Contracting Parties must neither encourage nor assist in violations of the Conventions by any Parties to a conflict. Meanwhile, the positive obligation requires them to take all reasonable measures within their power to prevent and halt such violations.[28]

In addition to ensuring respect by a State's own armed forces and population ('internal' dimension of obligation), States are required to ensure respect by parties to a conflict, even if they are not parties to that conflict ('external' dimension of obligation). The obligation to ensure respect encompasses a duty of due diligence to prevent and repress acts infringing on the protections set out in IHL. As an obligation of conduct or means, its precise content depends on the circumstances, including the foreseeability of violations, their gravity, the means reasonably available to the State, and the level of influence the State exercises over the private actors.[29]

State practice suggests a strong reliance on two mechanisms in particular to exert influence over parties to a conflict to ensure their respect for IHL: (i) diplomatic protests, which can be manifested through bilateral diplomatic protests, within international forums, or through resolutions by international organizations and (ii) collective measures, which includes, inter alia, convening international conferences on specific situations, investigating potential violations, establishing ad hoc criminal tribunals and courts, imposing international sanctions, and deploying peacekeeping or peace-enforcement troops.[30]

Moreover, enforcement of basic rules of IHL constitutes obligations *erga omnes,*[31] which is owed to the international community as a whole.[32] Therefore it is the responsibility of all States to ensure that IHL is properly respected on battlefields.

Furthermore, some of the violations of IHL could involve a serious breach of States' obligations under a peremptory norm of international law,[33] third States can play a critical role in ending the unlawful situation by upholding their own obligations,[34] which include:

[28] Commentary to GC 1 (2016) para. 154.
[29] Commentary on the Third Geneva Convention. Convention (III) Relative to the Treatment of Prisoners of War, 2nd ed., Cambridge University Press, Cambridge, 2020, para. 183.
[30] CIHL, supra n. 27, commentary.
[31] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,* p. 136, para. 157.
[32] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970,* p. 32, para. 33.
[33] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001) 2 Yearbook Intl L Com (ARSIWA), article 40(2), which states that 'A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation'.
[34] ARSIWA, article 41(1).

- A duty not to recognise as lawful a situation created by a serious breach of international law, including avoiding formal and implied recognition;[35]
- An obligation to refrain from providing aid or assistance in maintaining such a situation, which could include military aid or trade relationships;[36] and
- A positive obligation to cooperate to bring an end to the serious breach through lawful means, either within the framework of an international organization or through non-institutionalized cooperation bilaterally or multilaterally.[37]

Accordingly, States, which are involved in armed conflict are the primary actors to respect IHL, but in some circumstances, also third states have a legal obligation under international law not to knowingly aid or assist in the commission of the violation, not to recognize the situation that resulted from the wrongful act, and to cooperate to bring the unlawful situation to an end through lawful means.[38]

3.2. Awarding compensation in case of violation of IHL

Article 91 of the Protocol I Additional to 1949 Geneva Conventions (AP I) sets out an obligation for any parties to the conflict to pay compensation if they violate the provisions of the GCs or AP I.[39] This rule originates from the Hague Convention[40] and also constitutes a principle of international law.[41] Responsibility for violation of IHL is recognized as part of customary law[42] – thus applicable to both IAC and NIAC. This obligation applies equally to all parties to the conflict, whether winner or defeated because IHL prevents all parties from 'absolve itself or any other Party of any liability incurred by itself or by another Party in respect of breaches of IHL.'[43]

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[35] ARSIWA, article 41(2).
[36] Ibid.
[37] ARSIWA, commentary, p. 114.
[38] ARSIWA, articles 16, 40, 41.
[39] Protocol (I) Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I), article 91.
[40] Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, 205 CTS 277 (Hague Regulations), article 3.
[41] The Permanent Court of International Justice held that: "It is a principle of international law and even a general conception of law, that any breach of an engagement involves an obligation to make reparation [...] Reparation is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself." See: Permanent Court of International Justice, Chorzow Factory Case, 13 September 1928, (Series A, No. 17, p. 29).
[42] CIHL, rule149.
[43] GC I, article 52; GC II, article 52; GC III, article 131; GC IV, article 148.

Article 91 obliges parties to the conflict to pay compensation only if the violations have been committed by acts, which are attributed to its armed forces.[44] The scope of this provision is limited to violations of the Conventions and the Protocol, but it is without prejudice to questions that might arise with regard to compensation for damage inflicted when there has not been any violation in the strict sense of the word.[45]

Mere violation of the IHL rules does not give a raise to claims for compensation, as the *Commentaries* to the AP I suggest 'there must also be a loss or damage which in most cases will be of a material or personal nature and such compensation is usually expressed in the form of a sum of money which must correspond either to the value of the object for which restitution is not possible or to an indemnification which is proportional to the loss suffered.'[46]

Therefore, for a person to claim compensation from a party to the conflict under Article 91, the following elements must be met cumulatively: (a) violation of the IHL rule must be committed; (b) violation must be committed by any parties to the conflict and thus be attributable to their armed forces and (c) violation must cause some loss or damage to the civilian population.

Besides article 91, neither core IHL treaties, nor customary law provide other rules about compensating victims of violation, therefore this provision remains the only point of reference in IHL, which can be applied to vindicating claims of States and civilians, who inflicted damage during warfare.

3.3. Factors affecting ineffectiveness of existing mechanisms in enforcement of IHL

Although IHL treaties provide mechanisms for the peaceful resolution of disputes,[47] these mechanisms, along with those established by public international law, are seldom utilized. This is understandable, as international armed conflicts would likely not arise if parties were able to resolve their disputes peacefully. Adjudication of disputes, apart from ICJ advisory opinions, typically occurs only after the conclusion of a conflict—and even then, such instances are rare. Nonetheless,

[44] AP I, article 91.
[45] Commentary to AP I, article 91, para. 3659.
[46] Ibid, para. 3655.
[47] Eg See GC I, article 11, GC II, article 11, GC III, article 11, GC IV, article 12.

judgments by the ICJ and certain arbitral tribunals have significantly contributed to the clarification of legal concepts and standards in IHL.[48]

Member States, the UN General Assembly, the UN Security Council, and other UN organs authorized by the General Assembly may request the ICJ, the UN's principal judicial organ, to interpret IHL. In fact, the ICJ has addressed various IHL issues in both contentious and advisory cases.[49]

However, due to the widespread refusal of most States to accept its compulsory jurisdiction, the ICJ plays only a minimal role in resolving disputes related to the law governing armed conflicts.[50] Regarding non-international armed conflicts, the ICJ cannot serve as a forum for armed non-State groups, limiting its involvement to cases where a State might be held responsible for the group's actions.

To complement the State-centric jurisdiction of the ICJ in adjudicating disputes related to the enforcement of IHL, international criminal law mechanisms aim to prosecute individuals accused of violating IHL. In these cases, special courts and tribunals assert jurisdiction over all individuals, regardless of their affiliation with State armed forces or non-state armed groups, and irrespective of whether the conflict is international or non-international.

International criminal law can support the enforcement of IHL in two main ways: either through the establishment of ad hoc international criminal tribunals by the UN Security Council or by prosecuting IHL violations through the permanent International Criminal Court, which was established under the Rome Statute,[51] an international treaty.

However, both approaches have their limitations. The creation of an ad hoc criminal tribunal for a specific armed conflict requires near-universal consensus, as evidenced by the affirmative vote of the permanent members of the UN Security Council. Even if such consensus is reached, the legality of the decision may be contested on several grounds, most notably whether

[48] SASSOLI, Marco. International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare, Elgar Publishing, 2024, p. 114

[49] The ICJ's Advisory Opinions on the *Legality of the Threat or Use of nuclear weapons* and on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* clarified important IHL issues, but those opinions did not actually resolve those issues. The famous *Nicaragua* and *Congo v. Uganda* cases also addressed and clarified important questions of IHL in depth.

[50] SASSOLI, supra, n. 48, p. 115.

[51] Rome Statute of the ICC (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (ICC Statute).

the Security Council can delegate judicial authority to a tribunal when it does not inherently possess such power.[52]

The ICC also faces significant limitations in prosecuting IHL violations, particularly regarding its restricted personal and territorial jurisdiction. The ICC can only prosecute individuals if they are nationals of a State Party to the Rome Statute or if the alleged crime was committed on the territory of a State Party.[53] Due to the relatively limited number of states that have ratified the Rome Statute, the court's jurisdiction is consequently constrained.

In light of the aforementioned limitations, we contend that these 'traditional' methods of enforcing IHL have proven to be ineffective and encounter numerous challenges in adequately addressing all violations. Therefore, we argue that international arbitration, which has only been utilized on rare occasions to enforce IHL, should be more broadly adopted. Expanding its use could ensure greater respect for IHL and provide a more effective means of redressing violations.

4. Why arbitration can be an effective means for enforcing IHL

It is exceedingly rare for parties to an armed conflict to agree to submit disputes concerning the interpretation and application of IHL to arbitration, whether during or after the conflict. Notable historical exceptions include the arbitrations established by the peace treaties following the two World Wars[54] and, more recently, the creation of an Arbitral Commission by Eritrea and Ethiopia after their international armed conflict between 1999 and 2000.[55] This Commission was tasked with adjudicating disputes related to the treatment and repatriation of prisoners of war (POWs), interned civilians, occupied territories, and the conduct of hostilities.

The Claims Commission was established to "decide through binding arbitration all claims for loss, damage, or injury by one government against the other" related to the armed conflict, arising from "violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law." The parties were entitled to submit claims on their own behalf, on behalf of their nationals (including both natural and legal persons), or, in

[52] This issue was discussed in *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, ICTY, 15 July 1999.
[53] ICC Statute, supra, n. 51, article 12(2).
[54] See E.G. Zollmann, akob. Mixed arbitral tribunals: post-first world war peace treaties, max planck encyclopedias of international law [mpil], june 2022; d'argent, pierre. Conciliation commissions established pursuant to art. 83 peace treaty with italy (1947), max planck encyclopedias of international law [mpil], june 2022.
[55] Agreement Between the Government of The Federal Democratic Republic of Ethiopia and The Government of The State of Eritrea, Algiers, Algeria, 12 December 2000 (The Algiers Agreement), article 5.

appropriate circumstances, on behalf of individuals of Ethiopian or Eritrean origin who were not nationals.[56]

The Commission was seated in The Hague, with the Permanent Court of Arbitration serving as its registry.[57]

Between July and August 2001, the Commission held hearings on significant questions related to jurisdiction, procedure, and potential remedies. These issues were addressed in Decisions 1-5, issued in August 2001.[58]

In October 2001, after consulting with the parties, the Commission adopted its Rules of Procedure,[59] which were based on the Permanent Court of Arbitration's Optional Rules for Arbitration of Disputes Between Two States.

The parties filed their claims by December 12, 2001, covering matters such as military operations in the front zones, treatment of prisoners of war, treatment of civilians and their property, diplomatic immunities, and the economic impact of certain government actions during the conflict.

The Commission decided to bifurcate the proceedings, addressing issues of liability first and reserving the determination of damages for a later stage. It heard the prisoner of war claims in December 2002, the Central Front claims in November 2003, the Home Front claims in March 2004, and the remaining liability claims in April 2005. Two rounds of hearings on damages were held in April 2007 and May 2008.

In total, the Commission delivered 15 partial and final awards on liability, concluding its work on August 17, 2009, with the delivery of its final awards on damages.[60]

Considering the Commission's limited resources, time constraints, and the challenges it faced in establishing facts, it performed commendably in interpreting, applying, and clarifying IHL rules regarding the protection of persons.[61] Its arbitral awards remain rare, recent, and real-life

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[56] Ibid.
[57] Permanent Court of Arbitration information note, available at https://pca-cpa.org/en/cases/71/.
[58] Eritrea-Ethiopia Claims Commission, Decisions no.1-5, 15 August 2001, available at https://pca-cpa.org/en/cases/71/.
[59] Eritrea-Ethiopia Claims Commission, Rules of Procedure, 1 October 2001, available at https://pcacases.com/web/sendAttach/774.
[60] Eritrea Ethiopia Claims Commission Final Award*, Ethiopia's Damages Claims between The Federal Democratic Republic of Ethiopia and The State of Eritrea*, The Hague, August 17, 2009.
[61] SASSOLI, supra, n. 48, p. 115

examples of IHL being upheld. Even after a conflict that caused immense suffering and loss, Eritrea and Ethiopia set a significant precedent by submitting their IHL disputes to arbitration. Notably, the Arbitral Commission, while recognizing that both parties had committed violations, also made a specific determination in its award concerning POWs.

Both Parties had a commitment to the most fundamental principles bearing on prisoners of war. Both parties conducted organized, official training programs to instruct their troops on procedures to be followed when POWs are taken. In contrast to many other contemporary armed conflicts, both Eritrea and Ethiopia regularly and consistently took POWs. Enemy personnel who were hors de combat were moved away from the battlefield to conditions of greater safety. Further, although these cases involve two of the poorest countries in the world, both made significant efforts to provide for the sustenance and care of the POWs in their custody.[62]

Conclusion

The primary objective of this paper was to identify existing gaps in the effective enforcement of International Humanitarian Law and to propose that international arbitration could be more broadly applied to ensure that IHL is respected, and violations are adequately addressed. Factors such as the agreement between parties, choice of law, flexible rules and procedures, and the binding nature of arbitral awards make international arbitration a practical and effective means of enforcing IHL.

In contrast, the lengthy proceedings at various international courts and tribunals, coupled with the limited jurisdiction and challenges related to the admissibility of specific disputes, render traditional methods of adjudication less effective in addressing IHL violations. Furthermore, the inability or unwillingness of third States to ensure that all parties to a conflict respect IHL imposes an additional burden on victims seeking justice and reparations.

Therefore, considering the infrequent but effective use of international arbitration—most notably illustrated by the Eritrea-Ethiopia Claims Commission as a case study—we conclude that the wider adoption of this method could potentially enhance compliance with IHL while also providing more effective remedies for the victims of violations.

[62] Eritrea Ethiopia Claims Commission, *Partial Award Prisoners of War Ethiopia's Claim 4 between The Federal Democratic Republic of Ethiopia and The State of Eritrea*, The Hague, July 1, 2003, para. 12.

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