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Ethiopia's Claim 5**

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## **PART VII**

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### **Partial Award Civilians Claims—Ethiopia's Claim 5**

**Decision of 17 December 2004**

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### **Sentence partielle Mauvais traitements des populations civiles— Réclamation de l'Éthiopie N° 5**

**Décision du 17 décembre 2004**



PARTIAL AWARD, CIVILIANS CLAIMS—ETHIOPIA'S CLAIM 5,  
DECISION OF 17 DECEMBER 2004

SENTENCE PARTIELLE, MAUVAIS TRAITEMENTS DES POPULATIONS  
CIVILES— RÉCLAMATION DE L'ÉTHIOPIE N° 5,  
DÉCISION DU 17 DÉCEMBRE 2004

Jurisdiction of the Commission—determination of the liability of States for breaches of international obligations—liability only for serious violations of international humanitarian law affecting several victims—liability engaged only for systematic, frequent and recurring violations—no jurisdiction over individual crimes—jurisdiction limited to events arising during the armed conflict and subsequent to it as a result of its ending.

Law in force during the armed conflict—Eritrea subject to customary humanitarian rules before becoming a party to Geneva Conventions—customary status of international humanitarian rules as exemplified by the Geneva Conventions—Protocol I viewed by the Parties as reflecting binding customary rules despite the doubtful status of some of its portions—burden of proof on the State denying customary status to a specific provision of a Geneva Convention or Protocol—human rights law not suspended during armed conflict—relevance of human rights to protect individuals not protected by international humanitarian law.

Treatment of aliens—international humanitarian law considered as guarantying respect of basic human rights during wartime—obligation to ensure the protection of aliens against acts or threats of violence on the streets and in other places—right of alien civilians to find employment, to receive education and medical care on the same basis than nationals—high price for obtaining alien card not considered as a collective punishment—burdensome bureaucratic process to obtain an exit visa not viewed as unreasonable.

Expulsion of civilians—no liability arising from departure resulting of economic and social dislocation due to war or for harsh conditions of such journeys thereafter—no liability arising from a short notice of departure and consecutive economic loss—right of expelled aliens to take care of their property prior to expulsion—liability arising from official wrongful seizure of property and consequent economic loss suffered.

Detention of civilians—mass detention of civilians permitted only if rendered absolutely necessary for national security—liability arising from the detention of alien civilians for long period in substandard conditions, without legal justification and with occurrence of physical and psychological abuses—a poor economic situation not accepted as legal defence for substandard treatment of internees—obligation to ensure physical protection and well-being of civilians detained—liability arising from the actions of untrained and undisciplined guards in the camps.

Question of evidence—requirement of clear and convincing evidence for crimes of a certain gravity—burden of proof on the claimant—credit accorded to cumulative, reinforcing and detailed testimonies—difficulty to rely in material not prepared as evidence in legal proceedings—lowered standard of evidence related to cases of

rape—collective punishments or reprisals against protected persons shall be evidenced by the high number of victims out of the relevant population.

Claims filing proceedings—to give more details in order to illustrate a variety of misconducts already alleged in mere general claims not considered as a new separate claim.

Compétence de la Commission—détermination de la responsabilité des Etats pour les violations d'obligations internationales—responsabilité limitée à des violations importantes du droit international humanitaire affectant plusieurs victimes—responsabilité uniquement engagée pour des violations systématiques, fréquentes et récurrentes—absence de compétence relative aux crimes individuels—jurisdiction limitée aux événements ayant eu lieu pendant le conflit armé et après celui-ci résultant de son achèvement.

Droit en vigueur pendant le conflit armé—Érythrée soumise aux règles du droit international humanitaire coutumier avant même de devenir Partie aux Conventions de Genève—caractère coutumier des règles humanitaires internationales tel qu'illustré par les Conventions de Genève—Protocole I considéré par les Parties comme reflétant des règles coutumières contraignantes malgré le statut incertain de certaines dispositions de celui-ci—charge de la preuve reposant sur l'État réfutant le statut coutumier d'une disposition particulière de l'une des Conventions de Genève ou Protocole—régime de protection des droits de l'homme non suspendu pendant le conflit armé—importance des droits de l'homme pour protéger les individus non couverts par le droit international humanitaire.

Traitement des étrangers—droit international humanitaire considéré comme garantissant le respect des droits de l'homme fondamentaux en temps de guerre—obligation de protéger les étrangers d'actes violents ou de menaces dans les rues ou en tout autre endroit—droit pour les civils étrangers de trouver un emploi, de s'instruire et de recevoir des soins médicaux sur la même base que les nationaux—un tarif élevé pour l'octroi d'une carte de résident étranger n'est pas considéré comme une punition collective—une procédure bureaucratique très lourde afin d'obtenir un visa de sortie n'est pas considérée comme irraisonnable.

Expulsion des étrangers—responsabilité non engagée par le départ résultant des bouleversements économiques et sociaux liés au conflit ou pour les conditions difficiles encourues lors de tels voyages—responsabilité non engagée par une notification de départ à court terme et les pertes économiques en résultant—droit des expulsés de prendre des dispositions concernant leurs biens avant leur expulsion—responsabilité engagée par la saisie injuste de biens et les pertes économiques en résultant.

Détention de civils—détention massive de civils autorisée seulement lorsqu'elle est rendue absolument nécessaire pour des raisons de sécurité nationale—responsabilité engagée par la détention de civils étrangers pour de longues durées dans des conditions médiocres, sans base légale et accompagnée de mauvais traitements physiques et moraux—une mauvaise situation économique ne peut légalement justifier les mauvais traitements infligés aux détenus—obligation de garantir la protection physique et le bien-être des civils détenus—responsabilité engagée par les actions de gardes sous-entraînés et indisciplinés dans les camps.

Question des preuves—nécessité de preuves claires et convaincantes pour les crimes d'une certaine gravité—charge de la preuve reposant sur le plaignant—crédit accordé aux témoignages cumulatifs, complémentaires et détaillés—difficulté de se fier aux documents non préparés pour servir de preuve dans les procédures juridiques—abaissement des critères d'établissement des preuves dans les affaires de viol—les punitions collectives ou les représailles contre des personnes protégées doivent être prouvées par le nombre important de victimes parmi la population concernée.

Procédure de soumission des réclamations—le fait de donner plus de détails afin d'illustrer différents mauvais agissements déjà invoqués n'est pas assimilé au dépôt d'une nouvelle plainte.

**ERITREA-ETHIOPIA CLAIMS COMMISSION**

**PARTIAL AWARD**

**Civilians Claims  
Ethiopia's Claim 5**

**between**

**The Federal Democratic Republic of Ethiopia**

**and**

**The State of Eritrea**

By the Claims Commission, composed of:

Hans van Houtte, President

George H. Aldrich

John R. Crook

James C.N. Paul

Lucy Reed

The Hague, December 17, 2004

**PARTIAL AWARD—Civilians Claims—Ethiopia's Claim 5  
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**TABLE OF CONTENTS**

I. INTRODUCTION .....	256
A. Summary of the Positions of the Parties.....	256
B. Proceedings.....	256
II. FACTUAL BACKGROUND .....	257
III. JURISDICTION.....	259
IV. APPLICABLE LAW .....	261
V. EVIDENCE.....	264
VI. ETHIOPIA’S CLAIMS.....	265
A. Physical and Mental Abuse Out of Detention .....	266
B. Other Unlawful Treatment Out of Detention .....	268
C. Confiscation and Discriminatory Levies .....	272
D. Unlawful Arrest, Detentions and Internment Prior to May 2000.....	273
E. & F. Physical and Mental Abuse and Unlawful Conditions of Detention .....	275
G. Expulsion Under Inhumane Conditions .....	277
VII. CLAIMS AFTER MAY 2000.....	279
VIII. AWARD .....	288
A. Jurisdiction .....	288
B. Applicable Law.....	288
C. Evidentiary Issues .....	289
D. Findings of Liability for Violation of International Law .....	289
E. Other Findings.....	290



## I. INTRODUCTION

### A. Summary of the Positions of the Parties

1. This Claim (“Ethiopia’s Claim 5,” “Ethiopia’s Civilians Claims”), described by the Claimant as encompassing its “Home Front Claims,” has been brought to the Commission by the Claimant, the Federal Democratic Republic of Ethiopia (“Ethiopia”), against the State of Eritrea (“Eritrea”), pursuant to Article 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of December 12, 2000 (“the December 2000 Agreement”). The Claimant asks the Commission to find the Respondent, Eritrea, liable for loss, damage and injury suffered by the Claimant, including loss, damage and injury suffered by Ethiopian nationals, resulting from alleged infractions of international law in the treatment of Ethiopian civilians who were living in Eritrea during the 1998–2000 international armed conflict between the two Parties.

2. Eritrea contends that it has fully complied with international law in its treatment of these Ethiopian nationals.

3. This Partial Award and the companion Partial Award rendered today in Eritrea’s Claims 15, 16, 23 and 27–32 (“Eritrea’s Civilians Claims”) are the third in a series of Partial Awards by the Commission on the merits of the Parties’ claims. Previous Partial Awards have addressed the Parties’ claims relating to the treatment of prisoners of war<sup>1</sup> and to the conduct of military operations on the Central Front.<sup>2</sup>

4. This Claim does not include any claims set forth in separate claims by the Claimant, such as those for mistreatment of prisoners of war (Ethiopia’s Claim 4) or for mistreatment of other Ethiopian nationals in the Central Front (Ethiopia’s Claim 2).

### B. PROCEEDINGS

5. The Commission informed the Parties on August 29, 2001 that it would conduct proceedings in Government-to-Government claims in two stages, first concerning liability and, second, if liability is established, concerning damages. Pursuant to Article 5 of the December 2000 Agreement,

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<sup>1</sup> Partial Award, Prisoners of War, Eritrea’s Claim 17 Between the State of Eritrea and the Federal Democratic Republic of Ethiopia (July 1, 2003) [hereinafter Partial Award in Eritrea’s POW Claims]; Partial Award, Prisoners of War, Ethiopia’s Claim 4 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (July 1, 2003) [hereinafter Partial Award in Ethiopia’s POW Claims].

<sup>2</sup> Partial Award, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 & 22 Between the State of Eritrea and the Federal Democratic Government of Ethiopia (April 28, 2004) [hereinafter Partial Award in Eritrea’s Central Front Claims]; Partial Award, Central Front, Ethiopia’s Claim 2 Between the Federal Democratic Government of Ethiopia and the State of Eritrea (April 28, 2004) [hereinafter Partial Award in Ethiopia’s Central Front Claims].

this Claim was filed by the Claimant on December 12, 2001. A Statement of Defense was filed by the Respondent on June 15, 2002, the Claimant's Memorial on November 15, 2002, and Respondent's Counter-Memorial on January 15, 2004. Both Parties filed additional evidence on February 13, 2004, and a hearing was held at the Peace Palace in The Hague in March 2004, in conjunction with a hearing on Eritrea's corresponding Claims 15, 16, 23 and 27-32.

## II. FACTUAL BACKGROUND

6. It is not disputed that tens of thousands of Ethiopian citizens lived and worked in Eritrea when the armed conflict between the Parties began in May 1998. The Parties had broadly consistent estimates of the size of this Ethiopian population in Eritrea when the conflict began. The wartime *chargé d'affaires* of Ethiopia's Embassy in Asmara, who testified at the hearing, estimated it at 120,000; at the hearing, Ethiopia's counsel spoke of numbers between 100,000 and 120,000. Counsel for Eritrea cited published estimates of 100,000 before the war. An Eritrean immigration official testified at the hearing that 85,000 or 90,000 residence permits were issued to Ethiopians after permits were required in May 1999, after 20,000 to 25,000 Ethiopians left Eritrea in 1998. The evidence leads the Commission to conclude that the pre-war population of Ethiopians in Eritrea was in the range of 110,000 to 120,000.

7. The evidence also indicated that between 20,000 and 25,000 Ethiopians left Eritrea in the summer or fall of 1998, within a few months of the outbreak of the war. Many previously worked at the port of Assab, which lost its business handling cargo to and from Ethiopia when the war began. It also appears that perhaps 5,000 Ethiopians left Eritrea in 1999, although the reasons for the smaller number are disputed. The Parties agree that after the June 18, 2000 Agreement on Cessation of Hostilities (the "Cease-Fire Agreement"),<sup>3</sup> large numbers of Ethiopians left Eritrea, continuing throughout the period covered by these claims and thereafter. The Parties again dispute the reasons for these later departures.

8. The evidence shows that by the end of 2001 many Ethiopians had left Eritrea, but the Parties disagreed regarding how many departed and how many remained. At the hearing, counsel for Ethiopia contended that 90% of the Ethiopian population left Eritrea during or soon after the conflict ended. Eritrea disputed that the departure rate was so high; an Eritrean immigration official testified that about 40,000 Ethiopians remain in Eritrea. That official also testified that Eritrea issued about 60,000 exit visas to Ethiopians, most during 2000 and 2001.

9. The Ethiopian wartime *chargé d'affaires* in Eritrea estimated that 60% of the pre-war Ethiopian population lived in or around the capital city of Asmara, 26% in the port city of Assab or its environs, 7% in small villages

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<sup>3</sup> Agreement on the Cessation of Hostilities, June 18, 2000.

in southern Eritrea, and about 4% in the port city of Massawa or its environs. Eritrea did not question these estimates.

10. The Commission will refer to these population estimates *infra*, in connection with Ethiopia's claims that large numbers of Ethiopians were wrongfully expelled by Eritrea.

11. The evidence indicates that the pre-war Ethiopian population in Eritrea included persons of varied social, educational and economic backgrounds. Most were from Tigray. Many had limited financial resources and held low paying jobs, such as casual labor in construction or agriculture. Many of the claims forms in Ethiopia's evidence identified the claimants as day laborers. Thousands of Ethiopians handled cargo in Eritrean ports, particularly in Assab, Ethiopia's principal link to the sea before the war. Many worked as housemaids and in other service roles. There appear to have been many male and female workers not accompanied by families, but the evidence did not establish the proportion of women or numbers of families.

12. The Parties vigorously dispute both the treatment received by these Ethiopians in Eritrea during the war and the circumstances of those who departed. Eritrea contended that its policy towards Ethiopians residing in Eritrea was benevolent, and was reflected in a June 26, 1998 statement of the National Assembly indicating that the Eritrean Government "has not, and will not, take any hostile action against Ethiopians residing in the country. Their right to live and work in peace is guaranteed. If this right is infringed under any circumstances or by any institution, they have the full rights of appeal." Ethiopia denies that this was reflected in practice, alleging frequent and severe abuse of Ethiopian nationals throughout the war.

13. In May 1999, Eritrea began to require Ethiopian nationals to register with the immigration authorities and to obtain and carry official identity cards. Many of Ethiopia's claims involve Eritrea's enforcement of these requirements, which involved frequent document checks and detentions for non-compliance.

14. The evidence shows that the situation of Ethiopians in Eritrea varied during the course of the conflict. Their conditions became more difficult after Ethiopia's military successes in May and early June 2000. In that period, the Eritrean authorities detained many thousand Ethiopians in harsh conditions; the Parties dispute whether this was done to protect them from hostile public opinion or for other reasons. This Partial Award is structured in part to reflect what the evidence shows were significant differences in conditions in Eritrea before and after the 2000 Ethiopian offensive.

15. The International Committee of the Red Cross ("ICRC") played a role in these events. Eritrea contended that places where Ethiopians were detained were open to and regularly visited by the ICRC; that the ICRC screened departures from Eritrea to ensure that they were voluntary; and that the ICRC provided homeward transportation for most Ethiopians. Ethiopia disputed many

of these contentions. The Commission has noted various ICRC reports, press releases and other public statements in the record in these proceedings. However, the Commission did not encourage the Parties to seek additional non-public information from the ICRC, given the ICRC's prior inability to provide information sought by the Parties concerning their prisoner of war claims because of its policies on confidentiality.<sup>4</sup>

### III. JURISDICTION

16. Article 5, paragraph 1, of the December 2000 Agreement establishes the Commission's jurisdiction. It provides, *inter alia*, that the Commission is to decide through binding arbitration claims for all loss, damage or injury by one Government or its nationals against the other that are related to the earlier conflict between them and that result from "violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law."

17. Temporal Jurisdiction. The Commission determined in Decision No. 1<sup>5</sup> that the central reference point for determining its temporal jurisdiction is the armed conflict between the Parties. However, its jurisdiction also extends to claims involving subsequent events, if the claims arose as a result of the armed conflict or occurred in the course of measures to disengage contending forces or otherwise to end the military confrontation. This is in harmony with important international humanitarian law principles, which continue to provide protection throughout the complex process of disengaging forces and addressing the immediate aftermath of armed conflict.

18. However, Ethiopia does not seek relief regarding events after conclusion of the December 2000 Agreement. The Civilians Claims Ethiopia filed in December 2001 are expressly limited to Eritrea's actions "from the time it initiated the conflict in May 1998 through the conclusion of the conflict by execution of the 12 December 2000 Peace Agreement."<sup>6</sup> Ethiopia's Memorial and its final submissions at the hearing likewise dealt only with matters prior to the December 2000 Agreement. In its Memorial and at the hearing, Ethiopia referred to certain events after December 12, 2000, but it did not purport to submit new claims, and the Commission does not regard those discussions of later events as constituting new claims, which in any case would not be timely under the Agreement.

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<sup>4</sup> See Partial Award in Eritrea's POW Claims, *supra* note 1, at paras. 50–53; Partial Award in Ethiopia's POW Claims, *supra* note 1, at paras. 45–48.

<sup>5</sup> Commission Decision No.1: The Commission's Mandate/Temporal Scope of Jurisdiction, issued July 24, 2001.

<sup>6</sup> Ethiopia's Statements of Claim, Claim 5, filed by Ethiopia on December 12, 2001, p. 308.

19. As its previous Partial Awards make clear, the Commission does not have jurisdiction over claims that were not filed by December 12, 2001. This follows from Article 5, paragraph 8, of the December 2000 Agreement, which requires that all claims be filed by December 12, 2001 and operates to extinguish any claims not so filed.<sup>7</sup> Moreover, the addition of claims at such a late stage of the proceedings would be inconsistent with orderly and fair procedures.

20. Eritrea also objected to several Ethiopian claims on the grounds that they were not filed within the December 12, 2001 filing deadline established by Article 5, paragraph 8, of the December 2000 Agreement. Eritrea's Counter-Memorial identified 18 such claims that it alleged were not raised in Ethiopia's Statements of Claim and that therefore should be dismissed as untimely. Eritrea described these as involving claims that Eritrea:

1. Interned Ethiopians at the Massawa Naval Base;
2. Did not provide proper conditions of transport to detention or between supposed detention sites;
3. Interrogated Ethiopians;
4. Exposed Ethiopian detainees/internees to public curiosity;
5. Subjected Ethiopians to curfew;
6. Subjected Ethiopians to house arrest;
7. Rounded up Ethiopian street children;
8. Did not allow Ethiopians to congregate in public places;
9. Did not provide separate quarters for women held in detention;
10. Housed Ethiopian detainees with criminals;
11. Housed healthy detainees with those who were infirm;
12. Improperly denied relations with the exterior to Ethiopian detainees/internees;
13. Interfered with detainees'/internees' freedom of religion;
14. Improperly failed to post camp regulations;
15. Allowed children to be beaten in Eritrean schools, both by Eritrean teachers and by Eritrean students;
16. Prohibited employers from paying Ethiopian workers;
17. Conducted "sweeps" of the street of Assab to collect young Ethiopian men; and
18. Forced Ethiopians to donate blood.

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<sup>7</sup> See Partial Award in Eritrea's POW Claims, *supra* note 1, at paras. 23–26; Partial Award in Ethiopia's POW Claims, *supra* note 1, at paras. 19–20; Partial Award in Eritrea's Central Front Claims, *supra* note 2, at paras. 11–17.

21. Having reviewed Ethiopia's Statements of Claim, the Commission agrees that items numbered 2, 4 and 18 above are claims that were not timely raised and are therefore extinguished by Article 5, paragraph 8, of the December 2000 Agreement. The Commission believes that the remaining 15 items either are not themselves separate claims for purposes of the Commission's jurisdiction, or were identified by Ethiopia in its Statements of Claim with sufficient particularity to allow an Eritrean defense. Many of the challenged items appear to the Commission to be illustrations of varieties of misconduct alleged in more general claims in Ethiopia's Statements of Claim, not separate claims as such. In particular, the Statements of Claims' allegations of unlawful treatment and unlawful conditions of confinement contrary to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Geneva Convention IV")<sup>8</sup> are broad enough to include many of the more specific items now questioned by Eritrea.

#### IV. APPLICABLE LAW

22. Under Article 5, paragraph 13, of the December 2000 Agreement, "in considering claims, the Commission shall apply relevant rules of international law." Article 19 of the Commission's Rules of Procedure defines the relevant rules in the familiar language of Article 38, paragraph 1, of the International Court of Justice's Statute. Article 19 directs the Commission to look to:

1. International conventions, whether general or particular, establishing rules expressly recognized by the parties;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognized by civilized nations;
4. Judicial and arbitral decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

23. As in other claims, both Parties' discussions of the applicable law reflected a common view, shared by the Commission, that the 1998–2000 conflict between them was an international armed conflict regulated by international humanitarian law. In many respects, the Parties agreed on the substantive content of the applicable rules. However, there was some disagreement as to whether particular rules applied by operation of conventions or as a matter of customary law. There was also dispute as to whether and when certain humanitarian law protections of civilians ceased to apply.

24. Geneva Conventions Largely Reflect Custom. In its Partial Awards on Prisoners of War and the Central Front, the Commission held that the law applicable to those claims prior to August 14, 2000, when Eritrea acceded to

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<sup>8</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. p. 3516, 75 U.N.T.S. p. 287 [hereinafter Geneva Convention IV].

the four Geneva Conventions of 1949,<sup>9</sup> was customary international humanitarian law.<sup>10</sup> The Commission also held that those Conventions have largely become expressions of customary international humanitarian law and, consequently, that the law applicable to those claims was customary international humanitarian law as exemplified by the relevant parts of those Conventions. Those holdings apply as well to the present claims and, indeed, to all the claims submitted to the Commission. The Commission does not mean by this that international humanitarian law is the sole source of potentially relevant norms in this or any other case. However, these norms were the central element of the Parties' legal relationships during the conflict, and both Parties drew upon them heavily in framing their cases.

25. Protocol I. Both Parties also invoked provisions contained in Additional Protocol I to the Geneva Conventions of 1949 ("Protocol I").<sup>11</sup> While portions of Protocol I reflect progressive development of the law, both Parties treated core provisions governing the protection of civilians as reflecting customary rules binding between them. The Commission agrees. The Commission also recalls its earlier holding that, during the armed conflict between the Parties, most of the provisions of Protocol I were expressions of customary international humanitarian law.<sup>12</sup> Had either Party asserted that a particular provision of that Protocol I should not be considered part of customary international humanitarian law at the relevant time, the Commission would have decided that question, but the need to do so did not arise.

26. Human Rights Law. At the hearing, distinguished counsel for both Parties addressed the interplay between international humanitarian law and human rights law during an international armed conflict. They both essentially urged, correctly in the Commission's view, that, as a practical matter, international humanitarian law is a *lex specialis* providing rules directly applicable in the course of armed conflicts. However, in principle, it does not suspend the continued application of relevant human rights rules. Instead, as the International Court of Justice recently observed:

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<sup>9</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. p. 3114, 75 U.N.T.S. p. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. p. 3217, 75 U.N.T.S. p. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. p. 3316, 75 U.N.T.S. p. 135; Geneva Convention IV, *supra* note 8.

<sup>10</sup> See Partial Award in Eritrea's POW Claims, *supra* note 1, at para. 38; Partial Award in Ethiopia's POW Claims, *supra* note 1, at para. 29; Partial Award in Eritrea's Central Front Claims, *supra* note 2, at para. 21; Partial Award in Ethiopia's Central Front Claims, *supra* note 2, at para. 15.

<sup>11</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. p. 3.

<sup>12</sup> See Partial Award in Eritrea's Central Front Claims, *supra* note 2, at para. 23; Partial Award in Ethiopia's Central Front Claims, *supra* note 2, at para. 17.

[T]he protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.<sup>13</sup>

27. Reflecting the central role of international humanitarian law in the armed conflict between them, both Parties primarily invoked that law, notably the relevant provisions of Geneva Convention IV and Protocol I. There was little detailed discussion of potentially relevant human rights norms. The Parties' written pleadings identified two human rights treaties by which both were bound at some time during the conflict. These are the African Charter of Human and People's Rights,<sup>14</sup> which became binding as a treaty between Eritrea and Ethiopia on April 14, 1999, and the Convention on the Rights of the Child,<sup>15</sup> which became binding between them in 1994. However, neither Party placed particular reliance on these instruments in this case.

28. The Commission reiterates its holding that the law primarily applicable to the present claims is customary international humanitarian law. Nonetheless, the Commission recognizes that customary law concerning the protection of human rights remains in force during armed conflicts, enjoying particular relevance in any situations involving persons who may not be protected fully by international humanitarian law, as with a Party's acts affecting its own nationals.

29. In this connection, the Commission notes that Article 75 of Protocol I sets forth "fundamental guarantees" applicable to any "persons who are in the power of a Party to the conflict who do not benefit from more favorable treatment under the Conventions or under this Protocol." That provision applies even to a Party's own nationals, and the guarantees provided by the Article constitute a summary of basic human rights most important in wartime.<sup>16</sup> Article 75 goes far toward filling possible gaps in international humanitarian law by making many important human rights a part of that law. Given the fundamental humanitarian nature of the rules contained in Article 75, the Commission views them as part of customary international humanitarian law.

30. The Duration of Humanitarian Law Protections. Eritrea argued that the period during which international humanitarian law protections applied should be determined based on the principles of Article 6, paragraph 2, of

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<sup>13</sup> *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory* (Advisory Opinion), I.C.J. Rep. 2004, at advisory opinion p. 41 (para. 106).

<sup>14</sup> African Charter of Human and People's Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5; 21 I.L.M. p. 58 (1982).

<sup>15</sup> Convention on the Rights of the Child, Nov. 20, 1989, Dec. A/RES/44/25, 28 I.L.M. p. 1448 (1994).

<sup>16</sup> See Michael Bothe, Karl Joseph Partsch & Waldemar Solf, *New Rules for Victims of Armed Conflicts* (1982); *The Handbook of Humanitarian Law in Armed Conflicts* p. 233 (Dieter Fleck ed., 1995) [hereinafter *Handbook of Humanitarian Law*]; International Committee of the Red Cross, *Commentary on the Additional Protocols of 1977* para. 3082 (1987).



Geneva Convention IV. That Article provides that, except for occupied territory or civilians in detention, the Convention's protections cease to apply as of the "general close of military operations." Eritrea urged that this occurred with the June 2000 Cease-Fire Agreement between the Parties. Ethiopia responded that these protections should be seen to operate until February-March 2001, but in any case extended through conclusion of the December 2000 Agreement.

31. The Commission believes that the comprehensive settlement embodied in the December 12, 2000 Agreement marks the legal turning point between the regime of Geneva Convention IV and peacetime rules, but with international humanitarian law protections continuing to operate thereafter to protect both persons in detention until their release and others in the process of repatriation or re-establishment.<sup>17</sup> This is in keeping with the Commission's Partial Award on Eritrea's POW Claims, where it found that the December 2000 Agreement marked the cessation of active hostilities for purposes of the obligation to release prisoners of war under Article 118 of Geneva Convention III.<sup>18</sup>

## V. EVIDENCE

32. As in the Parties' prior cases, there are sharp conflicts in the evidence, particularly between the hundreds of sworn declarations submitted by the two Parties. (Ethiopia also submitted sworn claims forms; the persons providing either declarations or claims forms are referred to herein as "declarants.") Eritrea devoted much effort in its written materials and at the hearing to attacking the accuracy and veracity of Ethiopia's evidence; Ethiopia tallied such attacks on 66 of its total of 402 declarations and claims forms. Eritrea presented documents from official records said to show material omissions, inconsistencies or inaccuracies in the declarants' evidence. Ethiopia responded that Eritrea's challenges often mischaracterized declarants' testimony or the Eritrean records, involved persons other than Ethiopia's declarants, or were otherwise unpersuasive.

33. The Commission believes that the materials submitted by Eritrea did expose material omissions and other inaccuracies in some declarations and claims forms. As to others, the Commission was not convinced that the materials impeached the substance of the evidence offered. However, the challenges to both Parties' evidence during the proceedings illustrate the difficulty

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<sup>17</sup> Article 6(2) of Geneva Convention IV provides that the Convention's application in the territory of a Party to the conflict "shall cease on the general close of military operations." However, under Article 6(4), "[p]rotected persons whose release, repatriation or re-establishment may take place after [this date] . . . shall meanwhile continue to benefit by the present Convention." See also Article 3(b) of Protocol I, under which the protection of the Conventions and the Protocol is extended for all persons whose "final release, repatriation or re-establishment takes place thereafter."

<sup>18</sup> Partial Award in Eritrea's POW Claims, *supra* note 1, at para. 146.

of determining the truth in the aftermath of a bitter armed conflict. As the Commission has noted previously, in such circumstances, modern warfare does indeed tend to produce a “nationalization of the truth.”<sup>19</sup>

34. Both Parties were well aware of the frequent glaring conflicts in the evidence and of the disputes about its accuracy and credibility. To supplement the record, Eritrea — and to a lesser extent, Ethiopia as well — referred to the reports of outside observers such as the ICRC, United Nations bodies, the British Home Office, the United States Department of State and international human rights non-governmental organizations (“NGOs”) like Amnesty International and Human Rights Watch. Both Parties noted the potential pitfalls and limitations of unquestioning reliance on such materials, which were not prepared for the purpose of serving as evidence in legal proceedings. Particularly given the extensive conflicts in the Parties’ evidence, as well as their own use of materials from various outside observers, the Commission has also drawn upon such materials in the record as one source of evidence, albeit one requiring careful awareness of the materials’ limitations.

35. As in the Parties’ prior cases, the Commission has required proof of liability by clear and convincing evidence. Thus, conflicting, yet credible, evidence is likely to result in fewer findings of unlawful acts than either Party might expect. The Commission has again taken its fundamental responsibility to be to concentrate on persistent and widespread patterns of misconduct, rather than individual acts.

36. At the hearing, the Commission heard the following witnesses:

For Ethiopia:

Mr. Hagos Kahsay Atsbeha  
Ms. [Name Withheld]  
Mr. Muluaem Abadi Habtu  
Ms. Netsannet Asfaw  
Mr. Wondimu Degefa

For Eritrea:

Lieutenant Colonel Seyoum Kidane  
Captain Solomon Abreha Gebregergis  
Mr. Tesfamariam Tekeste  
Dr. Richard Reid

## VI. ETHIOPIA'S CLAIMS

37. Ethiopia’s Memorial presented a complex matrix of claims, alleging up to 13 separate types of violations of international law in each of the principal administrative areas in Eritrea. In its Partial Award on Ethiopia’s POW Claims, the Commission noted the difficulties posed by such a complex struc-

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<sup>19</sup> Julius Stone, *Legal Controls of International Conflict* pp. 321–323 (1954).

ture, which generates a very large number of issues while sometimes blurring distinctions between matters of greater and lesser importance.<sup>20</sup>

38. At the hearing, Ethiopia responded to these concerns by reorganizing its claims into a less complex structure. Ethiopia alleged violations of international law with respect to the following seven broad categories of claim:

- (A) Physical and Mental Abuse Out of Detention;
- (B) Other Unlawful Treatment Out of Detention;
- (C) Confiscation and Discriminatory Levies;
- (D) Unlawful Arrest, Detention and Internment;
- (E) Physical and Mental Abuse in Detention;
- (F) Unlawful Conditions of Detention; and
- (G) Expulsion Under Inhumane Conditions.

This Partial Award is organized along the lines of this simplified structure so as to concentrate on claims Ethiopia regarded as most significant. Some of the discussion is divided into two sections, reflecting the significant changes in Ethiopian nationals' circumstances following military developments in May and June 2000. With respect to items (A) and (E) above, the Commission found the distinction between treatment of persons in and out of detention sometimes to be artificial and difficult to apply, but it has nevertheless followed the structure proposed by the Claimant. Given the number and scope of the claims that were developed and the limited time and resources available, this Partial Award addresses the issues emphasized by the Claimant in the above list.

39. Different Conditions Before and After May 2000. As to Ethiopia's claims for unlawful arrest, detention and internment; for abuse in detention; for unlawful detention conditions; and for expulsion under improper conditions, the Commission finds that relevant circumstances differed, sometimes substantially, before and after May 2000. Accordingly, this Partial Award will deal separately with these claims for the periods before and after May 2000. Limitations in the evidence for these claims often complicated analysis, because many declarants did not indicate when the events took place.

### **A. Physical and Mental Abuse Out of Detention**

40. Ethiopia alleged frequent beatings and verbal harassment of Ethiopian nationals in the streets and other public locations by Eritrean police and

<sup>20</sup> Partial Award in Ethiopia's POW Claims, *supra* note 1, para. 50.

sometimes by civilians.<sup>21</sup> Eritrea acknowledged that there were occasional incidents of street violence aimed at Ethiopians, particularly following Ethiopian military successes. However, Eritrea maintained that these events were infrequent; that they resulted from inflamed public passions and not government actions; and that the police took proper measures to protect Ethiopians.

41. A significant proportion of Ethiopia's witness declarations contain allegations that the declarant either saw or experienced violence directed against Ethiopians in public places in Eritrea and, in a few cases, murders. In this connection, the evidence shows that Eritrean military and civilian police frequently checked identity documents on the street and at road checkpoints, and that the frequency and brutality of such stops intensified as the war progressed. Ethiopia's declarants stated that identity checks were frequently accompanied by violence against those identified as Ethiopians; a witness who testified before the Commission described how he and his companions were insulted and made to roll on the ground when police saw their Ethiopian identity cards. The evidence indicated upsurges of violence against Ethiopians following Ethiopian military successes like Operation Sunset in February 1999 and the bombing of Asmara airport in May 2000. Counsel for Eritrea acknowledged one such incident in which at least one Ethiopian was killed by a mob in Massawa in March 1999.

42. The principles of Geneva Convention IV provided important protections to Ethiopians who remained in Eritrea during the war. In particular, Article 27 requires that protected persons "shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity." Article 33 prohibits protected persons from being punished for offenses they did not commit, as well as collective punishments and measures of intimidation.

43. The evidence does not prove that violence and abuse were directed against Ethiopians as a matter of government policy. However, it shows that violence and abuse frequently occurred at the hands of police or military personnel and sometimes at the hands of civilians. The Commission concludes that Eritrea failed to meet its legal obligation to ensure that Ethiopians in Eritrea who were not in detention were protected against acts or threats of violence on the streets and in other places.

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<sup>21</sup> Ethiopia's evidence in this regard included a few declarations describing bodies of murdered Ethiopians left in the streets, beheadings and other extreme violence allegedly directed against Ethiopians. These extreme allegations were few in number and were not corroborated by Ethiopia's other declarants or by outside observers. The Commission did not accord them significant weight.

## B. Other Unlawful Treatment Out of Detention

44. Ethiopia next alleged that Ethiopians who were not detained nevertheless suffered multiple forms of unlawful treatment, including discriminatory enforcement of identity card requirements and unlawful denial of employment, housing and medical care.

45. Identity Card Enforcement. Ethiopia contended that the essential concept and implementation of Eritrea's identity card system for Ethiopian nationals violated international law. Eritrea first required Ethiopians to register and obtain identification cards in the spring of 1999. Ethiopia acknowledged that a State may require aliens to register and to obtain and carry identification documents. However, it argued that Eritrea's system, particularly the requirement to carry distinctive identity cards, was actually a form of prohibited collective punishment or of reprisal, with the cards used to mark Ethiopians for beatings and persecution.

46. While identity card checks were frequent in Eritrea, the evidence does not demonstrate that they or other aspects of administering the identity card system were specifically directed against Ethiopians in ways that violated international law. Other foreigners were also required to register; Eritreans and foreigners alike were required to carry identity cards. A senior Eritrean immigration official testified at the hearing that about 3,000 to 4,000 Ethiopians were detained at some time for immigration law violations after registration was required in May 1999. This testimony was not challenged by Ethiopia. Given a total Ethiopian population of perhaps 85,000 to 100,000 as of 1999, this does not indicate an excessive or abusive level of enforcement. This claim is dismissed for failure of proof.

47. Employment, Housing and Business Licenses. Ethiopia contended that many Ethiopians lost their means of livelihood and housing because of Eritrean Government policies or actions contrary to international law. Many Ethiopians employed in public sector jobs, including workers at a State-owned brewery and other enterprises, claimed that they were discharged solely because of their Ethiopian nationality. Others alleged that private sector employers dismissed them acting under government directions or policies. Some Ethiopians alleged that they were evicted from publicly-owned housing, particularly during and after August 2000. Others alleged that their business licenses were summarily revoked and their businesses closed.

48. Ethiopia contended, *inter alia*, that Eritrea violated Article 39 of Geneva Convention IV, which provides that protected persons who lose their gainful employment as a result of the war "shall be granted the opportunity to find paid employment" on the same basis as nationals, "subject to security considerations."

49. Eritrea denied any government policy requiring or encouraging discharge of Ethiopians, and the record does not contain any official documents or directives to this effect; Ethiopia responded that the absence of such

directives reflected the allegedly closed nature of the Eritrean administration. Eritrea contended that discriminatory discharges of Ethiopian workers would have conflicted with Eritrea's June 1998 National Assembly declaration regarding treatment of the Ethiopian population. As to housing, Eritrea contended that publicly-owned housing was in short supply, that priority was given to government employees, and that it was not wrongful to give notice to Ethiopian tenants. With respect to business licenses, Eritrea contended that it was under no obligation to authorize aliens to conduct business.<sup>22</sup>

50. The evidence indicated that many Ethiopians continued to hold regular jobs, operate small businesses or work as day laborers through at least May 2000. The allegations against Eritrea during the war also must be weighed against the prevailing economic circumstances. The evidence indicates that there was a substantial economic downturn, reflecting the wartime loss of markets in Ethiopia. Eritrean ports that earlier employed thousands of Ethiopians handling cargo to and from Ethiopia, particularly Assab, suffered dramatic losses of business. Eritrea's economy also faced the challenge of thousands of job seekers arriving in Eritrea from Ethiopia, under circumstances addressed in Eritrea's Civilians Claims 15, 16, 23 and 17–32. Further, the evidence does not show widespread deprivation or denial of housing or revocation of business licenses during this period. Accordingly, Ethiopia's claims for denial of employment and housing and revocation of business licenses prior to the summer of 2000 are rejected for lack of proof.

51. The Commission finds that Ethiopians in Eritrea experienced substantially different conditions after mid-2000. The evidence indicates that following the June 2000 Cease-Fire Agreement, a large number of Ethiopians was discharged from employment, both public and private. It shows that in August 2000 the authorities gave Ethiopians living in publicly-owned housing a month's notice to vacate. Finally, it establishes that, particularly in August 2000, the licenses of many Ethiopian-owned businesses were revoked and the businesses closed. The evidence does not establish how many were affected by these developments, but their impact appears to have been significant. Many Ethiopians were placed in precarious economic and social situations, perhaps leading many to join the large outflow of Ethiopians leaving Eritrea that began in the summer of 2000.

52. Active hostilities had ended when these events occurred, but the Parties had not yet concluded the comprehensive December 2000 Agreement that the Commission has found marks the transition between the regime of Geneva Convention IV and peacetime rules.<sup>23</sup> Accordingly, Ethiopians in Eri-

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<sup>22</sup> The Parties did not directly address the potential relevance of pre-war agreements and arrangements between them addressing the ability of nationals of one party to conduct business in the territory of the other. The Parties appear to have regarded the operation of these instruments to have been suspended if not terminated by the conflict, but the Commission need not decide their status in the context of the present claim.

<sup>23</sup> See para. 31 *infra*.

trea remained entitled to the protections of Geneva Convention IV, including Article 39, which guarantees protected persons the right to find employment on the same basis as nationals. Given the totality of the circumstances following the June 2000 cease-fire, including the widespread discharge of Ethiopians by public and private employers, their ejection from public housing and the widespread if not total termination of Ethiopians' business licenses, the Commission finds that Eritrea did not meet its obligation under Article 39 of Geneva Convention IV. Eritrea failed to assure Ethiopians the right to find employment on the same basis as nationals during this period.

53. Denial of Education. Ethiopia contended that Ethiopian students at all levels were harassed and forced to withdraw from schools in Eritrea as a result of government policy. Ethiopia contended that this violated Eritrea's obligations under, *inter alia*, Article 27 of Geneva Convention IV, which assures protected persons the right to humane treatment and to protection against threats and violence.

54. Eritrea submitted extensive rebuttal evidence, including what were described as at least 56 declarations from teachers and school administrators, all contending that Ethiopian students attended their schools freely and without official harassment. These educators uniformly stated that Ethiopian students leaving school did so without compulsion by the school and received transcripts and other requested documents. A witness for Eritrea, a history instructor at Asmara University, testified at the hearing that Ethiopian students in his classes continued their studies, with some voluntarily withdrawing to return to Ethiopia.

55. Although there were instances of harassment of individual Ethiopian students by Eritrean teachers and students alike, the Commission finds that the claim that Ethiopian students were wrongfully denied the opportunity to attend school or were mistreated there fails for lack of proof.

56. Medical Care. The Commission finds more compelling the evidence concerning Ethiopia's claim that Eritrea failed to allow Ethiopians access to medical care. Article 38, paragraph 2, of Geneva Convention IV requires that "protected persons" be given "medical attention and hospital treatment to the same extent as the nationals of the State concerned." Ethiopia asserts that Eritrean government hospitals unlawfully refused to treat Ethiopians during the conflict, and submitted at least ten declarations in which declarants reported that they or their families or friends were turned away from government hospitals after officials learned that they were Ethiopians.

57. Many more declarants reported that they sought treatment directly from private facilities or did not seek required treatment at all because it was generally believed that Ethiopians would not be treated by Eritrean government hospitals. Indeed, the Commission heard testimony at the hearing from a witness who described taking a child to an Eritrean government hospital for treatment, but hospital officials refused to treat the child—who later died—and told her that no medical treatment was available for Ethiopians. The witness

stated that she did not subsequently take another person requiring medical care to the government hospital because she knew he would be turned away. Ethiopia's *chargé d'affaires* in Asmara during the conflict testified to receiving reports that Ethiopians were refused medical treatment at public hospitals.

58. Eritrea responded with declarations from public officials and hospital medical directors contending that Ethiopians received medical treatment throughout the conflict on par with Eritreans. Some attached a limited number of medical records reflecting treatment provided to some Ethiopian patients. However, these are not all translated and many are difficult to read. The Commission cannot ascertain the precise number of patients involved, but the records seem to involve about 25 individuals. The record contains about the same number of medical records regarding treatment before and after the conflict.

59. Most of the Ethiopian declarants contending that they were refused medical care at public hospitals allegedly had sought that care in Asmara, where about 60% of the Ethiopian population lived. However, there was a dearth of medical records from Asmara hospitals. Eritrea submitted declarations from the administrator of the Halibet Hospital in Asmara and from the medical director of the Maekel Zoba (where Asmara is located), but provided the medical records of only five Ethiopians who received treatment in Asmara during the conflict.<sup>24</sup>

60. Eritrea contended that many undocumented Ethiopians avoided public hospitals because they feared that visiting them would reveal their illegal status. This might partially explain a scarcity of medical records after residence permits were required in the spring of 1999, but it does not explain the dearth of such records from the previous year.

61. Thus, Eritrea's rebuttal evidence indicated that some Ethiopians received some medical treatment from some public hospitals, but it is insufficient to rebut Ethiopia's evidence indicating that Ethiopians often were denied medical care because of their nationality, particularly in Asmara.<sup>25</sup>

62. The Commission therefore determines that Eritrea has failed to rebut Ethiopia's evidence that Eritrean government hospitals by and large refused to provide Ethiopians with medical treatment on grounds of their nationality during the conflict, in violation of Eritrea's obligations under Article 38 of Geneva Convention IV.

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<sup>24</sup> Additional records were attached but they reflected treatment post-dating the conflict.

<sup>25</sup> The Commission acknowledges, as pointed out by some Eritrean declarants, that Eritrean medical records do not necessarily list nationality, making it somewhat difficult to locate records pertaining to Ethiopians. The Commission notes, however, that the National AIDS Control Program forms in the record do list nationality, and that hospital admissions forms do list the country of birth. Eritrea apparently considered the country-of-birth designation as a proxy for nationality in many cases; many of the medical records it submitted noted the patients' birth in Ethiopia.



### C. Confiscation and Discriminatory Levies

63. Ethiopia advanced three main types of claims under this heading: that Eritreans were charged excessive and discriminatory fees for identity cards; that they were forced to pay excessive or unjustified fees, taxes or other charges to obtain exit permits; and that their properties were wrongly taken or property values wrongly impaired, particularly in connection with expulsions or other departures from Eritrea. This last group of claims, involving property losses connected to departures from Eritrea, will be considered *infra*.<sup>26</sup>

64. Fees for identity cards. Ethiopia alleged that Eritrea charged exorbitant fees to obtain and renew alien identity cards; these were said to be so high as to constitute a form of collective punishment prohibited by international humanitarian law. The evidence indicated that the fees to register and obtain an alien identification card were indeed heavy for many Ethiopians. Registration and a card valid for one year initially cost 200 nakfa, an amount later increased. Persons detained for failing to register and obtain a card had to pay both the current charges and fines covering past periods of unregistered residence. As a result, some Ethiopians who failed to register when the obligation was first imposed in 1999 later had to pay substantial amounts to obtain current cards and their release from detention.

65. Eritrea's rebuttal evidence indicated that its registration and identity card requirements were applied to all aliens, not just Ethiopians, and there was testimony that the fees charged Ethiopians were less than those charged other nationalities.

66. It is not contrary to international law for a State to require aliens, particularly nationals of the enemy State, to register and obtain and carry identification cards. Most Ethiopians were able to comply with the financial registration requirements. The Commission finds that the fees charged, although burdensome for many, were not so high as to be an impermissible collective punishment or reprisal. Accordingly, Ethiopia's claims that Eritrea's alien registration and identity card requirements were an unlawful collective punishment are rejected.

67. Excessive or unjustified charges to obtain exit permits. Ethiopia's claims regarding the circumstances under which many thousands of Ethiopians left Eritrea in the second half of 2000 are discussed *infra*.<sup>27</sup> Persons who were not repatriated directly from places of detention and who sought to depart had to complete a bureaucratic process to obtain an exit visa. Applicants had to visit and obtain clearances from multiple government offices and agencies, including the tax office. A senior Eritrean immigration official told the Commission that Eritrea issued about 60,000 such exit visas, most during 2000 and 2001. Eritrean witnesses' estimates of the time required to complete the bureaucratic process varied from three to six days, but they acknowledged

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<sup>26</sup> See paras. 132–135 *infra*.

<sup>27</sup> See para. 120 *infra*.

longer delays when the process became clogged with applicants after the war ended. Applicants understandably found this process burdensome and aggravating, but the Commission finds that requiring it was not in itself unreasonable or contrary to international law.

68. Nor was there sufficient evidence to show a pattern of arbitrary or unreasonable refusal of the necessary clearances. Several declarants complained that they were charged excessive amounts for tax clearances, but the evidence does not demonstrate a recurring pattern of abusive or unlawful conduct in this regard. Taken as a whole, the evidence does not demonstrate a consistent pattern of internationally wrongful conduct in Eritrea's process for obtaining exit visas.

#### **D. Unlawful Arrest, Detentions and Internment Prior to May 2000**

69. Arrests and Detentions for Identity Card Violations. Ethiopia alleged that there were numerous illegal arrests and detentions for immigration violations after the identity card requirement was imposed in the spring of 1999, usually for failure to obtain or to carry an identity card. It is undisputed that in Asmara, Ethiopians accused of such immigration violations were generally taken to an immigration detention camp at Adi Abeyto. Detentions there generally appear to have been brief. Detainees could elect to be repatriated to Ethiopia (a process that often involved participation by the ICRC). Alternatively, they could pay any charges and fines required to register and obtain an alien identity card, and remain in Eritrea.

70. Ethiopia contended that these arrests and detentions violated international law either as prohibited collective punishments or as reprisals against protected persons, both prohibited by Article 33 of Geneva Convention IV.

71. As noted above,<sup>28</sup> Eritrea presented testimony that there were about 3,000 to 4,000 arrests for immigration law violations after the Ethiopian identity card program was implemented in May 1999, and that figure was not challenged by Ethiopia. Given the estimated population of 85,000 to 100,000 Ethiopians in Eritrea after 1998, these arrest figures do not support the claim that detentions for immigration law violations constituted prohibited collective punishments or reprisals against protected persons. This claim must be dismissed for failure of proof.

72. Other forms of detention prior to May 2000. Ethiopia contended that prior to May 2000 Ethiopians were frequently incarcerated in Eritrean police stations or prisons without proper legal basis. (It also alleged that they were subjected to harsh and abusive conditions. Claims of physical and mental abuse are addressed in the next section.) Eritrea denied this, maintaining that few Ethiopians were detained during this period except for immigration violations. Eritrea also contended that all places where Ethiopian civilians were

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<sup>28</sup> See para. 46 *supra*.

detained were open to and inspected by the ICRC, although Ethiopia challenged this contention.

73. There were substantial conflicts in the evidence regarding the frequency of, and grounds for, detention of Ethiopians in Eritrea prior to May 2000. On the one hand, Eritrea contended that few were detained, and those were for ordinary crimes. It cited the ICRC's public reports of its 1998 and 1999 prison visits, which identify visits to just six detained Ethiopians in the last quarter of 1998, 11 in the next quarter and similarly low numbers until May 2000, when the number jumped to 4,300. Eritrea also cited a Human Rights Watch report indicating that Ethiopia's wartime *chargé d'affaires* in Asmara could not substantiate charges that 500 Ethiopians had been detained to a visiting United Nations delegation or to Human Rights Watch.

74. On the other hand, approximately 15% of Ethiopia's 402 declarants claimed they were detained in Eritrea prior to May 2000. A number alleged that they were detained for long periods on suspicions related to security and that they were not formally charged with or tried for criminal offenses. These accounts indicated that former Ethiopian "Fighters" and members of the Tigrayan People's Liberation Front and Tigrayan Development Authority were often detained for long periods. At the hearing, a witness for Ethiopia testified to being arrested on suspicion of having donated funds to Ethiopia (which he denied) and then being shuttled between police stations for nearly two years, allegedly to prevent his discovery by the ICRC. The witness testified that he was physically abused and was not charged or brought before a judge.

75. Weighing the totality of the evidence, the Commission finds that an unknown but appreciable number of Ethiopians was detained in Eritrean prisons and jails prior to May 2000 without formal charges or trials, often on the basis of suspicions related to security. Prisoners were sometimes concealed from the ICRC, contrary to Article 143 of Geneva Convention IV. Their detention lacked clear legal basis and they were not accorded the minimum procedural rights due to all persons held in the power of a Party under Article 75 of Protocol I.

76. Illegal Internment Prior to May 2000. Ethiopia alleged that Ethiopian civilians were interned without proper legal basis prior to May 2000. Eritrea denied these claims.

77. The evidence and arguments in this regard centered on conditions at Hawshaite, a camp located in a desolate area in western Eritrea. Ethiopia contended that Hawshaite (also spelled Haweshait and Aweshait) was a prison camp where Ethiopians of varying ages were forcibly and unlawfully detained during the first half of 1999 after Ethiopia's successful Operation Sunset. Eritrea denied this, contending that Hawshaite was a camp for internally displaced persons and that Ethiopians were there because they had been displaced by military operations, not as detainees.

78. The evidence relating to Hawshaite was not extensive, but was sufficient to establish a *prima facie* case, unrebutted by Eritrea, that a signifi-

cant number of Ethiopians (most from the Gash Barka District) was forcibly detained there for periods of up to six months after about February 1999. The evidence shows that conditions were harsh. Prisoners were exposed to the heat and elements with little shelter, a meager diet, little or no medical care and poor sanitary conditions. There were multiple accounts of beatings and some reports of intentional killings of prisoners by guards.

79. Based on this evidence, the Commission concludes that Ethiopian civilians were detained at Hawshaite camp during and after February 1999 without legal justification and were subjected to physical and psychological abuse and substandard living, sanitary and health conditions contrary to Articles 27 and 37 of Geneva Convention IV.

### **E. & F. Physical and Mental Abuse and Unlawful Conditions of Detention**

80. Previous sections addressed Ethiopia's claims that Ethiopians were held in custody without proper legal basis prior to May 2000. Ethiopia also contended that these Ethiopians regularly faced unlawful mental or psychological abuse and that their physical conditions, including living conditions, food and medical care, were harsh and inadequate. Eritrea denied these allegations.

81. In assessing these claims of poor conditions and abusive treatment in confinement, the Commission has been guided by Articles 27 and 37 of Geneva Convention IV, which require that all protected persons, including those in confinement, must be treated humanely and protected against all acts and threats of violence. The findings below relating to treatment in police stations, jails and prisons apply throughout the period covered by Ethiopia's claims, both before and after May 2000.

82. Conditions in Police Stations, Jails and Prisons. The declarations of Ethiopians held in such facilities consistently and convincingly described harsh and crowded conditions with little food, inadequate sanitary facilities and little or no medical care. They also described frequent beatings and punishments intended to inflict pain such as the "helicopter tie." The Commission finds that detention of Ethiopians in Eritrean police stations, jails and prisons throughout the period covered by these claims was characterized by frequent physical and psychological abuse and by harsh and substandard living, sanitary and health conditions. Eritrea failed to provide humane treatment to persons in captivity as required by Articles 27 and 37 of Geneva Convention IV.

83. Rape. Ethiopia alleged frequent rape of Ethiopian civilian women by soldiers throughout the conflict, both inside and outside of Eritrean detention facilities. As most of the evidence concerned alleged rape in detention, the Commission will address the entire issue here.

84. Under Common Article 3, paragraph 4, of the 1949 Geneva Conventions, States must ensure that women civilians are granted fundamental

guarantees, including the prohibition against “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . outrages on personal dignity, in particular humiliating and degrading treatment.” Article 27 of Geneva Convention IV provides, in part, that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault.” Article 76.1 of Protocol I adds: “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”

85. As discussed in the Partial Awards in the POW and Central Front Claims,<sup>29</sup> the Tribunal recognizes that rape is such a sensitive matter in Ethiopian and Eritrean culture that victims are extremely unlikely to come forward, and that evidence is likely to be far less detailed and explicit than for non-sexual offenses. The Commission, accordingly, does not require evidence of a pattern of frequent or pervasive rape as the basis for State responsibility. Nor, however, does the Commission assess government liability for isolated individual rapes or on the basis of entirely hearsay accounts.

86. Ethiopia presented very little evidence of rape either in or out of detention, although some of that limited evidence was nonetheless credible and disturbing. In particular, the Commission received a compelling and credible first-hand account of an Ethiopian woman who described being raped by a senior official at the Adi Abeyto immigration facility. That rape occurred after a female official at the camp ceased efforts to help the victim after learning she was Ethiopian. However, because of the circumstances through which this evidence came into the record, Eritrea was not in a position to attempt to provide rebuttal evidence.

87. Of Ethiopia’s total of 402 declarations and claim forms, only some 12 include accounts of rapes, and only four of these were victims or eyewitnesses. Particularly troubling were the accounts of an eyewitness to the rape of four Ethiopian detainees by soldiers at the naval base near Massawa and that of an 87-year-old victim of an attempted rape by a drunken soldier. There were also written and videoed interviews with identified and unidentified alleged rape victims, including from two household maids who described being raped by household members who were Eritrean “national service soldiers.”

88. In its defense, Eritrea focused on the role of the ICRC in inspecting detention facilities and thereby serving to curb abuse. Eritrea also made particular reference to a report by UNICEF<sup>30</sup> and a joint UNICEF/Women’s

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<sup>29</sup> See Partial Award in Eritrea’s POW Claims, *supra* note 1, at paras. 139–142; Partial Award in Eritrea’s Central Front Claims, *supra* note 2, at paras. 36–43; Partial Award in Ethiopia’s Central Front Claims, *supra* note 2, at paras. 34–40.

<sup>30</sup> UNICEF Report, The Situation of Women and Children in Conflict Affected Areas in Tigray, Ethiopia, Nov. 2000, in Ethiopia’s Claim 5, Memorial, filed by Ethiopia on Nov. 15, 2002 [hereinafter ET05 MEM], Documentary Annex 409 [hereinafter UNICEF Report].

Association of Tigray study (“UNICEF/WAT Study”) introduced by Ethiopia.<sup>31</sup> Those documents make brief mention of rape of Ethiopian women, and specifically household helpers, in wartime Eritrea. However, Eritrea focused on detailed statistics in the UNICEF report concerning rape of returning Ethiopian women and girls living in internally displaced persons (“IDP”) camps in Ethiopia; 34% of the respondents reported being raped and 10% reported having daughters who were raped, but by Ethiopian soldiers, not while in Eritrea.<sup>32</sup>

89. The Commission is struck by the UNICEF report, because it suggests that Ethiopian returnees who were willing to report (anonymously) having been raped only described attacks in IDP camps in Ethiopia, not while they were still in Eritrea. This, combined with the very small number of accounts of rape by victims and eyewitnesses, leads the Commission to conclude that Ethiopia has not presented sufficient evidence on which to base a finding of liability involving rape against the Government of Eritrea.

90. As in the Partial Awards in the POW and Central Front Claims, it bears emphasis that this Commission is not a criminal tribunal or otherwise charged with assessing (or given resources to assess) liability in individual instances of violation of international humanitarian law, however egregious. As a consequence, the Commission’s determination with regard to Ethiopia’s rape claims (or with regard to other allegations of egregious individual misconduct, such as intentional killing), 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.

## G. Expulsion Under Inhumane Conditions

91. Ethiopia contended that Eritrea was internationally responsible for the damages suffered by every Ethiopian who left Eritrea during the period covered by its claims, including those not expelled by direct government action. Many departures were claimed to be “indirect” or “constructive” expulsions resulting from unlawful Eritrean Government actions and policies causing hostile social and economic conditions aimed at Ethiopians. Ethiopia also contended that the physical conditions of departures often were unnecessarily harsh and dangerous. Eritrea denied that it was legally responsible for Ethiopians’ departures, contending that they reflected individual choices freely made by the persons concerned.

92. The great majority of Ethiopians who left Eritrea did so after May 2000; claims regarding the conditions of their departures are analyzed below.

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<sup>31</sup> Report on the Joint UNICEF/Women’s Association of Tigray (“WAT”) Study of Ethiopian Deportees/Returnees from Eritrea Living in Tigray (Dec. 2001) *in* ET05 MEM, Documentary Annex 405 [hereinafter Report on the Joint UNICEF /WAT Study].

<sup>32</sup> UNICEF Report, *supra* note 30, at para. 4.3.4.

As to those who departed earlier, the evidence indicates that an initial wave of 20,000 to 25,000 departures in 1998 largely resulted from economic factors. Many were port workers, most from Assab, unemployed after Eritrean ports stopped handling cargo to and from Ethiopia. A 1999 Amnesty International report in the record estimated that the closing of Assab port cost 30,000 jobs; Amnesty reported that none of the returnees it interviewed in Ethiopia during this period said that he or she had been expelled. A few thousand more Ethiopians left Eritrea during 1999; the evidence indicates that these too were mostly economically motivated. A second Amnesty report cited more than 3,000 Ethiopians who returned to Ethiopia in early 1999 due to unemployment, homelessness or reasons related to the war. Amnesty felt these did not appear to have been expelled by the Eritrean Government or due to government policy. The December 2001 UNICEF/WAT Study in Ethiopia's evidence also highlights the economic motivation of departures during this period.<sup>33</sup>

93. The Commission appreciates that there was a spectrum of "voluntariness" in Ethiopian departures from Eritrea in 1999 and early 2000. Ethiopian declarants described growing economic difficulties, family separations, harassment and sporadic discrimination and even attacks at the hands of Eritrean civilians. However, the Commission is also struck that only about 70 declarations and claim forms specifically described leaving in 1998 and 1999, and of these, fewer than 20 declarants seemed to consider themselves "expelled or deported."

94. The Commission concludes from the evidence that departures of Ethiopians before May 2000 in very large measure resulted from economic or other causes, many reflecting economic and social dislocation due to the war, for which the Government of Eritrea was not legally responsible.

95. The evidence suggests that the trip back to Ethiopia or to other destinations for those who elected to depart during this period could be harsh, particularly for those who left Assab to return to Ethiopia across the desert. However, the evidence does not establish that this was the result of actions or omissions by Eritrea for which it is responsible. Accordingly, Ethiopia's claims in this respect are dismissed.

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<sup>33</sup> Report on the Joint UNICEF/WAT Study, *supra* note 31, at §§ 1.2.1, 2.2.1. The study reported that 90% of the 100 persons interviewed described their departures from Eritrea to have been "forced," but this term was used to embrace circumstances such as employment, social isolation and harassment; physically forced departures would have been inconsistent with the ICRC role in arranging returns. Accordingly, the Study used the qualified term "forced or induced repatriation" (emphasis added). *Id.* § 1.2.1.



## VII. CLAIMS AFTER MAY 2000

96. As more fully described in the Commission's Partial Awards on the Central Front Claims,<sup>34</sup> Ethiopia carried out extensive attacks against Eritrea in May 2000. Ethiopian troops penetrated deep into Eritrean territory, displacing as many as 750,000 Eritrean civilians. The evidence indicates that these events were traumatic for the people and Government of Eritrea. There was an increase in previous levels of harassment and violence against Ethiopians and their property by Eritrean civilians. For the first time, large numbers of Ethiopians were forcibly detained, interned and then repatriated.

97. Against this background, the Commission will review Ethiopia's claims for physical and mental abuse out of detention; for unlawful arrest, detention and internment; for unlawful detention conditions and abuse in detention; and for expulsion under improper conditions after May 2000.

98. Physical and Mental Abuse Out of Detention After May 2000. Both sides' evidence showed an upsurge in harassment and attacks against Ethiopians by Eritrean civilians during this period. These were particularly frequent and intense after events such as Ethiopia's May 2000 bombings of Massawa and of Asmara Airport. Eritrea acknowledged that there was increased hostility against the Ethiopian community at this time. It contended that many Ethiopians were taken into custody precisely to protect them from attacks by members of the civilian population.

99. The evidence does not demonstrate that the increased *public animus* against Ethiopians resulted from Eritrean government actions or policies. Accordingly, the question before the Commission is whether Eritrea met its obligation under Article 27 of Geneva Convention IV to ensure the humane treatment of Ethiopian civilians and their protection against insults and "all acts of violence or threats thereof." The Commission recognizes that there were some efforts to protect Ethiopians during a very difficult period. Nevertheless, it concludes that Eritrea failed to take sufficient measures to ensure the safety and protection of Ethiopian nationals during this period, contrary to Article 27 of Geneva Convention IV.

100. Unlawful Arrest, Detention and Internment After May 2000. The evidence shows that several thousand Ethiopians were arrested and forcibly held in internment or detention camps after May 2000, with many more held in local detention facilities. The numbers were disputed. Ethiopia claimed that approximately 7,000 Ethiopians were so detained. The ICRC reported visiting smaller numbers of detainees, but its reports mention only certain camps by name, and it is not clear how many camps the ICRC was able to visit during this period. A U.S. State Department estimate cited about 10,000 to 20,000 Ethiopians in camps in Eritrea, including internally displaced persons,

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<sup>34</sup> See Partial Award in Eritrea's Central Front Claims, *supra* note 2, at paras. 32–34; Partial Award in Ethiopia's Central Front Claims, *supra* note 2, at para. 26.



detainees and persons in assigned residence. The evidence regarding the pre-war population and departures during the war years suggests that the total remaining Ethiopian population in Eritrea in May 2000 was perhaps 80,000 to 90,000. Thus, while thousands of Ethiopians clearly were detained, the evidence does not show a generalized rounding-up of the entire Ethiopian population by Eritrea.

101. Eritrea maintained that its actions were justified under Article 42 of Geneva Convention IV, which allows internment or assigned residence “if the security of the Detaining Power makes it absolutely necessary.” It contended at the hearing that many Ethiopians were confined because their celebrations following Ethiopian victories or other conduct marked them as endangering security. Ethiopia acknowledged that a belligerent may intern nationals of an enemy State under appropriate safeguards, but contended that Eritrea arbitrarily and unlawfully rounded up these Ethiopian civilians without attempting to assess individuals’ potential threat to security.

102. Ethiopia’s declarations and claims forms indicated that many detainees were day laborers or other poor and uneducated persons not seeming to pose immediate threats to security. There was no evidence indicating that there was any process to identify individual Ethiopians potentially posing security risks. While the evidence is limited, it suggests that Ethiopians were hurriedly rounded up in some areas but not in others; the risk of detention seems to have been heavily influenced by geography. Those detained included many from the port city of Massawa and from outlying areas in Eritrea; residents of Asmara and Assab appear to have been less affected. The evidence does not disclose any process, formal or informal, by which detainees could secure review of their status.

103. Eritrea also contended that some Ethiopians were held to protect them from hostile public opinion, allegedly inflamed by Ethiopians’ provocative celebrations following Ethiopian victories. Indeed, Eritrea contended that some Ethiopians asked to be taken into protective custody. There was little evidence supporting this contention, and the Commission doubts that many persons requested internment.

104. Taking into account the high standard for forcible internment indicated by Article 42 of Geneva Convention IV, the Commission believes that it was incumbent upon Eritrea to show some substantial basis for abruptly seizing and holding several thousand Ethiopians in detention, particularly as they were detained under harsh conditions. Eritrea failed to show that its mass detentions of Ethiopians during and after May 2000 satisfied the requirements of Article 42 of Geneva Convention IV as being “absolutely necessary” for its security.

105. Physical Conditions of Detention After May 2000. Eritrea acknowledged that Ethiopians detained during this period endured harsh conditions. The evidence showed that detention camps were hurriedly prepared, and many lacked even rudimentary shelter or sanitary facilities. Food and clean water

often were scarce. Several camps were located in extremely hot desert areas, and unsheltered detainees suffered greatly from blistering summer heat.

106. Eritrea argued that these poor living conditions were the unavoidable result of the humanitarian crisis facing Eritrea at the time, when perhaps one-third of the Eritrean population was also displaced by Ethiopia's military offensive. Eritrea contended that while the detainees' conditions were poor, they were no worse than those endured by many internally displaced Eritreans. It contended that was the best Eritrea could do given its resources and the massive national emergency.

107. The Commission recognizes the great challenges Eritrea faced in May 2000, but it cannot accept them as a legal defense. Geneva Convention IV reflects minimum standards of humanitarian treatment that apply whenever protected persons are detained. Article 27 directs that all protected persons must be treated humanely at all times. Article 85 requires that internees be provided with quarters that protect them "as regards hygiene and health, and. . . . against the rigours of the climate." Article 89 requires adequate daily food rations and drinking water; Article 90 requires suitable clothing. The evidence shows that these requirements were not met. Eritrea did not ensure that detainees received humane treatment, including the minimum standards of food and accommodation required by international law.

108. Abuse in Detention After May 2000. Ethiopia alleged that the poor physical conditions in the detention camps were accompanied by wide-scale physical and psychological abuse of detainees. Eritrea acknowledged one serious shooting incident causing the death of several detainees at Wi'a camp (discussed below), but otherwise denied that conditions were as claimed by Ethiopia.

109. The evidence indicates that untrained and unqualified Eritrean personnel guarded the camps. Their lack of training and discipline contributed to widespread physical violence and other abuse against detainees. Ethiopia's declarations and claims forms include frequent and consistent accounts, essentially un rebutted by Eritrea, of recurring beatings and other abuses by camp guards. Some abusive guards are identified by name in multiple claims forms or declarations. There are disturbing accounts of prisoners at Wi'a camp being tortured by being buried in pits in the hot sand, leading to severe burns and, in one case, possibly death. Several accounts by prisoners at Wi'a refer to beatings and other acts of cruelty inflicted by "Omar" or "Umar," the head of the camp guard force implicated in the serious shooting incident discussed below. The Commission heard testimony from a prisoner held at Wi'a who described frequent brutal beatings and other forms of abuse he and other prisoners received. Several claims forms represented that conditions at Afabet, to which the prisoners from Wi'a were transferred after the shooting incident, were even worse than at Wi'a.

110. Given the extensive and essentially un rebutted evidence of widespread and brutal physical abuse in the camps, the Commission finds that Eri-

trea failed to meet its obligation under humanitarian law to ensure the physical protection and well-being of the protected persons it detained in May 2000 and thereafter. It thereby permitted acts of violence and abuse directed against detainees by camp guards.

111. The Killings at Wi'a Camp. There is clear and compelling evidence of a serious incident on July 11, 2000 at the Wi'a camp in which many detainees were killed and injured at the hands of untrained and undisciplined Eritrean guards. An outbreak of shooting by guards killed at least 15 prisoners and wounded at least 16 more.

112. Evidence submitted by both sides presented similar descriptions of these killings at Wi'a. Witnesses, including a witness wounded in the shooting who testified before the Commission, agreed that ICRC personnel visited the camp earlier in the day. There was evidence that the guards instructed the prisoners not to speak to the ICRC representatives, and that some guards changed clothes and mingled with the prisoners to discourage contact. After the ICRC left, the guards identified prisoners who they thought had spoken with the ICRC, and at least one prisoner was led off and beaten.

113. The witness accounts then diverge somewhat. Some allege that prisoners began to throw stones at the guards doing the beating. Others did not see stones being thrown, or denied that there was any significant disorder. However, the accounts generally agree that the commander of the guards, named "Omar" or "Umar," appeared with his Kalashnikov assault rifle. He and other guards began to fire indiscriminately at the detainees, who fled or took shelter if they could. The firing continued for some time.

114. Accounts provided by both Parties' witnesses suggest that the Eritrean commander of the camp, an immigration officer called "Wedi Keshi" by the detainees, intervened and was able after a time to halt the shooting. By the time it ended, at least 15 detainees were dead and at least 16 were wounded. Wounded detainees were loaded onto a truck and taken into Massawa for medical care. There were statements that some seriously wounded were left behind and shot, but this was not corroborated. Eritrea submitted evidence indicating that its authorities quickly initiated an investigation of the killings, and that the guard commander was subsequently removed from Wi'a. However, there is no evidence showing any other disciplinary action against anyone involved.

115. The Commission appreciates the candid and forthright way that counsel for Eritrea addressed the killings at Wi'a camp. The Commission notes that the Eritrean camp commander's actions to halt the shooting probably limited the loss of life. Nevertheless, Eritrea had placed the guard commander and the guards in their positions of power over the detainees, and Eritrea is internationally responsible for their actions. The Commission finds that Eritrea is responsible for permitting conditions under which undisciplined camp guards used excessive and indiscriminate lethal force against protected persons, killing at least 15 and seriously injuring at least 16 more.

116. Expulsion Under Inhumane Conditions After May 2000. The Parties agree that the number of Ethiopian departures greatly increased after the June 2000 Cease-Fire Agreement, but offered sharply conflicting explanations.

117. Ethiopia alleged that many departures resulted from unlawful direct government expulsion, and that the rest were the direct and inevitable result of deliberate and harsh government policies and actions intended to drive Ethiopians from Eritrea. Further, departures from Eritrea were said by Ethiopia often to involve harsh and dangerous physical conditions.

118. Eritrea painted a very different picture. In Eritrea's view, the thousands of departures were the natural and benign by-product of the end of the war. The June 2000 Cease-Fire Agreement made it safer and easier for Ethiopians who wanted to return to Ethiopia to do so. As counsel portrayed it, "the buses were running" and conditions finally allowed the pent-up demand of thousands of Ethiopians who wanted to end years of wartime separation from homes and families to be met. Eritrea contended that these departures were voluntary, and denied any broad government policy aimed at encouraging or requiring Ethiopians to leave.

119. Legal Considerations Applicable to Departures After May 2000. Neither Party specifically addressed the scope of the powers of belligerents under international humanitarian law to expel the nationals of enemy States during an international armed conflict.<sup>35</sup> The arguments concerning departures in the period after the June 2000 Cease-Fire Agreement emphasized factual and not legal matters.

120. Ethiopia acknowledged that States have broad powers to require aliens to leave their territory, but it contended that departures after May 2000 were unlawful because they did not result from a proper legal process and did not provide affected Ethiopians with proper respect and protection. Ethiopia contended that:

- Many — particularly those who were forcibly detained and then left for Ethiopia directly from the detention camps, but including others as well—were arbitrarily expelled by direct government action. It cited the accounts of several Ethiopian declarants who claimed that Eritrean officials ordered them to leave Eritrea against their will.
- All others who left were constructively expelled as the result of hostile conditions attributable to deliberate Eritrean Government actions and policies, and under conditions that denied them proper respect and protection. Ethiopia cited official actions allegedly aimed at making Ethiopians' post-war conditions of life intolerable, including revoking business

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<sup>35</sup> Eritrea denied that any Ethiopians were expelled during this period pursuant to official actions or policies, contending that departures reflected free choices by those who left. For its part, Ethiopia emphasized the rules relating to expulsions of aliens in peacetime.

licenses and terminating tenancies in public housing. Counsel argued that such government actions and policies allowed “no real choice to remain behind,” and reflected Eritrea’s intention that Ethiopians leave.

- The enormous size of the outflow from Eritrea demonstrated a deliberate mass expulsion by Eritrea, contrary to international law.
- The process of expulsion was procedurally deficient because Ethiopians were not given any opportunity whatsoever to contest their expulsions.
- Departing Ethiopians were illegally denied means to protect their property and interests. This claim will be discussed *infra*, in connection with Ethiopia’s claims relating to deprivation of property.

Eritrea denied these contentions.

121. In its separate Partial Award on Eritrea’s Civilians Claims, the Commission addresses the right of a belligerent under the *jus in bello* to expel the nationals of an enemy State during an international armed conflict.<sup>36</sup> The evidence indicates that a very high proportion of the thousands of Ethiopians who were held in Eritrean detention camps, jails and prisons were expelled by Eritrea directly from their places of detention. The personal consequences of these enforced departures from Eritrea may have been harsh in many cases. Nevertheless, Eritrea acted consistently with its rights as a belligerent in compelling these departures and those of any other Ethiopians who were forced to leave during this period.

122. However, the conditions of all such expulsions must meet minimum humanitarian standards, as set forth in Articles 35 and 36 of Geneva Convention IV. Further, expellees were entitled to adequate opportunity to protect any property or economic interests they had in Eritrea. The Commis-

<sup>36</sup> See Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27–32 Between the State of Eritrea and the Federal Democratic Government of Ethiopia (Dec. 17, 2004), Part VIII. Numerous writers on international humanitarian law affirm the right of belligerents to expel the nationals of an enemy state to their country of nationality. See, e.g., Karl Doehring, *Aliens, Expulsion and Deportation*, in 8 *Encyclopedia of Public International Law* p. 16 (1985) (“[A] State may nonetheless be justified in expelling such a group without regard to the individual behaviour of its members, if the security and existence of the expelling State would otherwise be seriously endangered, for example . . . during a state of war.”); Gerald Draper, *The Red Cross Conventions* pp. 36–37 (1958), quoted in 10 *Digest of International Law* p. 274 (Marjorie Whiteman ed., 1968) (citing “the customary right of a state to expel all enemy aliens at the outset of a conflict”); *Handbook of Humanitarian Law*, *supra* note 16, at § 589(5), p. 287 (forced “repatriation [of nationals of an enemy state] must be considered as permissible”); I *Oppenheim’s International Law* § 413, pp. 940–945 (Sir Robert Jennings & Sir Arthur Watts eds., 1996); Lord McNair & Arthur Watts, *The Legal Effects of War* p. 76 (4th ed. 1966) (“There is no rule which requires a belligerent to allow enemy subjects to remain in his territory and he is entitled to expel them if he chooses”). Geneva Convention IV does not explicitly address expulsion of nationals of the enemy state or other aliens, instead emphasizing the right of aliens who wish to leave the territory of a belligerent to do so. See Art. 35.

sion considers below questions relating to the physical conditions of protected persons' departures and the treatment of their property.

123. The evidence does not establish that other Ethiopians who left Eritrea between June and December 2000 were expelled pursuant to actions or policies of the Government of Eritrea. While Eritrea had the right as a belligerent to require nationals of the enemy State to depart, the evidence does not establish that it took such action with respect to persons not held in detention.

124. The record did not include any decrees, directives or other documentary evidence indicating an Eritrean Government policy of forcing the departure of other Ethiopians who were properly registered with the immigration authorities. Likewise, the evidence did not show an unwritten policy of deliberate expulsion. Ethiopia cited the accounts of some Ethiopians who stated that Eritrean officials ordered them to leave, but the circumstances described are often ambiguous. Some of these same declarants apparently spent substantial periods arranging their affairs before acting on alleged orders to depart. Others let their exit visas expire and delayed getting new ones, without apparent adverse consequences. The U.S. State Department's Human Rights Report concluded that most of those who left during 2000 did so voluntarily.

125. Further, a substantial population of Ethiopians remained in Eritrea following the departures in 2000 covered by these claims (although many more Ethiopians departed in 2001<sup>37</sup>). It is difficult to reconcile this with the contention that Eritrea expelled large numbers of Ethiopians in the months following the June 2000 Cease-Fire Agreement. Ethiopia's claim that large numbers of persons who were not in detention were wrongly expelled by direct State action by Eritrea after hostilities ended must fail for lack of proof.

126. Ethiopia also contended that those who left between May 2000 and December 2000 were victims of unlawful indirect or constructive expulsion. The Parties expressed broadly similar understanding of the law bearing on these claims. Both cited the jurisprudence of the Iran-U.S. Claims Tribunal, which establishes a high threshold for liability for constructive expulsion. That Tribunal's constructive expulsion awards require that those who leave a country must have experienced dire or threatening conditions so extreme as to leave no realistic alternative to departure. These conditions must result from actions or policies of the host government, or be clearly attributable to that

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<sup>37</sup> The United Nations Secretary-General reported in December 2001 that 21,255 persons of Ethiopian origin were repatriated to Ethiopia in 2001, following the period covered by Ethiopia's claims. Progress Report of the Secretary-General on Ethiopia and Eritrea, Dec. 13, 2001, para. 47, doc. S/2001/1194.

government. Finally, the government's actions must have been taken with the intention of causing the aliens to depart.<sup>38</sup>

127. The evidence does not meet these tests. Post-war Eritrea was a difficult economic environment for Ethiopians and Eritreans both, but the Eritrean Government did not intentionally create generalized economic adversity in order to drive away Ethiopians. The Commission notes that the Government of Eritrea took actions in the summer of 2000 that were detrimental to many Ethiopians' economic interests and that there was anti-Ethiopian public opinion and harassment. Nevertheless, many Ethiopians in Eritrea evidently saw alternatives to departure and elected to remain or to defer their departures. Given the totality of the record, the Commission concludes that the claim of wide-scale constructive expulsion does not meet the high legal threshold for proof of such a claim.

128. Physical conditions of repatriation. Ethiopia contended that expellees were forced to leave Eritrea in harsh and unsafe conditions, citing Article 36 of Geneva Convention IV, which requires that all voluntary departures from the territory of a belligerent "must be carried out in satisfactory conditions as regards safety, hygiene, sanitation and food." Eritrea maintained that departure conditions were satisfactory, contending that departures generally were conducted with active ICRC involvement, and were as safe and comfortable as possible in the circumstances.

129. The ICRC publicly reported that it organized the safe return to Ethiopia of 12,000 Ethiopians during 2000. Eritrea presented numerous witness statements describing the ICRC's role in arranging safe transports of Ethiopians, particularly from the immigration detention facility at Adi Abeyto. The record also indicates that Ethiopian prisoners directly expelled to Ethiopia from other Eritrean detention camps were physically transported by the ICRC or under its supervision. The witness accounts of released detainees typically express satisfaction with the ICRC's role in their return to Ethiopia, not complaints.

130. However, the evidence also showed that the ICRC was not involved in some transports that exposed departing Ethiopians to harsh and hazardous conditions. Eritrea's own witnesses described a case where local authorities transported a group of Ethiopians to the border without coordination or ICRC involvement. The U.S. State Department cited reports of six deportees allegedly drowning while attempting to cross the Mereb River. There were disquieting reports regarding a group of women transported from Assab to Djibouti by sea under harsh and dangerous conditions in mid-July 2000. The ICRC publicly criticized the forcible deportation of 2,700 people from a camp north of Asmara under harsh and dangerous conditions in August 2000.

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<sup>38</sup> Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal* pp. 343-365 (1998); George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* pp. 464-471 (1996).



131. The evidence indicates that the ICRC played a valuable role in ensuring that thousands of Ethiopians returned home safely, but Eritrea has not explained why the ICRC played no role in other departures which did not ensure safe and humane repatriations. The Commission finds that Eritrea failed to ensure safe and humane conditions in departures in which the ICRC did not play a role.

132. Claims for Property Losses. Article 35 of Geneva Convention IV requires that deportees be allowed to take funds required for their journey and “a reasonable amount of their effects and articles of personal use.” Article 33 of Geneva Convention IV prohibits reprisals against the property of protected persons, and Article 23, paragraph (g), of the Hague Regulations<sup>39</sup> forbids seizure of enemy property unless demanded by military necessity. These safeguards, of course, operate in the context of another broad and sometimes competing body of belligerent rights to deny the resources of enemy nationals to the enemy State.

133. The evidence showed that those Ethiopians expelled directly from Eritrean detention camps, jails and prisons after May 2000 did not receive any opportunity to collect portable personal property or otherwise arrange their affairs before being expelled. Accordingly, Eritrea is liable for those economic losses (suffered by Ethiopians directly expelled from detention camps, jails and prisons) that resulted from their lack of opportunity to take care of their property or arrange their affairs before being expelled.

134. The record also contained many complaints from other departing Ethiopians about the short time they were allowed to arrange their affairs, and even troubling instances of interference by Eritrean officials in their efforts to secure or dispose of property (addressed below). On balance, the record supports the conclusion that, under the necessarily disruptive circumstances, the departing Ethiopians who were not expelled had reasonable opportunity to arrange their affairs as best they could prior to departure. Claims for economic losses based solely on short notice for departure are dismissed.

135. The Commission, however, was struck by the cumulative evidence of the destitution of Ethiopians arriving from Eritrea, whether expelled directly from detention post-May 2000 or otherwise. Although this may be partially explained by the comparatively low-paying jobs held by many in the original Ethiopian community, the Commission finds it also reflected the frequent instances in which Eritrean officials wrongfully deprived departing Ethiopians of their property. The record contains many accounts of forcible evictions from homes that were thereafter sealed or looted, blocked bank accounts, forced closure of businesses followed by confiscation, and outright seizure of personal property by the police. The Commission finds Eritrea liable for economic losses suffered by Ethiopian deportees that resulted from Eritrean officials’

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<sup>39</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and Annexed Regulations, Oct. 18, 1907, 36 Stat. p. 2277,1 Bevans p. 631.



wrongful seizure of their property and wrongful interference with their efforts to secure or dispose of their property.

## VIII. AWARD

In view of the foregoing, the Commission determines as follows:

### A. Jurisdiction

1. The Commission lacks jurisdiction over claims that were not filed by December 12, 2001. Consequently, the following claims are hereby dismissed for lack of jurisdiction:
  - a. claims that Eritrea did not provide proper conditions of transport to or between supposed detention sites;
  - b. claims that Eritrea exposed Ethiopians detainees/internees to public curiosity; and
  - c. claims that Eritrea forced Ethiopians to donate blood.
2. All other claims asserted in this proceeding are within the jurisdiction of the Commission.

### B. Applicable Law

1. With respect to matters prior to Eritrea's accession to the Geneva Conventions of 1949, effective August 14, 2000, the international law applicable to this claim is customary international law, including customary international humanitarian law as exemplified by the relevant parts of the four Geneva Conventions of 1949.
2. Had either Party asserted that a particular relevant provision of those Conventions was not part of customary international law at the relevant time, the burden of proof would have been on the asserting Party, but that did not happen.
3. With respect to matters subsequent to August 14, 2000, the international law applicable to this claim is the relevant parts of the four Geneva Conventions of 1949, as well as customary international law.
4. Most of the provisions of Protocol I of 1977 to the Geneva Conventions, including Article 75 thereof, are expressions of customary international humanitarian law applicable during the conflict. Had either Party asserted that a particular provision of Protocol I should not be considered part of customary international humanitarian law at the relevant time, the burden of proof would have been on the asserting Party, but that did not happen.
5. Customary law concerning the protection of human rights remained in force during the armed conflict between the Parties, with particular rel-

evance in any situations involving persons not fully protected by international humanitarian law.

6. The Agreement of December 12, 2000 was the transition point between the regime of Geneva Convention IV and peacetime rules of international law. However, international humanitarian law protections continued to apply after December 12, 2000 with respect to persons who remained in detention or in the process of repatriation or re-establishment.

### **C. Evidentiary Issues**

The Commission requires clear and convincing evidence to establish the liability of a Party for violations of applicable international law.

### **D. Findings of Liability for Violation of International Law**

The Respondent is liable to the Claimant for the following violations of international law involving acts or omissions by its civilian officials, military personnel or others for whose conduct it is responsible:

1. For failing to ensure that Ethiopians in Eritrea who were not in detention were protected against acts or threats of violence by civilian and military police and the civilian population as required by Article 27 of Geneva Convention IV;

2. For failing to ensure Ethiopians the right to find paid employment on the same basis as nationals after the June 2000 Cease-Fire Agreement, contrary to Article 39 of Geneva Convention IV;

3. For failing to ensure that Ethiopians were able to receive medical treatment to the same extent as Eritrean nationals as required by Article 38 of Geneva Convention IV;

4. For detaining Ethiopians in police stations, prisons and jails without clear legal basis, without charge or trial or minimum procedural rights, including those under Article 75 of Protocol I, and for concealing some of these Ethiopians from the ICRC in violation of Article 143 of Geneva Convention IV;

5. For permitting Ethiopians so detained to be subjected to physical and psychological abuse and substandard living, sanitary and health conditions contrary to Articles 27 and 37 of Geneva Convention IV;

6. For detaining Ethiopians at Hawshaite camp in western Eritrea during and after February 1999 without legal justification, and for permitting the Ethiopians so detained to be subjected to inhumane treatment and to inadequate food, sanitary and health conditions contrary to Article 27 and 37 of Geneva Convention IV;

7. For detaining several thousand Ethiopian civilians during and after May 2000 without sufficient justification satisfying Article 42 of Geneva Convention IV;

8. For failing to provide these detainees humane treatment and the minimum standards of food and accommodation in violation of Articles 27, 89 and 90 of Geneva Convention IV;

9. For permitting these detainees to be subjected to acts of violence and physical abuse by camp guards, and in particular, for permitting untrained and undisciplined camp guards to use indiscriminate and excessive lethal force against detainees at Wi'a detention camp in July 2000, causing numerous deaths and serious injuries;

10. For expelling several thousand Ethiopians from Eritrea directly from detention camps, prisons and jails during the summer of 2000 under conditions that did not allow them to protect their property or interests in Eritrea;

11. For failing to ensure the safe and humane repatriation of departing Ethiopians in transports that were not conducted or supervised by the ICRC; and

12. For allowing the seizure of property belonging to Ethiopians departing other than from detention camps, prisons and jails, and otherwise interfering with the efforts of such Ethiopians to secure or dispose of their property.

## **E. Other Findings**

All other claims presented in this case are dismissed.

Done at The Hague, this 17<sup>th</sup> day of December, 2004,

[Signed] PRESIDENT HANS VAN HOUTTE

[Signed] GEORGE H. ALDRICH

[Signed] JOHN R. CROOK

[Signed] JAMES C.N. PAUL

[Signed] LUCY REED