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**Eritrea-Ethiopia Claims Commission - Partial Award: Central Front - Ethiopia's
Claim 2**

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PART V

**Partial Award
Central Front—Ethiopia's Claim 2**

Decision of 28 April 2004

**Sentence partielle
Front central—Réclamation de l'Éthiopie N° 2**

Décision du 28 avril 2004

PARTIAL AWARD. CENTRAL FRONT—ETHIOPIA'S CLAIM 2
DECISION OF 28 APRIL 2004

SENTENCE PARTIELLE, FRONT CENTRAL—RÉCLAMATION DE
L'ÉTHIOPIE N° 2, DÉCISION DU 28 AVRIL 2004

Jurisdiction of the Commission—liability only for serious violations of international humanitarian law affecting several victims—liability engaged only for systematic, frequent and recurring violations—apportionment of legal liability between Parties for the loss, damage or injury occurred.

Law in force during the armed conflict—customary international law of armed conflict, as exemplified by Geneva Conventions and The Hague Conventions—burden of proof on the State denying customary status to a specific provision of any of these Conventions—treaties on the use of anti-personnel landmines and booby traps not considered as an expression of customary international law—treaties concluded too recently and practice of States too varied for conferring customary status to those provisions—recognition of customary principles only regarding the limitation of the use of such weapons by the recording of mine fields and the prohibition of indiscriminate use.

Customary humanitarian law principles—absence of liability for the displacement of civilians fleeing the battle unless the intentional spreading of terror as a primary purpose of the invasion may be proved—liability for permitting troops to abuse physically the civilian population, to loot and to destruct properties—insults, verbal abuse and psychologically painful situations not considered automatically as mental abuse—airports, housing or not military aircrafts, considered as legitimate military objectives—liability occurring from the failure to take all feasible precautions in the conduct of air strikes such as training of pilots and subsequent lack of investigations—status of “undefended place” prevented by the existence of some local resistance by militia and police.

Occupied territories—possibility to apply the status of occupation to territory with unclear and contested title of sovereignty, without prejudicing its future status—liability arising from the failure in the taking of effective measures to prevent rape by soldiers during occupation—State responsibility arising even for infrequent cases of rape—the subsequent allocation of a disputed territory to the occupying power not considered to imply the denial of protection of the civilian population under international humanitarian law.

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—uncertain probative value of questionnaires and forms for filing claims—sworn witness declarations considered as the most trustworthy form of written testimonies—standard of evidence lowered regarding rapes because of the typically secretive and unwitnessed nature of such act.

Compétence de la Commission—responsabilité limitée à des violations importantes du droit international humanitaire affectant plusieurs victimes—responsabilité engagée uniquement pour des violations systématiques, fréquentes et récurrentes—répartition de la responsabilité juridique entre les Parties pour les pertes, dommages ou dégâts survenus.

Droit en vigueur pendant le conflit armé—droit international coutumier des conflits armés tel qu'illustré par les Conventions de Genève et les Conventions de La Haye—charge de la preuve reposant sur l'État réfutant le statut coutumier d'une disposition particulière de l'une de ces Conventions—traités relatifs à l'emploi des mines anti-personnelles et des pièges non considérés comme une expression du droit international coutumier—traités ayant été conclus trop récemment et pratique des États en la matière trop variée pour que ces dispositions relèvent de la coutume—reconnaissance de principes coutumiers uniquement en ce qui concerne la limitation de l'emploi de telles armes par l'enregistrement des champs de mines et l'interdiction d'un emploi indiscriminé.

Principes du droit humanitaire coutumier—absence de responsabilité en vertu du droit international pour le déplacement des civils fuyant les combats, à moins de prouver que le but premier de cet invasion était la propagation de la terreur—responsabilité engagée pour avoir laissé les troupes maltraiter physiquement la population civile, piller et détruire les propriétés—les insultes, maltraitements verbales et souffrances psychologiques ne sont pas automatiquement considérées comme des sévices psychologiques—les aéroports hébergeant ou non des appareils militaires sont considérés comme des objectifs militaires légitimes—responsabilité engagée pour les défaillances au niveau de la prise de précaution dans la conduite des frappes aériennes, telles que l'entraînement des pilotes et l'absence d'investigation ultérieure—présence de mouvements locaux de résistance par des milices ou la police considérée comme un obstacle à la reconnaissance du statut de « place non défendue ».

Territoires occupés—possibilité de conférer le statut de territoire occupé à un territoire ayant un titre de souveraineté flou et contesté, sans préjudice de son statut ultérieur—engagement de la responsabilité pour les défaillances dans la prise de mesures efficaces de prévention des viols par les soldats lors de l'occupation—responsabilité étatique engagée même pour des cas de viol isolés—l'attribution subséquente du territoire contesté à la Puissance occupante n'est pas considérée comme impliquant un déni de protection des populations civiles en vertu du droit international humanitaire.

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—valeur probante incertaine des questionnaires et des formulaires de soumission de réclamations—considération des déclarations faites sous serment comme la forme la plus fiable de témoignage écrit—rabaissement des critères d'établissement des preuves dans les affaires de viol, du fait que ce type d'acte est généralement perpétré en toute discrétion et sans témoin.

ERITREA-ETHIOPIA CLAIMS COMMISSION

PARTIAL AWARD

Central Front
Ethiopia's Claim 2

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, April 28, 2004

PARTIAL AWARD—Central Front—Ethiopia's Claim 2
between the Claimant,
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I. INTRODUCTION

A. Summary of the Positions of the Parties

1. This Claim (“Ethiopia’s Claim 2”) has been brought to the Commission by the Claimant, the Federal Democratic Republic of Ethiopia (“Ethiopia”), 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 Agreement”). The Claimant asks the Commission to find the Respondent, the State of Eritrea (“Eritrea”), liable for loss, damage and injury suffered by the Claimant, including loss, damage and injury suffered by the Claimant’s nationals, as a result of alleged infractions of international law occurring on the Central Front of the 1998–2000 international armed conflict between the Parties. The Claimant requests monetary compensation. 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 areas of Eritrea not directly affected by the armed conflict (Ethiopia’s Claim 5).

2. The Respondent asserts that it fully complied with international law in its conduct of military operations.

B. Background and Territorial Scope of the Claims

3. Between 1998 and 2000, the Parties waged a costly, large-scale international armed conflict along several areas of their common frontier. This Partial Award, like the corresponding Partial Award in Eritrea’s Claims 2, 4, 6, 7, 8 and 22, addresses allegations of illegal conduct related to military operations on the Central Front of that conflict.

4. Claims based on alleged breaches by the Respondent of the *jus ad bellum* are deferred for decision in a subsequent proceeding.

5. For purposes of these Claims, the Central Front encompassed the area of military operations extending between Ethiopia’s Mereb Lekhe Wereda on the west and Irob Wereda on the east and the corresponding areas to the north in Eritrea. The Central Front in Ethiopia included (from west to east) parts of the border weredas of Mereb Lekhe, Ahferom, Gulomakheda and Irob. Relevant events are also alleged in Genta Afeshum Wereda, which is located to the south of Gulomakheda Wereda and does not adjoin the boundary.¹

¹ See Ethiopia’s Memorial, Claim 2, filed by Ethiopia on Oct. 15, 2002, at II-32, II-36.

C. General Comment

6. As the findings in this Partial Award and in the related Partial Award in Eritrea's Claims 2, 4, 6, 7, 8 and 22 describe, the allegations and the supporting evidence presented by the Parties frequently indicate diametrically opposed understandings of the relevant facts. Such incompatible views of the relevant facts may perhaps be considered not surprising in light of the confusion and uncertainty characteristic of military operations and the polarizing effects of warfare. It has often been said that, in war, truth is the first casualty.² Or, as Julius Stone expressed it half a century ago, modern warfare tends to produce "nationalization of the truth."³ Nevertheless, the Commission must note the obvious difficulties it faces when each Party presents large numbers of sworn declarations by witnesses asserting facts that disagree completely with the facts asserted in large numbers of sworn declarations by the witnesses of the other Party.

7. In these unhappy circumstances, the Commission, which is charged with determining the truth, must do its best to assess the credibility of such conflicting evidence. Considerations of time and expense usually prevent more than a handful of witnesses being brought to The Hague to testify before the Commission; so the Commission is then compelled to judge the credibility of any particular declaration, not by observing and questioning the declarant, but rather on the basis of all the relevant evidence before it, which may or may not include evidence from persons or parties not directly involved in the conflict. In that connection, the Commission recalls its holding on the required standard of proof in its earlier Partial Awards: "Particularly in light of the gravity of some of the claims advanced, the Commission will require clear and convincing evidence in support of its findings."⁴ The same requirement is applicable to the claims presented in the present Partial Award.

8. The Commission recognizes that this standard of proof and the existence of conflicting evidence may result in fewer findings of liability than either Party expects. The Awards on these claims must be understood in that unavoidable context.

² That comment is generally attributed to Senator Hiram Johnson, an opponent of entry by the United States in the First World War. See Philip Knightly, *The First Casualty—From the Crimea to Vietnam: The War Correspondent as Hero, Propagandist and Myth Maker* p. 17 (1975).

³ Julius Stone, *Legal Controls of International Conflict* pp. 321–323 (1954).

⁴ Partial Award, Prisoners of War, Eritrea's Claim 17 Between the State of Eritrea and The Federal Democratic Republic of Ethiopia, para. 46 (July 1, 2003) [hereinafter Partial Award in Eritrea's Claim 17]; Partial Award, Prisoners of War, Ethiopia's Claim 4 Between The Federal Democratic Republic of Ethiopia and The State of Eritrea, para. 37 (July 1, 2003) [hereinafter Partial Award in Ethiopia's Claim 4].

II. PROCEEDINGS

9. The Commission informed the Parties on August 29, 2001 that it intended to conduct proceedings in Government-to-Government claims in two stages, first concerning liability and, second, if liability is found, concerning damages. This Claim was filed on December 12, 2001, and a Statement of Defense on April 15, 2002. The Claimant's Memorial was filed on October 15, 2002, and the Respondent's Counter-Memorial on September 1, 2003. Both Parties filed additional evidence on October 13, 2003. A hearing on liability was held at the Peace Palace in November 2003, in conjunction with a hearing in Eritrea's related Claims 2, 4, 6, 7, 8 and 22.

III. JURISDICTION

10. Article 5, paragraph 1, of the 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 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."

11. In this Claim, as in Eritrea's Claims 2, 4, 6, 7, 8 and 22, the Claimant alleges that the Respondent's conduct related to military operations on the Central Front violated numerous rules of international humanitarian law. Thus, the claims fall directly within the scope of the Commission's jurisdiction.

12. Eritrea's Statement of Defense and Counter-Memorial do not contest the Commission's jurisdiction over the types of claims presented by Ethiopia. Indeed, Eritrea's Memorial in its Claims 2, 4, 5, 6, 7, 8 and 22 presents a case for the Commission's jurisdiction comparable to that advanced by Ethiopia. The Commission agrees with both Parties and finds that it has jurisdiction over all of Ethiopia's claims.⁵

IV. THE MERITS

A. Applicable Law

13. Under Article 5, paragraph 13, of the 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. It directs the Commission to look to:

⁵ Eritrea's claims present jurisdictional issues regarding certain claims allegedly not asserted in its Statement of Claim. These are not present in Ethiopia's Claim 2 and will be addressed in the Commission's separate Award in Eritrea's Claims 2, 4, 6, 7, 8 and 22.

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.

14. Both Parties' discussions of the applicable law reflect the premise, which the Commission shares, that the 1998–2000 conflict between them was an international armed conflict subject to the international law of armed conflict. However, the Parties disagree as to whether certain rules apply by operation of conventions or under customary law.

15. In its Partial Awards on Prisoners of War, the Commission held that the law applicable to those claims prior to August 14, 2000, when Eritrea acceded to the four Geneva Conventions of 1949,⁶ was customary international humanitarian law.⁷ In those same awards, 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.⁸ Those holdings apply as well to the Central Front claims addressed in the present Partial Award and, indeed, to all the claims submitted to the Commission.

16. The Parties have identified no other potentially relevant treaties to which both Eritrea and Ethiopia were parties during their armed conflict. As the claims presented for decision in the present Award arise from military combat and from belligerent occupation of territory, the Commission makes the same holdings with respect to the customary status of the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 and its annexed Regulations ("Hague Regulations")⁹ as those it has made with respect

⁶ 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 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].

⁷ Partial Award in Eritrea's Claim 17, *supra* note 4, at para. 38; Partial Award in Ethiopia's Claim 4, *supra* note 4, at para. 29.

⁸ Partial Award in Eritrea's Claim 17, *supra* note 4, at paras. 40–41; Partial Award in Ethiopia's Claim 4, *supra* note 4, at paras. 31–32.

⁹ 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 [hereinafter Hague Regulations].

to the Geneva Conventions of 1949. The customary law status of the Hague Regulations has been recognized generally for more than fifty years.¹⁰ Had either Party asserted that a particular provision of those Conventions or Regulations should not be considered part of customary international humanitarian law at the relevant time, the Commission would have decided that question, with the burden of proof on the asserting Party. In the event, however, neither Party contested their status as accurate reflections of customary law.

17. Both Parties also relied extensively in their written and oral pleadings on provisions contained in Additional Protocol I to the Geneva Conventions of 1977 ("Protocol I").¹¹ Although portions of Protocol I involve elements of progressive development of the law, both Parties treated key provisions governing the conduct of attacks and other relevant matters in this Case as reflecting customary rules binding between them. The Commission agrees and further holds that, during the armed conflict between the Parties, most of the provisions of Protocol I were expressions of customary international humanitarian law. Again, had either Party asserted that a particular provision of that Protocol 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.

18. Both Parties presented numerous claims alleging improper use of anti-personnel landmines and booby traps, but there was limited discussion of the law relevant to the use of these weapons in international armed conflict. The Commission notes that the efforts to develop law dealing specifically with such weapons have resulted in the following treaties: Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects,¹² Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices ("Protocol II of 1980"),¹³ that Protocol as amended

¹⁰ International Military Tribunal, Trial of the Major War Criminals by the International Military Tribunal pp. 253–254 (1947); *United States v. Von Leeb* [High Command Case], 11 *Trials of War Criminals Before the Nuernberg Military Tribunal Under Control Council Law No. 10*, at p. 462 (1950); Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808, Annex, at 9, U.N. Doc. S/25704 (1993); see also 2 Lassa Oppenheim, *International Law* pp. 234–236 (Hersch Lauterpacht ed., 7th ed., 1952); Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 Wash. L. Rev. p. 971 (1986).

¹¹ 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 [hereinafter Protocol I].

¹² U.N. Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. p. 137, *reprinted in* 19 I.L.M. p. 1523.

¹³ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Oct. 10, 1980, 1342 U.N.T.S. p. 168, *reprinted in* 19 I.L.M. p. 1529 [hereinafter Protocol II of 1980].

on May 3, 1996,¹⁴ and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.¹⁵ None of these instruments was in force between the Parties during the conflict. Accordingly, the Commission holds that customary international humanitarian law is the law applicable to these claims. In that connection, the Commission considers that those treaties have been concluded so recently and the practice of States has been so varied and episodic that it is impossible to hold that any of the resulting treaties constituted an expression of customary international humanitarian law applicable during the armed conflict between the Parties. Nevertheless, there are elements in Protocol II of 1980, such as those concerning recording of mine fields and prohibition of indiscriminate use, that express customary international law. Those rules reflect fundamental humanitarian law obligations of discrimination and protection of civilians.

19. While Eritrea suggested in its Memorial that the 1966 International Covenant on Civil and Political Rights¹⁶ might also be relevant,¹⁷ it has not relied on the Covenant or identified any relevant provisions. Moreover, the Commission notes that the Covenant permits parties to derogate from many of its provisions during public emergencies, such as war.¹⁸ As the Parties have not referred in their written pleadings to any specific provisions of the Covenant, the Commission need not decide its applicability.

B. Evidentiary Issues

1. Question of Proof Required

20. As discussed above,¹⁹ the Commission will require clear and convincing evidence in support of its findings.

2. Proof of Facts

21. In its Partial Award of July 1, 2003 on Ethiopia's Claims regarding the treatment of prisoners of war, the Commission stated that the claims forms completed by former prisoners of war were of uncertain probative value and that it did not rely on them for its conclusions.²⁰ In the present proceeding,

¹⁴ *Id.*, as amended at Geneva, May 3, 1996, *reprinted in* 35 I.L.M. p. 1209 (1996).

¹⁵ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. p. 1507 (1997).

¹⁶ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. p. 171 [hereinafter ICCPR].

¹⁷ Eritrea's Memorial, Claims 2, 4, 6, 7 and 8, filed by Eritrea on Oct. 15, 2002, Vol. 1, para. 1.17.

¹⁸ ICCPR, *supra* note 16, at art. 4.

¹⁹ *See supra* para. 7.

²⁰ Partial Award in Ethiopia's Claim 4, *supra* note 4, at para. 41.

Ethiopia pointed out that some of the claims forms it has submitted in support of these claims are signed and sworn documents that contain considerable detailed information, and it requested that they be considered seriously by the Commission. The Commission agrees that some of those forms contain additional indicia of reliability and may have probative value. The Commission has considered them, not as the sole proof, but as supplementary to the sworn witness declarations, which remain the most trustworthy form of written testimony.

22. At the hearing in the present proceedings, the following witnesses were presented:

By Ethiopia:

Brigadier General Alemu Ayele—Fact Witness
 Mr. Tsegaye Temalow—Fact Witness
 General (Ret.) Charles W. Dyke—Expert Witness

By Eritrea:

Dr. Efreem Fesseha Kidanemariam—Fact Witness
 Col. Abraham Ogbasellassie—Fact Witness
 Major (Ret.) Paul Noack—Expert Witness
 Col. (Ret.) Jake Bell—Expert Witness

3. Estimation of Liability

23. The claims before the Commission involved complex events, some unfolding over many months. In several situations, the Commission concluded that particular damage resulted from multiple causes operating at different times, including both causes for which there was State responsibility and other causes for which there was not. The evidence did not permit exact apportionment of damage to different causes in these situations. Accordingly, the Commission has indicated the percentage of the loss, damage or injury concerned for which it believes the Respondent is legally responsible, based upon its best assessment of the evidence presented by both Parties.

C. Summary of Events on the Central Front Relevant to these Claims

24. After the armed conflict began on the Western Front in May 1998, both Eritrea and Ethiopia began to strengthen their armed forces along what would become the Central Front. From mid-May to early June, Eritrean armed forces attacked at a number of points, first in Ahferom and Mereb Lekhe Weredas, then in Irob and Gulomakheda Weredas. In Gulomakheda Wereda, the significant border town of Zalambessa (with a pre-war population estimated at between 7,000 and 10,000) was also taken. In all four weredas, Eritrean forces moved into areas administered prior to the conflict by Ethiopia, occupied territory, and established field fortifications and trench lines, sometimes

permanently and sometimes only for a brief period before returning to adjacent territory administered prior to the conflict by Eritrea. In all cases, they carried out intermittent operations that extended beyond the occupied areas. These operations included artillery fire, intermittent ground patrols, and the placement of defensive fields of land mines.

25. In response to these military operations, many residents of those areas fled and sought refuge in caves or displaced persons camps established by Ethiopia. Some civilians nevertheless remained in the occupied areas. Some who remained, including those who stayed in Zalambessa, were later moved by Eritrea to internally displaced persons (“IDP”) camps within Eritrea.

26. When Ethiopia later introduced substantial numbers of its armed forces into the four weredas, a static, although not fully contiguous, front was created that remained largely the same for nearly two years. Hostilities varied in intensity during that period and included some instances of intense combat during 1999. However, in May of 2000, Ethiopia launched a general offensive that drove all Eritrean armed forces out of the territory previously administered by Ethiopia and took Ethiopian forces deep into Eritrea. Ethiopian armed forces remained in Eritrean territory until late February 2001, when they returned to the pre-war line of administrative control pursuant to the Cessation of Hostilities Agreement of June 2000 and the Peace Agreement of December 12, 2000.

27. The Commission wishes to emphasize that its description of territories administered by one Party or the other prior to the conflict and the conclusions reached in this Partial Award are not intended to, and indeed cannot, have any effect on the lawful boundary between the two nations. The determination of that boundary is the task of the Boundary Commission established by Article 4 of the Peace Agreement of December 12, 2000. That boundary is not relevant to the work of the Claims Commission. Our task under Article 5 of that Agreement is to determine the validity of each Party's claims against the other for violations of international law arising out of the armed conflict for which that other Party is responsible and which caused damage to the Claimant Party, including its nationals. The Commission considers that, under customary international humanitarian law, damage unlawfully caused by one Party to an international armed conflict to persons or property within territory that was peacefully administered by the other Party to that conflict prior to the outbreak of the conflict is damage for which the Party causing the damage should be responsible, and that such responsibility is not affected by where the boundary between them may subsequently be determined to be.

28. The alternative could deny vulnerable persons in disputed areas the important protections provided by international humanitarian law. These protections should not be cast into doubt because the belligerents dispute the status of territory. The alternative would frustrate essential humanitarian principles and create an *ex post facto* nightmare. Moreover, respecting international protections in such situations does not prejudice the status of the territory. As

Protocol I states, “Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.”²¹

29. The responsibility of a State for all acts contrary to international humanitarian law committed by members of its armed forces is clear wherever those acts take place.²² The Hague Regulations considered occupied territory to be territory of a hostile State actually placed under the authority of a hostile army,²³ and the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (“Geneva Convention IV”) applies to “all cases of partial or total occupation of the territory of a High Contracting Party.”²⁴ However, neither text suggests that only territory the title to which is clear and uncontested can be occupied territory.

30. In its Decision of April 13, 2002 Regarding Delimitation of the Border, the Boundary Commission primarily interpreted several century-old treaties. While it also looked at the subsequent conduct of the Parties, it did so largely as potentially relevant to the possible alterations of the boundaries established by those treaties.²⁵ It also seems clear that the Boundary Commission gave considerably greater weight to admissions by a Party in the course of the arbitral proceedings, such as those by Ethiopia that Tserona and Fort Cadorna were Eritrean²⁶ and to acknowledgements of sovereignty, such as by Eritrean officials with respect to Zalambessa,²⁷ than it did to evidence of *de facto* local or regional administration of territory. Indeed, that Commission was concerned to determine the boundary as of the independence of Eritrea on April 27, 1993, not the *de facto* line between effective administrations in 1998. Thus, the Boundary Commission was not purporting to reach any conclusions as to the areas effectively administered by either Party in May 1998, when the armed conflict between them began.

31. Consequently, the Boundary Commission was not charged with, and did not, determine the respective areas of effective administration by the Parties in May 1998. For the purposes of its assigned tasks, the Claims Commission concludes that the best available evidence of the areas effectively administered by Ethiopia in early May 1998 is the agreement on the areas to which Ethiopian armed forces were to be re-deployed, as set forth in paragraph 9 of the Cessation of Hostilities Agreement of June 18, 2000.

²¹ Protocol I, *supra* note 11, at art. 4.

²² *See, e.g., id.* at art. 91.

²³ Hague Regulations, *supra* note 9, at art. 42.

²⁴ Geneva Convention IV, *supra* note 6, at art. 2.

²⁵ Decision on Delimitation, Eritrea-Ethiopia Boundary Commission, April 13, 2003, para. 3.8.

²⁶ *Id.* at paras. 4.69 and 4.71.

²⁷ *Id.* at para. 4.75.

32. In addition to actions by ground forces, there were some aerial bombardments on the Central Front. In particular, on June 5, 1998, the Parties exchanged airstrikes on airfields—at Asmara in Eritrea and Mekele in Ethiopia. In Mekele, the town itself was also hit. Ethiopia also alleges that an airfield at Aksum was hit on the same afternoon. Eritrea denies any air strike at Aksum. On June 11, 1998, Eritrean aircraft also bombed targets within the Ethiopian town of Adigrat.

33. Ethiopia's Central Front claims are extensive and factually complex. These claims were generally organized on the basis of the wereda in which each claim was alleged to have occurred. Ethiopia alleged in each wereda a matrix of violations, involving from eight to thirteen distinct types of violations. The Commission has addressed these claims wereda by wereda, but, in view of the evidence presented, it has frequently combined the specific elements of the claims for purposes of simplification and greater clarity.

D. Comment on Rape

34. Before beginning its review of the claims wereda-by-wereda, the Commission considers that allegations of rape deserve separate general comment. Despite the incalculable suffering inflicted upon Ethiopian and Eritrean civilians alike in the course of this armed conflict, the Commission is gratified that there was no suggestion, much less evidence, that either Eritrea or Ethiopia used rape, forced pregnancy or other sexual violence as an instrument of war. Neither side alleged strategically systematic sexual violence against civilians in the course of the armed conflict and occupation of Central Front territories. Each side did, however, allege frequent rape of its women civilians by the other's soldiers.

35. The Parties agree that rape of civilians by opposing or occupying forces is a violation of customary international law, as reflected in the Geneva Conventions. Under Common Article 3(1), States are obliged to 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 (emphasis added):

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They 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.

Women 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.”

36. We turn now to the specific allegations and proffered evidence concerning rape of civilian women. Both Parties explained that rape is such a sensitive matter in their culture that victims are extremely unlikely to come forward, and when they or other witnesses do present testimony, the evidence available is likely to be far less detailed and explicit than for non-sexual offenses. The Commission accepts this and has taken it into account in evaluating the evidence. To do otherwise would be to subscribe to the school of thought, now fortunately eroding, that rape is inevitable collateral damage in armed conflict.

37. Given these heightened cultural sensitivities, in addition to the typically secretive and hence unwitnessed nature of rape, the Commission has not required evidence of a pattern of frequent or pervasive rapes. The Commission reminds the Parties that, in its Partial Awards on Prisoners of War, it did not establish an invariable requirement of evidence of frequent or pervasive violations to prove liability. The relevant standard bears repeating, with emphasis added:

The Commission does not see its task to be the determination of liability of a Party for each individual incident of illegality suggested by the evidence. Rather, it is to determine liability for serious violations of the law by the Parties, which are *usually* illegal acts or omissions that were frequent or pervasive and consequently affected significant numbers of victims.²⁸

38. Rape, which by definition involves intentional and grievous harm to an individual civilian victim, is an illegal act that need not be frequent to support State responsibility. This is not to say that the Commission, which is not a criminal tribunal, could or has assessed government liability for isolated individual rapes or on the basis of entirely hearsay accounts. What the Commission has done is look for clear and convincing evidence of several rapes in specific geographic areas under specific circumstances.

39. Perhaps not surprisingly, the Commission has found such evidence, in the form of un rebutted *prima facie* cases, in the Central Front regions where large numbers of opposing troops were in closest proximity to civilian populations (disproportionately women, children and the elderly) for the longest periods of time—namely, Irob Wereda in Ethiopia and Senafe Town in Eritrea. Knowing, as they must, that such areas pose the greatest risk of opportunistic sexual violence by troops, Ethiopia and Eritrea were obligated to impose effective measures, as required by international humanitarian law, to prevent rape of civilian women. The clear and convincing evidence of several incidents of rape in these areas shows that, at a minimum, they failed to do so.

²⁸ Partial Award in Ethiopia’s Claim 4, *supra* note 4, at para. 54; Partial Award in Eritrea’s Claim 17, *supra* note 4, at para. 56.

40. For other areas along the Central Front, although there was evidence of occasional rape (deserving of at least criminal investigation), the Commission did not find sufficient evidence on which to find either government liable for failing to protect civilian women from rape by its troops.

E. Mereb Lekhe Wereda

41. Mereb Lekhe is at the western end of the Central Front, separated from Eritrea by the Mereb River. In 1998, it was primarily an agricultural wereda. The wereda and its principal town, Rama, are traversed by a north-south road crossing the international boundary, one of the few such roads connecting the two countries. Ethiopia's claims with respect to this wereda are based on allegations of physical and mental abuse of the civilian inhabitants of the wereda, the abduction of some civilians, indiscriminate shelling, indiscriminate placement of land mines, looting and unlawful destruction of private and public property, destruction of objects indispensable to the survival of the civilian population, and unlawful damage to environmental resources. Ethiopia also asserts that these alleged unlawful actions for which Eritrea is responsible resulted in the displacement of approximately 50,000 residents of the wereda and that Eritrea should consequently be liable for such displacement.

42. Eritrea did not present a detailed factual rebuttal of Ethiopia's evidence regarding Mereb Lekhe Wereda, or indeed of the evidence relevant to the other weredas of the Central Front. Eritrea contended that the factual allegations in Ethiopia's numerous witness declarations were characteristically vague and general. It asserted that many narratives did not involve events or injuries showing any violation of international law and that much of Ethiopia's evidence failed to relate the events described to the armed conflict itself. In view of these perceived deficiencies in Ethiopia's evidence, Eritrea contended that it had "no case to answer." While there is merit in some of these arguments, the Commission nevertheless has found that the evidence was sufficient to show liability for some violations of international law.

43. The evidence presented by Ethiopia in the form of witness declarations by residents of villages near the Mereb River shows that, beginning in mid-May 1998, Eritrean armed forces crossed the river at a number of places. It appears that many if not most of the inhabitants fled their villages at the approach of the Eritrean forces, often taking refuge in caves that were some hours walk from the villages. The evidence demonstrates that some casualties were incurred by the Ethiopian civilians during these events, both from Eritrean artillery fire and from direct small-arms fire. It appears that no significant Ethiopian armed forces were present where and when these crossings occurred, although there was occasional resistance by a few Ethiopian militia members and police in some villages. Usually the militia members, who apparently had no weapons other than individual small arms, fled with the civilians.

44. The un rebutted witness declarations contain several credible reports of the intentional killing of Ethiopian civilians by Eritrean soldiers in circumstances where it should have been clear that these persons were not lawful targets. Some of these incidents occurred while civilians were fleeing their villages and in other cases while herding cattle which the Eritrean soldiers took, often herding the animals to places north of the river. For example, witness declarations, including one from a victim, described in detail an incident in which Eritrean soldiers shot two shepherd boys who were herding cattle in May Wedi Amberay Kebele in January 1999. One boy was killed with a shot to the head and the other was wounded. When two village elders demanded return of the cattle, they were taken to Eritrea and returned three months later with signs of serious physical abuse.

45. There is considerable evidence of looting by Eritrean soldiers and the related destruction of homes, farming equipment, crops and other property. There is also evidence that a few residents of the wereda were taken to Eritrea. Some of these persons later returned to the wereda and reported that they had been interrogated concerning the positions of Ethiopian armed forces and had been beaten during their captivity. Others are reported simply as not having been seen again in Ethiopia.

46. The evidence shows that these incursions into Ethiopian administered territory were often accompanied by shelling. In addition, the occasional shelling of inland areas at a distance from the front lines, including towns (such as Rama), smaller villages and even camps for displaced persons (such as the Setato IDP camp), or areas containing large numbers of displaced persons (such as the vicinity of the Enguya River) continued until the Ethiopian offensive in May of 2000 drove into Eritrea and made such shelling impossible. When the Eritrean forces withdrew, mine fields that they had laid were left behind. Until the mines in those fields could be found and either be removed or destroyed, they endangered returning Ethiopians and their domestic animals. Innocent lives continued to be lost to these blind weapons long after the forces that had laid them had gone.

47. The Commission recognizes that these military operations by Eritrea resulted in substantial numbers of Ethiopian civilians suffering prolonged danger, deprivation and sometimes injury or death, first, while fleeing under fire, second, as displaced persons in caves and camps and, finally, from the presence of land mines when eventually they were able to return to their villages. Nevertheless, the evidence is inadequate for the Commission to hold that either the shelling or the placement of land mines was unlawful on grounds that they targeted civilians or were indiscriminate. Certainly there is evidence that civilian residences and places where displaced persons were housed suffered from Eritrean shelling. With respect to all Eritrean shelling of inland targets, and particularly in the vicinity of IDP camps or other concentrations of IDPs, the Commission is concerned about civilian casualties, but it lacks evidence with respect to targeting and with respect to the location of the places

at risk and of legitimate targets sufficient to show that such shelling was either targeted at unlawful targets or was indiscriminate.

48. With respect to the shelling that accompanied the initial infantry attacks, the legal question is a difficult one. Normally the intentional shelling of an undefended town open for occupation by the attacking forces would be unlawful.²⁹ In a 1976 amendment to the United States Army Field Manual, entitled "The Law of Land Warfare," Article 25 of the Hague Regulations is interpreted as follows:

An undefended place, within the meaning of Article 25 HR, is any inhabited place near or in a zone where opposing armed forces are in contact which is open for occupation by an adverse party without resistance. In order to be considered as undefended, the following conditions should be fulfilled:

- (1) Armed forces and all other combatants, as well as mobile weapons and mobile military equipment, must have been evacuated, or otherwise neutralized;
- (2) No hostile use shall be made of fixed military installations or establishments;
- (3) No acts of warfare shall be committed by the authorities or by the population; and,
- (4) No activities in support of military operations shall be undertaken.³⁰

49. However, in the present case, it has not been shown that the Eritrean armed forces had reason to believe that any of the villages was undefended at the time they and the surrounding areas were attacked. Indeed, the evidence indicated that, in some cases, there was at least some local resistance by militia and police. Certainly there is no indication that Ethiopia had declared that these towns were undefended, and the Commission was told that the armed forces of both Parties apparently followed military doctrine derived from the former Soviet Union which emphasized the importance of preparing for and supporting infantry attacks by artillery fire whenever there seemed to be the possibility of resistance.

50. With respect to land mines, the evidence suggests that here, and in the other weredas, they were placed in front of Eritrea's fixed positions as a defensive measure, which is the type of use that has been common and permissible under customary international law. While the Eritrean forces remained in those positions, reasonable precautions, such as fences or warning signs, would have been required to protect civilians remaining in the area wherever they were at risk of entering those defensive mine fields. The Commission has no evidence concerning whether such precautions were taken. Instead, the claims before it involve injuries and damage caused by anti-personnel land-

²⁹ Hague Regulations, *supra* note 9, at art. 25.

³⁰ U.S. Dep't of Army, *Law of Land Warfare* (Field Manual No. 27-10, 1956, rev. 1976), at para. 39(b) [hereinafter Field Manual].

mines left behind when Eritrean forces withdrew from their positions, often at the time of the Ethiopian offensive of May 2000. When troops are compelled to quit their defensive positions by force of arms, as occurred then, it is understandable that they may be unable to remove or otherwise neutralize their mine fields. On the contrary, they may depend on those mine fields to slow their attackers or to channel their attacks sufficiently to allow defense and escape.

51. Thus, while the evidence in the present case does not permit the Commission to hold that Eritrea acted unlawfully with respect to its use of land mines in Mereb Lekhe Wereda, the continuing dangers they represented to returning Ethiopian civilians were serious. The risk posed to civilians from even lawful defensive uses of landmines demonstrates the importance of the rapid development in recent years of new international conventions aimed at restricting and even prohibiting all future use of anti-personnel land mines.³¹

52. On the other hand, the witness declarations provided by Ethiopia are adequate to establish a *prima facie* case that Eritrea, as the Occupying Power, permitted Eritrean military personnel to engage in the frequent physical abuse of civilians by means of intentional killings, beatings and abductions in the areas of the wereda occupied by Eritrean armed forces near the Mereb River and permitted widespread looting and property destruction in those areas. While Eritrea generally denies these claims by Ethiopia, it has provided little evidence to support that defense. Consequently, Eritrea is liable for permitting the frequent physical abuse and abduction of civilians and widespread looting and property destruction in the areas of Mereb Lekhe Wereda that were occupied by its armed forces during such time as such occupation continued in each of those areas from May 1998 until May 2000.

53. All other Ethiopian claims based upon alleged unlawful actions attributable to Eritrea in this wereda are dismissed for lack of proof. The evidence of damage to objects indispensable to the survival of the civilian population and to environmental resources fell far short of that required to establish liability. To the extent that Ethiopia also claims in this proceeding for civilian displacement in any wereda, such claim is dismissed for failure to allege or establish a breach of international law. The flight of civilians from the perceived danger of hostilities is a common, and often tragic, occurrence in warfare, but it does not, as such, give rise to liability under international humanitarian law. While Protocol I prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population,”³²

³¹ See Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, *supra* note 12; Protocol II of 1980, *supra* note 13; Protocol II of 1980, as amended at Geneva, May 3, 1996, *supra* note 14; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, *supra* note 15.

³² Protocol I, *supra* note 11, at art. 51.

it implicitly recognizes that civilians may, nevertheless, be terrorized because of the hostilities. Moreover, Ethiopia does not allege or prove that Eritrea deliberately tried to cause the civilian inhabitants of the wereda to flee by terrorizing them, let alone that spreading terror was the primary purpose of its acts during its invasion and occupation.

F. Ahferom Wereda

54. Ethiopia claims for the same types of alleged unlawful actions in Ahferom Wereda as it did in Mereb Lekhe Wereda. Eritrean armed forces entered the wereda in mid-May 1998 in the same way, accompanied by artillery shelling, the occupation of some areas, and the establishment of a zone in which artillery and patrolling operations were carried out on the Ethiopian side of the Eritrean lines. The evidence indicates that many, if not most, of the civilian population fled their homes in the areas occupied by Eritrean forces and in the areas nearby that were affected by Eritrean shelling or other military activities. Ethiopia's estimate of displaced persons in the wereda is 38,900.

55. Again, Eritrea did not present a detailed factual rebuttal of Ethiopia's evidence. Instead, Eritrea contended that Ethiopia's witness declarations were too imprecise and contained too little information relating allegations to the ongoing military operations to permit legal analysis. Accordingly, Eritrea felt that it had "no case to answer." Nevertheless, the Commission finds that the evidence is sufficiently clear and convincing to establish a *prima facie* case of several types of significant violations of international humanitarian law.

56. There is clear and convincing evidence that those fleeing from the Eritrean forces suffered not only from the shelling, but also from Eritrean small-arms fire aimed at them or indiscriminately fired in their direction. Some persons who were tending cattle were shot by Eritrean troops who took the cattle.

57. The evidence also demonstrates that many of the civilians who chose not to flee were physically abused by being beaten and, in some cases, by being taken to Eritrea for interrogation and imprisonment. Most of this evidence relates to the first days and weeks of the invasion, but there is some evidence of physical abuse at later dates. The evidence is also adequate to show that Eritrean forces engaged in frequent destruction of property and looting of useful animals, materials and other property. Witnesses describe bulldozers being used to destroy stone houses and heavy trucks being used to transport seized building materials. Others describe seeing their houses and crops being burned by Eritrean troops.

58. As in Mereb Lekhe Wereda, those who fled often report seeing deaths and injuries caused by shelling. Understandably, to the victims of shelling, it seemed that they or their camps were the targets or, at least, that the shelling was indiscriminate, but the evidence is inadequate to establish clearly and convincingly that such shelling was unlawful, either by being aimed at

unlawful targets or by being indiscriminate. Similarly, while the evidence demonstrates that land mines placed by Eritrean armed forces constituted a serious danger to returning Ethiopian civilians after the Eritrean forces were expelled from the wereda, the evidence does not show that those land mines had been placed unlawfully.

59. Consequently, the Commission finds Eritrea liable for permitting the frequent physical abuse of civilians in the wereda by means of intentional killings, killings and woundings caused by indiscriminate small-arms fire, beatings, abductions and widespread looting and property destruction in the wereda. All other Ethiopian claims based upon alleged unlawful actions attributable to Eritrea in this wereda are dismissed for lack of proof.

G. Gulomakheda Wereda

60. This wereda includes the significant border town of Zalambessa, which had served as a major communications and transport link between Eritrea and Ethiopia before the conflict. It was the northernmost point in Ethiopia on the main road connecting Addis Ababa with Asmara. Before the war, it was a growing community that played an important role in cross-border trade. It was the home of an Ethiopian customs post and other facilities supporting trade and commerce. Zalambessa suffered almost complete destruction during the war, and the issue of liability for such destruction and related looting will be dealt with separately from the rest of the wereda. Other liability issues, however, will be dealt with here, including both claims arising in Zalambessa and elsewhere in the wereda.

61. Eritrean armed forces entered the wereda in early June 1998 and established trench lines a few kilometers south of Zalambessa and an area of military operations beyond them, as in the other weredas. Of the total population of the wereda (claimed by Ethiopia to have been approximately 600,000), Ethiopia estimates that approximately 85,000 were displaced by mid-1999. Ethiopia claims for the same types of alleged unlawful actions in Gulomakheda Wereda as it did in the Mereb Lekhe and Ahferom Weredas, but it adds claims for forced labor, mental abuse and for the deportation of civilians to Eritrea.

62. The evidence is adequate for the Commission to find that Eritrea is liable for permitting frequent physical abuse of civilians during its invasion in June 1998, primarily in the form of aimed or indiscriminate small-arms fire, beatings and abductions. Some of these beatings appear to have been part of an effort by the Eritrean troops to obtain information about the location of Ethiopian armed forces and the identification of residents who might have been soldiers or members of the militia. The declarations of witnesses describe gratuitous and often brutal beatings, including of elders and women, often in public, and extended or repeated beatings that sometimes resulted in the death of the victims. The evidence of beatings and killings indicates that the majority

occurred in the first days and weeks of the invasion, although there is adequate evidence of abuse throughout the two years of the Eritrean occupation of substantial parts of the wereda. Although the accounts of intentional killing of Ethiopian civilians by Eritrean soldiers did not come from eyewitnesses, they were nonetheless credible as the witnesses described hearing shots, running to the fields, finding a shepherd or farmer shot, and observing uniformed Eritrean soldiers driving away livestock. A significant number of witnesses also credibly reported frequent abductions of named civilians during the first few days of the invasion, probably for intelligence purposes, and they assert that most of those abducted remain unaccounted for.

63. In comparison, the evidence does not support a finding of unlawful mental abuse of civilians in the wereda. At most, the evidence shows that Eritrean forces routinely insulted and humiliated Ethiopian civilians and occasionally threatened violence in the course of seeking military information from civilians. While such behavior cannot be condoned, it does not constitute unlawful mental abuse.

64. Turning to property damage, the evidence—much from eyewitnesses—is also adequate to find Eritrea liable for permitting frequent looting and destruction of civilian property, including burning and knocking down houses.

65. With respect to Ethiopia's claim of forced labor, some fourteen declarants described being forced to labor for the Eritrean armed forces for short periods. The types of work reported included burying bodies, digging trenches, carrying lumber, stones, or ammunition to the front, cutting trees and carrying looted property. None of these witnesses indicates that he received any pay for that labor, and, even more disturbingly, several assert that any person who resisted performing the labor was beaten. While Geneva Convention IV permits Occupying Powers to requisition labor, it requires fair pay and work proportionate to individuals' capacities. It also prohibits the Occupying Power from compelling protected persons to do work that would "involve them in the obligation of taking part in military operations."³³ In this regard, the U.S. Army Field Manual referred to earlier states:

The prohibition against forcing inhabitants to take part in military operations against their own country precludes requisitioning their services upon works directly promoting the ends of the war, such as construction of fortifications, entrenchments, and military airfields or the transportation of supplies or ammunition in the zone of operations.³⁴

66. While this labor is disturbing, particularly because of the brutality involved and the unlawful nature of some of the labor, it appears to have taken place only during the early days of the occupation, and consequently was

³³ Geneva Convention IV, *supra* note 6, at art. 51.

³⁴ Field Manual, *supra* note 30, at para. 419.

neither frequent nor pervasive. Consequently, this evidence does not justify a finding of liability under the standards applied by the Commission.

67. The claim for deportation relates primarily to evidence that thousands of residents of Gulomakheda Wereda, including all the residents of Zalambessa who remained there after the invasion, were compelled in early 1999 to leave their homes and go to displaced persons camps in Eritrea. Article 49 of Geneva Convention IV provides, in part, as follows:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power. . . . are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement.

68. Eritrea argues that the increased risks to inhabitants from Ethiopian artillery fire by February 1999 justified their mass relocation to IDP camps and, for material reasons, such camps had to be in Eritrea. While those risks are difficult for the Commission to evaluate on the basis of the evidence presented, it seems clear that any evacuation would have to be to a camp in Eritrea, and the Commission accepts that argument. Consequently, the claim for deportation in violation of Article 49 is dismissed.

69. Ethiopia also asserts that the conditions at these IDP camps in Eritrea, in particular Hambokha, were unlawfully harsh. There were isolated and undetailed allegations of physical torture. The evidence certainly suggests that conditions there were difficult, even grim, but the evidence falls short of proving a pattern of abuse or of conditions that were unlawful.

70. Consequently, the Commission finds Eritrea liable for permitting frequent physical abuse of civilians in Gulomakheda Wereda, including intentional killing, beating and abduction of civilians, during its invasion in June 1998 and less frequent, but recurring, physical abuse of civilians in the wereda during the next two years. The Commission also finds Eritrea liable for permitting frequent looting and destruction of property in the wereda during its occupation. Ethiopia's claim for unlawful deportation is dismissed, as the Commission accepts Eritrea's explanation as consistent with the requirements of the law. All other claims by Ethiopia relating to Gulomakheda Wereda, aside from those for looting and property destruction in Zalambessa, which are dealt with *infra*, are dismissed for lack of proof.

H. Zalambessa—Looting and Property Destruction

71. Throughout the proceedings, both Parties devoted much attention to the question of which side was responsible for the enormous damage inflict-

ed on the town of Zalambessa. Prior to the war, Zalambessa was a thriving town of approximately seven to ten thousand inhabitants, both Ethiopian and Eritrean, and it had close to 1,400 buildings. When it was recaptured by Ethiopian armed forces in May 2000, scarcely a single building remained intact. The aerial and ground level photographs submitted by the Parties provide graphic evidence of the extensive destruction suffered by the town. Virtually every building is missing a roof (except for some temporary plastic sheets), and most miss at least one wall, often that closest to the street. Ethiopia claims that the destruction was caused almost entirely by Eritrea, whose troops, it alleges, looted everything of value and then destroyed all structures by the use of bulldozers, explosives or fire. Eritrea denies that claim and alleges that the town was destroyed largely by Ethiopian artillery fire during the nearly two years that it was occupied by Eritrea.

72. In addition to the photographs, both Parties provided evidence in the form of testimony by residents and military officers, as well as by experts who examined the ruins or, in the case of Eritrea's expert, photographs of the ruins. Both Parties agreed that Zalambessa suffered some combat damage when it was taken by Eritrea in June 1998 and then retaken by Ethiopia in May 2000, but the extent of such combat damage was not established. With respect to what happened during the nearly two years between those events, the Parties differed sharply. Eritrea alleged that Zalambessa was shelled frequently and heavily by Ethiopia, and that this shelling was largely responsible for the extensive damage to the town. Eritrea submitted copies of Eritrean military documents that it asserted demonstrate a very heavy volume of Ethiopian shelling. Ethiopia denied that it shelled Zalambessa during that period, except for a few occasions when it tried to destroy bulldozers that, it alleged, were being used to destroy buildings in the town. Ethiopia supported its assertions with testimony by some of its officers who observed Zalambessa from a high vantage point several kilometers distant and by attacking the credibility of the Eritrean shelling reports. Ethiopia also provided witness declarations by residents of Zalambessa who asserted that they witnessed Eritrean troops looting buildings and destroying the looted structures, particularly after the successful Ethiopian attacks on the Western Front in early 1999 ("Operation Sunset"). Virtually all residents were compelled by Eritrea to leave Zalambessa in February 1999, although several of those residents reported things observed in later months during visits to the town.

73. After careful consideration of all relevant evidence, the Commission has reached the following conclusions:

- (1) The evidence shows that essentially nothing of value remained in the town by May 2000. Moveable property, roofing materials and other usable building materials had virtually all been looted. The witness evidence assigning responsibility for this looting to Eritrean personnel during the nearly two years of occupation is essentially un rebutted. Accordingly,

Eritrea, which was in control of the town throughout this period, is liable for the looting of Zalambessa.

(2) Eritrea's allegations of massive and sustained Ethiopian artillery fire into Zalambessa are not proven. The Commission is skeptical of the military documents submitted by Eritrea on this issue. The volumes and types of fire cited in the military documents submitted by Eritrea appear unrealistic given the quantities of weapons and ammunition likely available, and the format, dating and numbering of the documents raise further doubts.

(3) The Commission is also skeptical of Ethiopia's assertions that, during the nearly two years of Eritrea's occupation of Zalambessa, it fired artillery into Zalambessa only on a few occasions when it tried to prevent bulldozers from destroying buildings. Zalambessa's location and the cover and concealment offered by its buildings made the town an obvious location for Eritrean headquarters and support units. The topography also indicates that many of the supplies for the Eritrean forces to the south would probably have passed through the town. It is improbable that Ethiopian interdiction fire would never have been used against that route or would have been limited entirely to points that were outside of the town.

(4) Accordingly, some destruction of structures within Zalambessa must be ascribed to lawful combat damage. However, the Commission's inspection of the extensive evidence before it, particularly the photographic evidence showing a recurring pattern of collapse of the front walls of buildings, convinces it that the bulk of that destruction is ascribable to deliberate actions by Eritrea, including widespread use of bulldozers. Such destruction was unlawful, except as "rendered absolutely necessary by military operations."³⁵ Eritrea has neither alleged nor proved such necessity. While some structures were destroyed during the period from July 1998 until February 1999, the majority of the destruction took place after February 1999, that is, following Ethiopia's military advances in Operation Sunset.

(5) Given the limitations and conflicts in the evidence and the inherent uncertainty involved, the Commission cannot be certain of the precise percentage of the total property destruction resulting from deliberate actions by Eritrea. However, based upon its study of the evidence, including photographs, the Commission concludes that Eritrea's actions were the predominant cause of damage, and assigns it responsibility for seventy-five percent.

(6) Consequently, Eritrea is liable for one hundred percent of the property looted in Zalambessa and seventy-five percent of the physical damage to structures and infrastructure in the town.

³⁵ Geneva Convention IV, *supra* note 6, at art. 53.

I. Irob Wereda

74. General. Irob Wereda is at the eastern end of the Central Front. Much of the affected area is high, rugged and sparse, and there are few substantial towns. Before hostilities began in May 1998, the population was estimated to be 18,000.

75. Two factors complicated these claims. First, elsewhere on the Central Front, the front lines often roughly paralleled and lay close to what both Parties viewed as the international boundary. Consequently, Eritrean forces were either concentrated inside Eritrea or occupied relatively narrow areas in Ethiopia, sometimes only for limited periods. Irob was different. Eritrean forces were continuously present in large areas for about two years. As a result, Eritrean forces and the civilian population were in regular contact over a long period, giving rise to many allegations of serious incidents and abuses.

76. Second, sovereignty over large portions of Irob Wereda was disputed. The final award of the Boundary Commission placed in Eritrea substantial areas in northwest Irob that were claimed and administered by Ethiopia when the war began. Many claims alleged by Ethiopia arose in these areas.

77. At the hearing, Eritrea argued that the Commission should not address such claims in the context of the Central Front claims, for various reasons. *Inter alia*, it contended that the alleged offenses involved interactions between Eritrean forces and Eritrean nationals, and hence were outside the Commission's jurisdiction. It was also urged that, because the Boundary Commission determined the territory to be Eritrean, it could not be subject to belligerent occupation by Eritrea's own forces.

78. The Commission's response to such arguments was noted *supra* at paragraphs 27-31 in its summary of events on the Central Front. The Commission does not agree that persons should be denied the protections of international humanitarian law because of disputes between the Parties to an international conflict regarding sovereignty over the territory concerned.

79. Eritrea put in little evidence specifically addressing these claims. As with all of Ethiopia's wereda claims, Eritrea contended that Ethiopia's allegations and evidence were too unfocused, and provided too little information regarding the surrounding military conflict, to require or even permit an answer. Hence, Eritrea maintained it had "no claim to answer."

80. The Commission agrees that the evidence supporting several of Ethiopia's claims is insufficient to establish liability. However, as to several important claims, the Commission finds clear, compelling and un rebutted evidence showing patterns of serious misconduct by Eritrean forces. This evidence includes multiple allegations implicating named Eritrean officers.

81. Claims of Physical and Mental Abuse. The evidence shows frequent friction between occupied and occupiers in the occupied areas of Irob Wereda, including frequent insults and verbal abuse. There is no doubt that the situa-

tion was psychologically painful and difficult for many. However, the evidence is not sufficient to permit the Commission to make findings of liability for non-violent harassment and verbal abuse.

82. Of much greater concern are numerous accounts in Ethiopia's evidence of acts of violence by Eritrean forces against civilians. Many accounts, including eyewitness accounts, described frequent beatings of civilians by soldiers, often resulting in substantial injuries. More than a dozen accounts refer to intentional killings of civilians by soldiers unrelated to combat. Most of these deaths involved intentional shootings; others resulted from beatings. Many of these declarants claim to have been eyewitnesses. Some accounts converge; two describe the killing of a named civilian in Ayega shot in the back while carrying a beehive. The Commission believes that this unrebutted evidence is sufficient to establish a recurring pattern of excessive violence by Eritrean soldiers against civilians, including frequent beatings and deliberate killings.

83. Rape. Ethiopia presented detailed and cumulative evidence of several rapes by Eritrean soldiers of Ethiopian civilian women in Irob Wereda, in particular in Endalgeda Kebele. The Tigray Women's Association registered twenty-six rape victims in Irob Wereda, which was corroborated in a general manner by the declaration of a government official in Irob Wereda who estimated, on the basis of discussions with women and their families, that thirty-five women were raped by Eritrean troops. One declarant from Enguraela Kushet, Engaldeda Kebele, testified that he knew eleven women who were raped by Eritrean soldiers in the first week of the invasion in 1998; another testified to eleven rape victims from the same kushet bearing children and described the practice of Eritrean soldiers going door-to-door selecting women to take away. Several clergymen identified both rape victims and Eritrean military perpetrators by name. One priest described complaining, futilely, to Eritrean commanders about three specific Eritrean soldiers.

84. The Commission finds this specific evidence, with cumulative general declarations about unreported, opportunistic rape by Eritrean soldiers, sufficient to support an Ethiopian *prima facie* case. Eritrea effectively left this case unrebutted. Accordingly, the Commission finds Eritrea liable for failure to take effective measures to prevent rape by its soldiers of Ethiopian civilian women during Eritrea's invasion and occupation of Irob Wereda.

85. Abduction Claims. Numerous unrebutted declarations referred to individuals taken into custody by Eritrean soldiers who did not return. Missing individuals (and those said to be responsible) often were identified

by name.³⁶ Many were taken into custody soon after Eritrean troops arrived, but abductions are reported throughout the years of occupation. Some declarants described the disappearance³⁷ of civic leaders and other important people. Others referred to the detention of older men knowledgeable about the area. Some reported young women being taken away.

86. The un rebutted evidence is sufficient to establish a pattern of serious misconduct by Eritrean forces involving the detention and subsequent failure to release or provide information regarding the whereabouts of numerous civilians.

87. Mistreatment During Captivity. Other detained civilians were released, sometimes after relatively short periods of confinement. However, the evidence indicates that prisoners, including many detained for just a few days, were commonly subjected to mistreatment, often including severe beatings.

88. Multiple declarations describe individuals or groups who were detained, severely beaten, and then released, often with scars and bruises, sometimes with permanent injuries. The evidence rarely indicates why these people were detained or other relevant circumstances, and the Commission can make no finding regarding the lawfulness of their detention. However, the recurring, un rebutted declarations indicate a regular pattern of frequent severe beating and other physical abuse of civilians taken into custody.

89. Forced Labor. Article 51 of Geneva Convention IV indicates that civilians can be required to labor on behalf of the military forces of an occupying power, but only if compensated and only “on work which is necessary . . . for the need of the army of occupation.” Work supporting military operations is prohibited.

90. Allegations of forced labor in the Irob evidence were far less frequent than claims of physical abuse. Counsel for Ethiopia referred to ten declarations said to show forced labor contrary to international humanitarian law. However, the cited references are brief and provide little detail. A few refer to civilians being made to carry ammunition and other military supplies, particularly in the initial days following the invasion, but these are not sufficient to show a general pattern of prohibited behavior. Weighed in the aggregate, the evidence is not sufficient to show that uncompensated forced labor, or forced labor for prohibited purposes, characterized the occupation to the extent required for the Commission to find liability.

³⁶ Various declarations implicate a Colonel Shifa in these and other events. Two hold him responsible for fifty abductions. Another accused Shifa and named subordinates of abducting people in the night, claiming that Shifa took him and others to a place where they were forced to work on a road and/or were severely beaten. Another alleged that officers under Col. Shifa's command committed rapes and were not punished.

³⁷ In using the term “disappearance,” the Commission does not mean to imply that the missing individuals were killed while in custody. It received no evidence supporting such a finding. The Commission simply has no knowledge regarding the missing persons' whereabouts or fate.

91. Camp Conditions. In addition to its allegations regarding the disappearance and mistreatment of civilians held as prisoners, Ethiopia alleges that numerous civilians were forcibly interned under substandard conditions, particularly in a camp at Mekheta in Irob Wereda and at Hambokha camp near Senafe, Eritrea. Claims concerning Hambokha are dealt with *supra* at paragraph 69. Ethiopia's declarations include descriptions of harsh camp conditions.

92. While there is no doubt that conditions at Mekheta were harsh and difficult, the evidence is not sufficient to sustain a Commission finding that persons were unlawfully held there or that the camp failed to meet international standards.

93. Indiscriminate Shelling. As in the other weredas, Ethiopia referred extensively to Eritrea's use of artillery, both at the time of the initial invasion and subsequently, to shell adjoining areas. However, legal analysis of these claims is possible only if they can be related to ongoing military operations. The available evidence did not give the Commission sufficient basis to assess whether artillery fire during the invasion or subsequently intentionally targeted civilian objects, was indiscriminate or otherwise violated international humanitarian law rules.

94. While some declarations alleged shelling of locations where there was no armed resistance, others frequently refer to the presence of armed militia. Several refer to successful local defense by the militia; some describe situations where artillery was used only after the militia successfully turned back initial Eritrean attacks. There are also declarations claiming that there were no Ethiopian forces in an area, but also indicating that there were Eritrean casualties there. These claims must be dismissed for failure of proof.

95. Landmines. As with other weredas, the evidence indicates that Eritrea made extensive use of anti-personnel landmines, but it does not demonstrate a pattern of their unlawful use. For liability, the Commission would have to conclude that landmines were used in ways that intentionally targeted civilians or were indiscriminate. However, the available evidence suggests that landmines were extensively used as part of the defenses of Eritrea's trenches and field fortifications. Thus, the declarations citing landmine use also frequently refer to the presence of Eritrean trenches in the area/kushet concerned. In principle, the defensive use of minefields to protect trenches would be a lawful use under customary international law.

96. Looting. Ethiopia alleges, and the evidence confirmed, frequent and widespread acts of theft and destruction of civilian personal property by Eritrean forces during the occupation.

97. There are numerous un rebutted accounts of widespread thefts by Eritrean soldiers of livestock, the most common and important form of wealth in rural Irob. Numerous declarations describe Eritrean forces seizing large numbers of animals. Eritrean soldiers are described slaughtering and feasting on civilians' sheep and goats; other accounts tell of stolen livestock being col-

lected and herded back to Eritrean rear areas. The Commission encountered only one reference to Eritrean soldiers ever paying for livestock.

98. There were fewer allegations of thefts of sewing machines and other household goods by Eritrean soldiers while civilians remained in their homes. However, the many civilians who left their homes, either fleeing behind Ethiopian lines or being placed in IDP camps, commonly returned to areas previously controlled by Eritrean forces to find all of their property looted, including doors, windows and other recyclable house parts.

99. The evidence also demonstrated frequent and widespread acts of theft and destruction of public and community property in Irob, involving notably churches, schools and governmental offices. Much of this also occurred while the civilian population was absent at Hambokha Camp or other locations away from their homes. However, it occurred while Eritrea was the Occupying Power of the area and was responsible for maintaining public order. Accordingly, the Commission believes it is appropriate to find Eritrea liable for these losses.

100. Other Claims. The evidence is not sufficient to establish liability concerning several other types of claims asserted by Ethiopia. There is insufficient evidence to establish a pattern of conduct by Eritrean forces involving the unlawful transfer of civilians to Eritrea, forcible adoption of Eritrean nationality, or the destruction of objects indispensable for the welfare of the civilian population. The allegations and evidence of destruction of environmental resources also fall well below the standard of widespread and long-lasting environmental damage required for liability under international humanitarian law.

J. Aerial Bombardment of Mekele

101. On June 5, 1998, Ethiopia and Eritrea exchanged air strikes, Ethiopia attacking the Asmara airport and Eritrea attacking the Mekele airport. Each accuses the other of striking first, but that is a question the Commission need not address, because both airports housed military aircraft and were unquestionably legitimate military objectives under international humanitarian law. Ethiopia's claim in the present case is based not upon deaths, wounds and damage at the Mekele airport, but upon the fact that Eritrean aircraft also dropped cluster bombs that killed and wounded civilians and damaged property in the vicinity of the Ayder School and the surrounding neighborhood in Mekele town. Ethiopia states that those bombs killed fifty-three civilians, including twelve school children, and wounded 185 civilians, including forty-two school children.

102. Ethiopia alleges that Eritrea intentionally targeted this civilian neighborhood in violation of international law. Eritrea vigorously denies this allegation. While Eritrea acknowledges that one of its aircraft did drop cluster bombs in the vicinity of the Ayder School, it contends that this was an acci-

dent incidental to legitimate military operations, not a deliberate attack, and consequently not a basis for liability.

103. For the purposes of the present Award, the Commission focuses on the rather limited key facts and pieces of evidence. First, some important facts are agreed between the Parties and may be summarized as follows:

(1) Eritrea sent four separate single aircraft sorties to Mekele. The aircraft were Italian-made MB-339's, each flown by a single pilot. These aircraft allegedly had computerized aiming systems that are designed to release bombs at the proper time to hit a target when the pilot sees it aligned with a "heads up" display in the cockpit and pushes a bomb release switch.

(2) The first sortie had no bombs and strafed the airport at about 2:45 p.m., causing some casualties and damage. The following three sorties were armed with cluster bombs.

(3) The second sortie dropped cluster bombs on or near the airport runway at about 3:30 p.m.

(4) The third sortie dropped its two cluster bombs over the Ayder School and neighborhood at about 5:00 p.m.

(5) The Ayder School and neighborhood are located within the town of Mekele, on its northwest side; the Mekele airport is located approximately seven kilometers from Ayder on high ground outside the town to the southeast.

(6) Eritrea had instructed the pilots of all four sorties to follow a flight path that brought them to the airport from the west so that the sun would be behind them and they would be more difficult to see. (This was also a normal approach to the airport for civilian aircraft.) This approach took them directly over densely populated residential areas of Mekele city.

104. Other important facts are not agreed, and the Commission must decide those facts necessary to resolve this claim. The central disputed issue is whether there was one bombing attack that hit the Ayder School area, as Eritrea admits, or two, as contended by Ethiopia.

105. Eritrea asserts that the third sortie was instructed to attack Ethiopian anti-aircraft defenses northwest of the airfield and at least four kilometers from the Ayder neighborhood and that the bomb release computer had been set accordingly. Eritrea states that the pilot of the third sortie said that he had succeeded in hitting his target. Eritrea also asserts that the pilot of the fourth sortie was instructed to attack the airport and that his bomb release computer had been set accordingly. Eritrea states that the pilot of the fourth sortie, which was over Mekele at about 6:00 p.m., said that he had succeeded in hitting his target. Ethiopia asserts, to the contrary, that the fourth sortie did not drop a bomb on the airport and dropped at least one cluster bomb on the same Ayder neighborhood as the third sortie; and Ethiopia argues that, given the extreme odds against two errors resulting in bombing the same place, the Commission

must conclude that the Ayder School and neighborhood were deliberate and unlawful targets of those two sorties.

106. Eritrea denies that the fourth sortie dropped a bomb on the Ayder neighborhood. It pointed out that it had no reasons to target civilians and that it had strong reasons to target the Mekele airport, because Ethiopia's stronger air force, operating from there, might be able to put Asmara airport—which it says was its only airport—out of commission.

107. After carefully considering all the evidence, the Commission concludes that the fourth sortie dropped at least one cluster bomb on the Ayder neighborhood and that there is no evidence that it dropped any bomb on or near Mekele airport. There is compelling testimony by witnesses placing the strikes one hour apart, including testimony before the Commission by a witness to the first bombing who became an injured victim of the second. This testimony is consistent with video evidence, hospital records and a Reuters article dated June 5 by journalists in Mekele that day that refers specifically to a bombing in the town at dusk as well as one earlier in the afternoon.

108. Consequently, the Commission holds that Eritrea's four sorties resulted in two strikes hitting Mekele airport and two strikes hitting the Ayder neighborhood in Mekele. Nevertheless, the Commission is not prepared to draw the conclusion urged by Ethiopia, as it is not convinced that Eritrea deliberately targeted a civilian neighborhood. Eritrea had obvious and compelling reasons to concentrate its limited air assets on Ethiopia's air fighting capability—its combat aircraft and the Mekele airport, which was within twenty to twenty-five minutes' flight time from Asmara. Moreover, it is not credible that Eritrea would see advantage in setting the precedent of targeting civilians, given Ethiopia's apparent air superiority.

109. The Commission acknowledges the long odds against two consecutive sorties making precisely the same targeting error, particularly in view of Eritrea's representation that the two aircraft's computers were programmed for two different targets. However, the Commission must also take into account the evidence that Eritrea had little experience with these weapons and that the individual programmers and pilots were utterly inexperienced, and it recognizes the possibility that, in the confusion and excitement of June 5, both computers could have been loaded with the same inaccurate targeting data. It also recognizes that the pilots could reprogram or could drop their bombs without reliance on the computer. For example, it is conceivable that the pilot of the third sortie simply released too early through either computer or human error or in an effort to avoid anti-aircraft fire that the pilots of the previous sorties had reported. It is also conceivable that the pilot of the fourth sortie might have decided to aim at the smoke resulting from the third sortie.

110. The Commission believes that the governing legal standard for this claim is best set forth in Article 57 of Protocol I, the essence of which is that all feasible precautions to prevent unintended injury to protected persons must be taken in choosing targets, in the choice of means and methods of attack and in

the actual conduct of operations.³⁸ The Commission does not question either the Eritrean Air Force's choice of Mekele airport as a target, or its choice of weapons. Nor does the Commission question the validity of Eritrea's argument that it had to use some inexperienced pilots and ground crew, as it did not have more than a very few experienced personnel. The law requires all "feasible" precautions, not precautions that are practically impossible. However, the Commission has serious concerns about the manner in which these operations were carried out. The failure of two out of three bomb runs to come close to their intended targets clearly indicates a lack of essential care in conducting them, compounded by Eritrea's failure to take appropriate actions afterwards to prevent future recurrence.

111. The testimony of Colonel Abraham, Deputy Commander of the Eritrean Air Force, showed that he was aware of early news reports of events at Mekele, but also made clear that the only investigation after the bombs hit the

³⁸ *Supra* note 11. Article 57 provides in full:

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

Ayder neighborhood was limited to his questioning the pilot of the third sortie, whom he said told him that he had hit his target. Colonel Abraham indicated that he did not question the pilot of the fourth sortie, and he did not have either aircraft, including its computer, inspected. The Commission received no evidence indicating any changes in Eritrean training or doctrine aimed at avoiding possible recurrence of what happened in the third and fourth sorties on June 5, 1998. Eritrea did not make available to the Commission any evidence from the pilots and refused to identify them, although Colonel Abraham did acknowledge that the third sortie was that pilot's first mission.

112. From the evidence available to it, the Commission cannot determine why the bombs dropped by the third and fourth sorties hit the Ayder neighborhood. All of the information critical to that issue was in the hands of Eritrea or could have been obtained by it, and Eritrea did not make it available. In those circumstances, the Commission is entitled to draw adverse inferences reinforcing the conclusions already indicated that not all feasible precautions were taken by Eritrea in its conduct of the air strikes on Mekele on June 5, 1998.³⁹

113. For these reasons, the Commission finds that Eritrea is liable for the deaths, wounds and physical damage to civilians and civilian objects caused in Mekele by the third and fourth sorties on June 5, 1998.

K. Aksum

114. Ethiopia claims that Eritrea also bombed the Aksum civilian airport late on June 5, 1998, the same day that Mekele was bombed. Eritrea denies any such bombing. The Commission believes that there is credible evidence that a bomb was dropped and some damage caused at the Aksum airport on that date. It is possible that it was dropped by Eritrea's sortie number four, which may have dropped only one of its two bombs on Mekele. In any event, the Commission finds no liability for this Aksum bombing, as an airfield is a legitimate target, even when there are no military personnel there at the time. The landing strip and other facilities could be used later for military purposes.

L. Adigrat

115. Ethiopia claims for several air strikes against targets in the town of Adigrat and for periodic shelling of the town. It is contested whether one of the claimed air strikes occurred, but the Commission need not decide that, as the claims fail for lack of proof. Adigrat is on a main north-south road with many Ethiopian military installations and troops and consequently contains many

³⁹ Corfu Channel (*UK v. Alb.*), Merits, 1949 I.C.J. Rep. p. 4, at p. 18 (April 9).

legitimate targets. It has not been proved that any bombing or artillery attacks against Adigrat were aimed at unlawful targets or were indiscriminate.

V. AWARD

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

A. Jurisdiction

1. All 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 were 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 Commission would have decided that question, but that did not happen.

5. None of the treaties dealing with anti-personnel land mines and booby traps was in force between the Parties during the conflict. Accordingly, customary international humanitarian law is the law applicable to claims involving those weapons.

6. There are elements in Protocol II of 1980 to the U.N. Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons that express customary international law and reflect fundamental humanitarian law obligations of discrimination and protection of civilians.

C. Evidentiary Issues

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

D. Findings of Liability for Violations of International Law

The Respondent is liable to the Claimant for the following violations of international law committed by its military personnel or by other officials of the State of Eritrea:

1. For permitting in Mereb Lekhe Wereda frequent physical abuse of civilians by means of intentional killings, beatings and abductions, as well as widespread looting and property destruction in the areas that were occupied by its armed forces from May 1998 to May 2000;
2. For permitting in Ahferom Wereda frequent physical abuse of civilians by means of intentional killings, beatings, abductions and wounds caused by small-arms fire, as well as widespread looting and property destruction in the areas that were occupied by its armed forces from May 1998 to May 2000;
3. For permitting in Gulomakheda Wereda frequent physical abuse of civilians by means of intentional killings, beatings and abductions during the invasion in June 1998 and less frequent, but recurring, physical abuse of civilians and frequent looting and destruction of civilian property in the areas that were occupied by its armed forces from June 1998 to June 2000;
4. For permitting the looting and stripping of Zalambessa Town;
5. For the deliberate, unlawful destruction of 75% (seventy-five percent) of the structures in Zalambessa Town;
6. For permitting in Irob Wereda a recurring pattern of excessive violence by Eritrean soldiers against civilians, including frequent beatings and intentional killings, and frequent severe beating and other abuse of civilians taken into custody, as well as widespread looting and property destruction in the areas that were occupied by its armed forces from May 1998 to June 2000;
7. For failing to take effective measures to prevent rape of women by its soldiers in Irob Wereda;
8. For failing to release civilians taken into custody in Irob Wereda and to provide information regarding them; and
9. For failing to take all feasible precautions to prevent two of its military aircraft from dropping cluster bombs in the vicinity of the Ayder School and its civilian neighborhood in the town of Mekele on June 5, 1998, and for the resulting deaths, wounds and suffering by civilians and the physical damage to civilian objects.

E. Other Findings

1. Claims based on alleged breaches by the Respondent of the *jus ad bellum* are deferred for decision in a subsequent proceeding.
2. All other claims presented in this case are dismissed.

Done at The Hague, this 28th day of April, 2004,

[Signed] PRESIDENT HANS VAN HOUTTE

[Signed] GEORGE H. ALDRICH

[Signed] JOHN R. CROOK

[Signed] JAMES C.N. PAUL

[Signed] LUCY REED