

Eritrea/Djibouti: Repatriation of POWs

Case prepared by Mr. Tadesse Kebebew, LL.M., student at the Geneva Academy of International Humanitarian Law and Human Rights, under the supervision of Professor Marco Sassòli and Ms. Yvette Issar, research assistant, both at the University of Geneva.

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. Djibouti Eritrea Border War

[**Source:** Djibouti Eritrea Border War, African Volunteer Network, available at: http://www.african-volunteer.net/djibouti_eritrea_border.html]

[1] The Djibouti Eritrea Border War was of short duration from 10th - 13th June 2008, however reflected an ongoing uneasy tension between the two neighbours for many years.

[2] In the course of the conflict forty four Djibouti soldiers were killed and some fifty five were injured. The war centred on the disputed Ras Doumeira area on the Red Sea coast; an area Eritrea had launched a surprise 'attack' on in April prior to the war.

[...]

[3] Although there had been simmering resentment between the two nations over the Djibouti Eritrea border since independence, the first major crisis came in April 1996 when Djibouti accused Eritrea of shelling Ras Doumeira almost leading to all out war however the two nations stepped back from the precipice until 2008 when Eritrea crossed the Djibouti border claiming it required sand for road building.

[4] Djibouti claimed that far from crossing the border merely for sand Eritrea dug ditches and set up fortifications on both sides of Ras Doumeira to claim it as its own. Both sides then moved their troops into the area and a standoff ensued before the inevitable fighting broke out during which Eritrea suffered heavier casualties with a reported hundred soldiers killed and a further hundred captured.

[5] [...]. However in this short war some reports indicated that that the French Foreign Legion in Djibouti provided logistical support to the Djibouti troops.

[6] Following the conflict Djibouti approached the UN and requested assistance in patrolling the disputed area. They concurrently withdrew to territory held before June 10th 2008 and the UN requested that Eritrea do the same, however Eritrea refused.

[7] It took until June 2010 for Eritrea to pull out and both sides agreed to allow Qatar to mediate the dispute with Qatar deploying its troops in the interim until the dispute can be resolved [...].

B. Djibouti hands Eritrean prisoners of war over to UNHCR

[Source: 'Djibouti hands Eritrean prisoners of war over to UNHCR', SUDAN TRIBUNE, Wednesday 16 April 2014, available at: <http://www.sudantribune.com/spip.php?article50664>]

[1] April 15, 2014 (ADDIS ABABA) –The government of Djibouti says it has handed over 267 Eritrean prisoners of war to the United Nations refugee agency (UNHCR), ending an incarceration that began in 2008, when the two neighbouring countries engaged in a territorial dispute.

[2] The announcement on Monday comes after years of international campaigning led by Human Rights Concern Eritrea (HRCE), an exiled Eritrean human rights organisation.

[3] The human rights group had been calling for the immediate release of the prisoners arguing that the prisoners of war (POWs) were forcibly conscripted into the Eritrean army by president Isaias Afewerki's regime.

[4] According to human right groups, most of the former Eritrean soldiers joined the army in order to deliberately surrender to Djibouti defense forces, hoping to secure refugee status in neighbouring Djibouti.

[5] However Djiboutian authorities refused to free them, suspecting that they might be a threat to national security as the border row between the two East African neighbours remains unsettled.

[6] "We have made them talk to the International Committee of the Red Cross (ICRC) to facilitate their return to their country, and we're doing this despite the fact that we never heard of Djibouti's POWs," Djibouti presidential adviser Najib Ali Tahir told reporters on Monday.

[7] However an Eritrean activist, Yemane Bereket, who is based in Ethiopia, told *Sudan Tribune* that if they were returned to Eritrea the PoWs turned asylum seekers might face prosecution at home and called upon the UNHCR to resettle them to a third country for their safety.

[8] Bereket said the Eritreans who were held as POWs opted to join the army as a means to escape political oppression at home including, extra judicial killing, forcible and indefinite national military conscription.

[9] "They fled to escape the unjust and inhumane imprisonment at home only to end up in another prison" he said.

[10] The Eritrean politician further urged Djiboutian authorities to release the remaining 19 Eritrean prisoners of war still kept in detention at at Nagad Detention Centre in Djibouti.

[11] Some of those freed are said to have been military deserters.

[...]

C. Eritrea: AU and UN welcome release of Djibouti prisoners

[Source: 'Eritrea: AU and UN welcome release of Djibouti prisoners', Sudan TRIBUNE, Monday 21 March 2016 available at: <http://www.sudantribune.com/spip.php?article58376>]

[1] March 20, 2016 (ADDIS ABABA) – The African Union and United Nation[s] have welcomed the release by Eritrean authorities of four prisoners from Djibouti.

[2] The four Djiboutian prisoners of war, who had been in Eritrean jail since 2008, were released after long mediation efforts from Qatar.

[3] They were flown to Djibouti Friday by a Qatari plane accompanied by Qatar's foreign minister, Mohamed bin Abdul Rahman Al Thani. The four were detained in connection to a border dispute between Djibouti and Eritrea.

[4] The Chairperson of the African Union Commission, Nkosazana Dlamini Zuma has welcomed the move taken by Eritrean authorities and commended Qatar for the role it played in this respect.

[5] "The Chairperson of the Commission considers that the release of the Djiboutian prisoners is a positive step in the right direction within the process of normalization of relations between the two countries and in this context, she calls on the parties to clarify the fate of any remaining prisoners and to also release them," said Zuma.

[6] In 2008, Eritrea and Djibouti engaged in armed conflict over territorial disputes.

[7] In 2010, Eritrea and Djibouti signed a peace deal in Doha and hundreds of Qatari peace keepers were deployed to their disputed borders.

[8] Zuma called for the full implementation of the peace deal, which the two neighbours signed in 2010 under the auspices of Qatar and underscored needs for continued and expedited efforts in this respect.

[...]

[9] In 2014, the Djiboutian government freed over 260 Eritrean prisoners of war and handed them over to the UN refugee agency (UNHCR).

Discussion

I. Classification of the Situation and Applicable Law

1. (*Document A*) (*Paras [1]-[4]*) How do you classify the border conflict between Eritrea and Djibouti? When does IHL start to apply to this situation? Is crossing the border, and digging ditches and setting up fortifications on both sides of Ras Doumeira by Eritrean soldiers enough to trigger the applicability of IHL of international armed conflict? What is the level of intensity of violence required to trigger the applicability of IHL of international armed conflict? Do you think that threshold is met in the present case? When did IHL stop applying to the situation? (GC I-IV, Art.2; GC IV, Art.6; P I, Art.1 and Art.3 (b))
2. (*Document A, para. [5]*) What implications would the logistical support allegedly provided by the French Foreign Legion to Djibouti have under IHL?
3. (*Document A, para. [7]*) What is the effect of the June 2010 agreement between the parties? Does it necessarily imply the end of the conflict? The end of application of IHL? Which provisions of IHL would continue to apply even if the conflict was deemed to be over?

II. Treatment of POWs

4. What does IHL stipulate about the repatriation of POWs? When can active hostilities be considered to have ceased? Only after the withdrawal of all military forces to back behind internationally recognized borders? Only once Eritrea and Djibouti had reached a final peace treaty? Had active hostilities between the parties ceased on 13th June 2008 such that prisoners of war should have been repatriated? (GC III, Art. 118; CIHL, Rule 128)
5. (*Document B, paras [1], [4]-[5] and [10] and Document C, paras [2]-[4] and [7]*) When should the Eritrean POWs have been released according to IHL of international armed conflict? Should the release of POWs depend on mediation efforts or be subject to negotiations? Was the release effected in 2014 compatible with the rules of IHL? Was the internment of the POWs that began in 2008 and continued till 2014, compatible with the rules of IHL? Did Djibouti violate IHL by refusing to release the POWs claiming that the border row remained unsettled? Is there legitimate ground under IHL for Djibouti to have released some POWs and retained others? (GC III, Art.6, Art.118 and 119 (5); CIHL, Rule 128)
6. (*Document B, paras [2]-[4] & 11]*) Is the argument by human rights groups that Eritrean POWs were forcibly conscripted and they should be immediately released by Djibouti correct under IHL? Does it matter

whether the POWs are military deserters?

7. (*Document B, para. [6]*) What is the nature of the obligation to repatriate POWs? Of the obligation to allow the ICRC access to POWs? Can Djibouti refuse to give the ICRC access to visit POWs and delay the repatriation of POWs on the basis of the claim that it does not have information about its own POWs? Are a party's responsibilities towards captured POWs subject to the principle of reciprocity? Does Djibouti have an obligation to repatriate captured POWs even though Eritrea fails to do so? (GC III, Arts 1, 13(3) and 118; CIHL, Rule 140; Vienna Convention on the Law of Treaties, Art. 60(5))

8. (*Document B, para. [7]* and *Document C, para. [9]*) Under the obligation to repatriate, what should the destination of released POWs be? Should they be repatriated to the Power on which they depend? What about cases where there is a risk of persecution upon repatriation? Does the principle of *non-refoulement* apply to POWs where there exists a probability of persecution or ill-treatment upon repatriation? Under IHL, could Djibouti hand over captured POWs to UNHCR? Does that fulfil their obligation to repatriate such persons?

9. (*Document B, paras [7]-[11]*) May or must a POW not be repatriated on the mere basis that he or she objects to the repatriation? If his or her objection is motivated by fear to continue to be conscripted into the armed forces of the country on which he depends? What if such conscription is indefinite?

10. (*Document B, paras [8] and [9]*) Who determines whether a POW objects to his/her repatriation? The ICRC? Is that provided for in IHL? Why does the ICRC insist on visiting prisoners and interviewing them without witnesses? Does the ICRC have a right to insist on the latter condition? What would the status of persons who object to their repatriation be? Would they remain POWs or lose their status and become civilians? (GC III, Art. 126; GC IV, Art.4 (4) and Art.6 (4))

11. (*Document B, para. [6]* and *Document C, Para. [5]*) What are the procedural obligations of states upon capturing POWs under IHL? Are external requests required to activate the obligation to clarify the fate of POWs? (GC III, Arts. 17, 70, 122, and 123)