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## **PART XVII**

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### **Final Award Eritrea's Damages Claims**

**Decision of 17 August 2009**

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### **Sentence finale Réclamations de dommages de l'Érythrée**

**Décision du 17 août 2009**



FINAL AWARD, ERITREA'S DAMAGES CLAIMS  
DECISION OF 17 AUGUST 2009

SENTENCE FINALE, RÉCLAMATIONS DE DOMMAGES  
DE L'ÉRYTHRÉE, DÉCISION DU 17 AOÛT 2009

The final awards on claims for damages complete the Commission's work—except for administrative matters, disposition of its archives and potential post-Award matters.

Compensation can only be awarded where there is evidence sufficient in the circumstances to establish the extent of damage caused by conduct the Commission previously found to have violated international law. The awards probably do not reflect the totality of damages suffered by either Party but rather the damages that could be established with sufficient certainty through available evidence in complex international legal proceedings between Parties with modest resources and limited time.

Evidence of physical damage to buildings and infrastructure is more readily gathered and presented than evidence of the extent of injuries, including physical, economic and moral injuries, to large numbers of individuals. There is no sharp distinction between loss of property and death or personal injury in poor countries where security of property is often vital to survival. Awards for loss or destruction of property frequently stem from serious threats to physical integrity.

The compensation claims are almost entirely for violations of law suffered by the State party rather than claims on behalf of its nationals. The compensation awarded reflects the seriousness of those violations and their effects on the Claimant State Party rather than appropriate compensation for individual victims.

On 13 April 2006, the Commission established a simplified “fast-track” damages phase, involving a limited number of legal pleadings and evidence as well as a tight schedule of hearings, to limit the significant financial and other burdens imposed upon both Parties. The Commission also reiterated its recurring concern that proceeds accruing from the damages proceedings be used by the Parties to assist civilian victims of the conflict.

The Parties' limited economic capacity is relevant in determining damages claims. There is an intersection of the law of State responsibility with fundamental human rights norms. The fundamental human rights law rule of common Article 1 (2) of the International Covenants is applicable to the Parties notwithstanding the deletion of this qualification by the International Law Commission (ILC) in the Articles on State Responsibility. There is no need to decide the question of a possible cap on damages in light of the Parties obligations under human rights law in the present circumstances.

The Parties' overall economic position is also relevant to determining compensation for violations of *jus in bello*. The purpose of compensation payable by a responsible State is to wipe out all consequences of the illegal act and reestablish the preexisting situation (*Chorzów Factory* and ILC Articles on State Responsibility, art. 31). Diplomatic protection claims by a State on behalf of its nationals are based on injury to the State,

but the extent of injury to affected individuals can play a significant role in assessing the State's injury. Compensation has a limited role which is remedial, not punitive. In situations involving diplomatic protection, compensation must be assessed in light of the social and economic circumstances of the injured individuals in respect of whom the State is claiming. Compensation determined in accordance with international law cannot remedy the world's economic disparities.

The international law rule giving binding effect to matters already authoritatively decided (*res judicata*) has particular relevance at this stage of the proceedings. The Commission's previous findings on claims of violations of international law are final and binding, and define the extent of possible damages. Compensation can only be awarded for injuries which bear a sufficiently close causal connection with conduct that the Commission previously found to violate international law. The task of the Commission at this phase is not to revise or expand its prior findings on liability, but to apply those findings in determining appropriate compensation.

The Commission required clear and convincing evidence that damage occurred, but less rigorous proof for purposes of the quantification of damages which requires exercises of judgment and approximation. In commercial arbitration, lack of evidence may warrant dismissal of a damages claim for failure of proof. In contrast, when serious violations of international law, causing harm to many individuals, have been determined, it would be inappropriate to dismiss the claim outright. The Commission recognized its obligation to determine appropriate compensation, even if the process involves estimation or guesswork within the range of possibilities indicated by the evidence. The Commission further took into account a trade-off fundamental to recent international efforts to address injuries affecting large number of victims. Compensation levels were thus reduced, balancing uncertainties flowing from the lower standard of proof.

Compensation can only be awarded in respect of damages having a sufficient causal connection with conduct that violates international law. The necessary connection characterized by the term "proximate cause" requires a chain of causation sufficiently close in a particular situation, taking into account whether the particular damage should have been reasonably foreseeable to an actor committing the international delict in question.

Determining compensation in large inter-State claims is not a mechanical process. The Commission considered multiple factors, including the nature, seriousness and extent of particular unlawful acts, whether the acts were intentional, as well as any mitigating or extenuating circumstances. It also considered the number of persons who were victims of particular violations and the implications for their future lives.

The Commission decided not to award interest since the claims and awards are broadly similar; interest on the compensation would not materially alter the Parties' economic positions; the amounts awarded in many cases reflect estimates and approximates which militates against interest; and the Parties have been diligent and cooperative with no prejudice resulting from dilatory conduct.

The concept of consequential damages has a significant role in some national legal systems, but does not exist in others, and so cannot be viewed as a general principle of law. International law does not recognize a separate category of compensable "consequential damages" involving different standards of legal causation or other distinctive

legal elements. Eritrea's claim in this regard was thus examined in accordance with the principles generally applicable in determining damages in international claims.

Generalized conditions of war-related economic disruption and decline do not constitute compensable elements of damage, even in the case of some types of injury bearing a relatively close connection to illegal conduct.

International humanitarian law accords special protection to medical facilities and personnel, and civilians who depend on them. Where there are widespread unlawful damages to medical facilities, particularly where they are few in number, it should be reasonably foreseeable that injury will result to protected persons. The causal connection thus established, the Commission was required to estimate the extent of injury to civilians due to loss of access to health care, on account of damage to or destruction of hospitals and other medical facilities, and loss of medical supplies.

Serious damage to a significant object of cultural patrimony warrants some award of compensation going beyond the mere cost of attempting to restore the object to its earlier appearance.

The 2000 Agreement established the jurisdiction of the Commission, but did not create substantive rights. The Parties' claims for violations of international law generally remain subject to any qualifications or limitations applicable under customary international law. The Commission recognized the continued force of the rule of dominant and effective nationality in many circumstances, but held that it must be qualified in certain situations. Article 5 (9) of the 2000 Agreement is a compelling indication that the Parties did not view the general rules of diplomatic protection as applying in the unusual circumstances that led to the Agreement. It cannot be that, in such situations, international law would allow a State, having wrongfully expelled persons or deprived them of their nationality, to deny responsibility because of the very social connections or bonds of nationality that were ended by that same State.

As recognized by the International Court of Justice in the *Corfu Channel* case, where an injury is non-material and hence not compensable by restitution or compensation, the appropriate form of reparation is satisfaction. The appropriate form of reparation for Ethiopia's serious but non-material interference with an uncertain number of departing Eritrean diplomats was therefore found to be satisfaction in the form of a declaration of wrongfulness.

Les travaux de la Commission se sont achevés par la sentence finale sur les réclamations de dommages, à l'exception de questions administratives, des dispositions relatives à ses archives et d'éventuelles questions se posant une fois la sentence prononcée.

Une indemnisation ne peut être allouée que dans le cas où l'étendue du dommage, causé par un comportement préalablement considéré par la Commission comme contraire au droit, a été suffisamment prouvée en l'espèce. Les sentences ne reflètent assurément pas la totalité des dommages subis par chacune des Parties, mais plutôt les dommages qui ont pu être établis avec suffisamment de certitude au moyen des preuves disponibles dans le cadre de procédures judiciaires internationales complexes entre Parties ne disposant que de ressources modestes et de temps limité.

La preuve du dommage matériel infligé aux bâtiments et infrastructures est plus aisément réunie et présentée que la preuve de l'étendue des préjudices, y compris corporels, économiques et moraux, subis par un grand nombre d'individus. Il n'existe pas de distinction claire entre la perte de la propriété et le décès ou le préjudice corporel dans les pays pauvres, pays dans lesquels la garantie de la propriété est souvent indispensable à la survie. Les indemnités accordées pour la perte ou la destruction d'une propriété découlent fréquemment de menaces graves à l'encontre de l'intégrité corporelle.

Les réclamations d'indemnisation relèvent pour la plupart de violations du droit subies par l'Etat Partie, plutôt que de réclamations introduites au nom de ses nationaux. L'indemnisation octroyée reflète davantage le caractère grave de ces violations ainsi que leurs effets sur l'Etat Partie demandeur qu'une indemnisation appropriée des victimes individuelles.

Le 13 avril 2006, la Commission a mis en place une phase simplifiée et accélérée relative aux dommages, impliquant un nombre limité de plaidoiries et preuves ainsi qu'une liste restreinte d'auditions, afin de limiter l'importante charge financière et les autres charges imposées aux deux Parties. La Commission a également réitéré sa constante préoccupation que les produits découlant des procédures d'indemnisation soient utilisés par les Parties pour venir en aide aux victimes civiles du conflit.

La capacité économique limitée des Parties est un élément important à l'évaluation des réclamations de dommages. Le droit de la responsabilité de l'Etat et les normes fondamentales des droits de l'homme se recourent. La règle des droits de l'homme figurant à l'article 1 (2) commun aux Pactes internationaux s'applique aux Parties, nonobstant le fait que la Commission du droit international (CDI) n'y fait pas référence dans ses articles sur la responsabilité des Etats. Il n'est pas nécessaire de se prononcer sur la question de l'éventualité d'un plafonnement des dommages au vu des obligations découlant du droit des droits de l'homme dans les circonstances de l'espèce.

La situation économique générale des Parties est également un élément pertinent à la détermination de l'indemnisation relative aux violations du *jus in bello*. Le but de l'indemnisation exigible d'un Etat responsable est d'effacer toutes les conséquences de l'acte illégal et rétablir la situation préexistante (*Affaire relative à l'usine de Chorzów* et Articles de la CDI sur la responsabilité des Etats, art. 31). Bien que les réclamations de protection diplomatique introduites par un Etat au bénéfice de ses nationaux se fondent sur le dommage causé à l'Etat même, l'étendue du préjudice causé aux individus affectés peut jouer un rôle significatif dans l'évaluation du dommage causé à l'Etat. L'indemnisation se limite à un rôle correctif, et non punitif. Dans les situations impliquant la protection diplomatique, l'indemnisation doit être évaluée d'après les circonstances sociales et économiques des individus lésés au nom desquels l'Etat réclame une indemnisation. L'indemnisation déterminée en vertu du droit international ne peut remédier aux disparités économiques de ce monde.

La règle de droit international conférant un effet contraignant aux affaires bénéficiant de l'autorité de la chose jugée (*res judicata*) revêt une importance particulière à ce stade de la procédure. Les conclusions antérieures de la Commission sur les réclamations de violations du droit international sont définitives et contraignantes, et définissent l'étendue des éventuels dommages. Une indemnisation ne peut être attribuée

que pour les dommages présentant un lien de causalité suffisamment étroit avec le comportement que la Commission a précédemment jugé violant le droit international. A ce stade, la tâche de la Commission n'est pas de revoir ou d'étendre ses précédentes conclusions sur la responsabilité, mais d'appliquer ces conclusions dans la détermination d'une indemnisation appropriée.

La Commission a exigé des preuves claires et convaincantes de l'occurrence du dommage, mais des preuves moins contraignantes pour ce qui est de la quantification du dommage, qui appelle à des exercices de jugement et approximation. Dans le cadre de l'arbitrage commercial, l'absence de preuve peut justifier le rejet d'une demande d'indemnisation pour faute de preuve. Par contre, lorsque des violations graves du droit international, causant dommage à un grand nombre de personnes, ont été déterminées, il serait inapproprié de débouter sans réserve la requête d'indemnisation. La Commission a reconnu son obligation de déterminer une indemnisation convenable, même si le procédé implique une estimation, ou même un travail de supposition, dans l'éventail des cas de figure indiqués par la preuve. La Commission a également pris en compte un compromis fondamental aux récents efforts internationaux de prise en considération des préjudices affectant un grand nombre de victimes. Ainsi, les niveaux d'indemnisation ont été réduits, pondérant les incertitudes découlant de critères d'établissement des preuves moins élevés.

Une indemnisation peut uniquement être accordée pour ce qui est de dommages présentant un lien de causalité suffisamment étroit avec le comportement violant le droit international. Le lien nécessaire, caractérisé par la notion de «cause directe», requière une chaîne de causes suffisamment proches dans une situation donnée, prenant en considération si le dommage spécifique aurait raisonnablement dû être prévisible pour un acteur commettant le délit international en question.

La détermination de l'indemnité dans le cadre de larges réclamations interétatiques ne s'effectue pas par un procédé mécanique. La Commission a considéré plusieurs facteurs, y compris la nature, la gravité et l'étendue de certains actes illégaux, l'intentionnalité de ces derniers, ainsi que toute circonstance atténuante. Elle a également considéré le nombre de personnes victimes de violations particulières et les conséquences pour leur vie future.

La Commission a décidé de ne pas accorder d'intérêt étant donné que les réclamations et les réparations sont largement similaires; un intérêt sur l'indemnité n'altérerait pas matériellement la situation économique des Parties; dans plusieurs cas, les sommes attribuées reflètent des estimations et approximations qui militent à l'encontre d'un intérêt; et les Parties ont fait preuve de diligence et de coopération sans provoquer aucun préjudice résultant d'un comportement dilatoire.

Le concept de dommages indirects joue un rôle significatif dans certains systèmes juridiques nationaux, mais n'existe pas dans d'autres, et par conséquent ne peut être considéré comme un principe général de droit. Le droit international ne reconnaît pas une catégorie distincte de «dommages indirects» donnant lieu à indemnisation et impliquant différents niveaux de causalités ou autres éléments juridiques distincts. Ainsi, la réclamation de l'Érythrée à cet égard a été examinée conformément aux principes généraux applicables à la détermination des dommages lors de réclamations internationales.

**ERITREA ETHIOPIA CLAIMS COMMISSION****FINAL AWARD  
Eritrea's Damages Claims  
between  
The State of Eritrea  
and  
The Federal Democratic Republic of Ethiopia**

By the Claims Commission, composed of:

Hans van Houtte, President  
George H. Aldrich  
John R. Crook  
James C.N. Paul  
Lucy Reed

The Hague, August 17, 2009

**FINAL AWARD--Eritrea's Damages Claims  
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## TABLE OF CONTENTS

I. INTRODUCTION .....	516
II. PROCEDURAL ASPECTS OF THE DAMAGES PHASE .....	518
III. THE PARTIES' SITUATIONS .....	521
IV. APPLICABLE LEGAL PRINCIPLES .....	525
A. <i>Res Judicata</i> .....	525
B. Evidence and the Burden of Proof at the Damages Phase .....	527
C. Causation .....	529
V. ASSESSING COMPENSATION AND TECHNICAL FINANCIAL ISSUES .....	530
A. Currency Conversion .....	530
B. Interest .....	531
C. Other Technical Issues .....	532
VI. ERITREA'S GROUP NUMBER ONE DAMAGES CLAIMS .....	532
A. The Commission's Liability Findings .....	532

B. Loss of Personal and Business Property . . . . .	534
C. Damage to or Destruction of Buildings . . . . .	540
D. Claim for Consequential Damages . . . . .	573
E. Damage to Cultural Property . . . . .	579
F. Prisoners of War. . . . .	580
G. Rape. . . . .	582
H. Displacement of the Population of Awgaro . . . . .	584
VII. ERITREA'S GROUP NUMBER TWO DAMAGES CLAIMS . . . . .	586
A. The Commission's Liability Findings . . . . .	586
B. Non-Responsibility for Claims of Nationals; Dominant and Effective Nationality . . . . .	586
C. Deprivation of Nationality . . . . .	587
D. Wrongful Expulsion. . . . .	595
E. Harsh Conditions of Departure. . . . .	599
F. Property Losses By Persons Previously Residing in Ethiopia . . . . .	601
G. Property Losses By Non-Residents . . . . .	608
H. Other Non-Resident Property . . . . .	614
I. Unlawful Detention of Eritrean Civilians. . . . .	614
J. Diplomatic Claim. . . . .	617
VIII. INDIVIDUAL CLAIMS . . . . .	621
A. Claims 27 and 28, Hiwot Nemariam and Belay Redda. . . . .	622
B. Claim 29, Sertzu Gebre Meskel . . . . .	624
C. Claim 30, Fekadu Andemeskal . . . . .	625
D. Claim 31, Mebrahtu Gebremedhin . . . . .	627
E. Claim 32, Mebrat Gebreamlak. . . . .	627
IX. AWARD. . . . .	629

## I. INTRODUCTION

1. With this Final Award in Eritrea's claims for damages, and its companion Final Award in Ethiopia's damages claims, the Eritrea-Ethiopia Claims Commission largely completes its work.<sup>1</sup> The Commission appreciates the cooperation it has received from both Parties and their counsel throughout the damages phase of these proceedings, as in the earlier liability phase. Nevertheless, this phase has involved enormous challenges. Through their counsel, the States of Eritrea and Ethiopia have sought to quantify the extent of damage resulting from violations of international law previously found by the Commission. As discussed below, the Commission has sought to apply procedures and standards of evidence that take account of the challenges facing both Parties. Nevertheless, these are legal proceedings. The Commission's findings must rest on evidence. As the Commission has emphasized throughout, compensation can only be awarded where there is evidence sufficient in the circumstances to establish the extent of damage caused by conduct the Commission previously found to have violated international law.<sup>2</sup>

2. Accordingly, the Commission notes that its awards of monetary compensation for damages are less—probably much less—than the Parties believe to be due. The Commission thus stands in the tradition of many other past claims commissions that have awarded only a fraction of the total amounts claimed.<sup>3</sup> Its awards probably do not reflect the totality of damages that either Party suffered in violation of international law. Instead, they reflect the damages that could be established with sufficient certainty through the available evidence, in the context of complex international legal proceedings carried out by the Parties with modest resources and under necessary pressures of time.

3. In that connection, the Commission notes that evidence of the extent of physical damage to buildings and infrastructure is more readily gathered and presented than is evidence of the extent of injuries, including physical, economic and moral injuries, to large numbers of individuals. That fact may well have led to the lesser extent of evidence that often was offered in support of claims based on injuries to individuals. Moreover, as the claims addressed in this Award are almost entirely claims by the State Party for compensation for violations of law that it has suffered, rather than claims on behalf of its nationals, the Commission has been compelled to make judgments not as to appropriate compensation for individual victims, but instead as to the relative

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<sup>1</sup> Various administrative matters, including the final disposition of the Commission Archive, as well as any post-Award matters potentially arising under the Commission's Rules of Procedure, remain to be completed.

<sup>2</sup> See Eritrea-Ethiopia Claims Commission Decision No. 4 ("Evidence") (July 24, 2001) ("The Parties are reminded that under Article 5(13) of the Agreement of December 12, 2000, the Commission is bound to apply the relevant rules of international law and cannot make decisions *ex aequo et bono*. The rules that the Commission must apply include those relating to the need for evidence to prove or disprove disputed facts.")

<sup>3</sup> MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS p. 197 (1944).

seriousness of those violations of law and the effects they had on the Claimant State Party.

4. The Commission's Awards provide compensation in respect of claims both for losses of property and for deaths and various forms of personal injury. However, it would be wrong to draw a sharp distinction between the two types of claims. In poor countries like Eritrea and Ethiopia, with low incomes and life expectancies, security of property often is vital to survival. Property such as livestock, farmers' tools, utensils and houses has a direct impact on one's possibility to survive. Thus, awards of compensation for loss or destruction of property frequently stem from serious threats to physical integrity.

5. As described in its earlier Partial Awards, this Commission was created by 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" or "December 2000 Agreement").<sup>4</sup> The Agreement was a wide-ranging document concluded by the Parties to bring about a comprehensive settlement of the May 1998-June 2000 war between them. Under Article 5(1), "[t]he mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other" related to the 1998-2000 conflict that "result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law."

6. Beginning in 2001, and continuing throughout the proceedings, the Commission engaged in extensive consultations with the Parties. Following such consultations, it decided at an early stage first to decide the merits of the Parties' liability claims. Then, if liability were established and the Parties, or either of them, wished to do so, the Commission would hold further proceedings regarding the amount of damages. Accordingly, the Commission held four rounds of hearings on the merits of both Parties' claims between November 2002 and April 2005. Between July 1, 2003 and December 19, 2005, it issued four groups of Partial and Final Awards addressing claims of both Parties. The Commission rendered the following Awards on Eritrea's claims:

- Prisoners of War (Eritrea's Claim 17) (Partial Award, July 1, 2003);
- Central Front (Eritrea's Claims 2, 4, 6, 7, 8 & 22) (Partial Award, April 28, 2004);
- Civilians Claims (Eritrea's Claims 15, 16, 23 & 27-32) (Partial Award, December 17, 2004);

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<sup>4</sup> The Commission's previous work is described in its Awards, available on the website of the Permanent Court of Arbitration, [www.pca-cpa.org](http://www.pca-cpa.org). Throughout this process, the Secretary-General and staff of the Permanent Court of Arbitration have provided highly professional and efficient support for the Commission, which records its sincere appreciation for all that has been done on its behalf. The Commission expresses particular thanks to Ms. Belinda Macmahon, who has served as its Registrar since 2004 with unstinting efficiency and professionalism.

- Western Front, Aerial Bombardment and Related Claims (Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26) (Partial Award, December 19, 2005);
- Pensions (Eritrea's Claims 15, 19 & 23) (Final Award, December 19, 2005);
- Loss of Property in Ethiopia Owned by Non-Residents (Eritrea's Claim 24) (Partial Award, December 19, 2005); and
- Diplomatic Claim (Eritrea's Claim 20) (Partial Award, December 19, 2005).

7. The Commission's liability findings on Eritrea's claims are reproduced at relevant points in the text below. The Awards listed above resolved the extent of Ethiopia's liability with respect to all of Eritrea's claims. The amounts of compensation appropriate for them are decided in this Award.

## II. PROCEDURAL ASPECTS OF THE DAMAGES PHASE

8. Beginning in the summer of 2005, the Commission and the Parties consulted further, utilizing correspondence, conference calls and an informal meeting, regarding the possibility of further proceedings following completion of the merits of the Parties' claims. While the Parties indicated that they did not want the proceedings to end following the Awards on liability, these consultations highlighted a fundamental challenge. A damages phase involving precise assessment of the extent of injuries allegedly suffered by large numbers of persons, entities and government bodies would require years of additional difficult, burdensome and expensive proceedings.

9. The Parties chose to proceed despite concerns aired by the Commission. Among other possibilities, the Parties and the Commission discussed a proposal by Ethiopia that, in lieu of further legal proceedings on damages, the Commission should be converted into a mechanism working to increase the flow of relief and development funds from international donors to alleviate the consequences of the war in both countries. Eritrea expressed serious reservations regarding this proposal. The Commission also viewed it as unlikely to be productive in the circumstances, as it came at the compensation phase of the proceedings, following formal findings of liability against both Parties for violations of international law. In the absence of agreement by the Parties, this proposal to change the Commission's mandate was not pursued, and it was not possible to terminate the proceedings without a damages phase.

10. As the Commission considered options for proceedings to assess damages, it took account of its responsibilities under Article 5(12) of the Agreement, requiring the Commission to endeavor to complete its work within three years of the filing of the Parties' claims, that is, by December 2004. (This was extended in February 2003 in response to both Parties' requests for additional time.) The Commission was also mindful of the complexity and cost of the

proceedings to date, and of the significant financial and other burdens they imposed upon both Parties.<sup>5</sup> Following careful consideration, in an Order dated April 13, 2006, the Commission directed the Parties to proceed with a simplified “fast-track” damages phase, involving a limited number of filings of legal pleadings and evidence, and a tight schedule of hearings. This Order indicated the Commission’s recurring concern that proceeds accruing from the damages proceedings be used by the Parties to assist civilian victims of the conflict.

11. Because of the significance of the April 13, 2006 Order to the subsequent proceedings, its operative portions are set out here:

1. In order to permit the earliest possible assistance to individuals who have suffered injury or loss and to reduce the cost of the proceedings, the Commission will seek to complete the damages phase before the end of 2008. In view of the humanitarian purposes set forth in Article 5(1) of the December 12 Agreement, the Commission requests that the Parties inform it in their first filings how they intend to ensure distribution of damages received to civilian victims, including presently available information on existing or anticipated structures and procedures for this purpose.
2. The Commission welcomes the fact that the Parties are in general agreement on a considerable number of the issues they have discussed.
3. The Commission recognizes that there are a few legal issues, such as the scope of damages for breach of the *jus ad bellum*, that could usefully be addressed as preliminary issues to be decided prior to the filing of briefs on any category of claimed damages. However, the Commission has decided that the additional months required for separate proceedings to hear and decide those preliminary issues would unduly extend the time required to complete the Commission’s work on damages. Consequently, the Commission has decided that all such issues should be briefed as part of the first group of claimed damages.
4. Again, for reasons of expeditious resolution of all claimed damages, the Commission has decided to divide the claimed damages into two groups only. Group Number 1 includes the War Front Claims, the Prisoner of War Claims, the Displaced Persons Claims and the preliminary issues the Parties may raise, including the scope of damages for breach of the *jus ad bellum*, which is an element of all of Ethiopia’s claims. Thus, Group Number 1 comprises Eritrea’s Claims 1, 3, 4, 5, 7, 9, 13, 17, 21 and 22, Ethiopia’s Claims 1, 2, 3 and 4, as well as any preliminary issues raised by either Party. Group Number 2 is composed of all remaining claims, including the Civilians or Home Front claims. Thus, Group Number 2 comprises Eritrea’s Claims 15,

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<sup>5</sup> All of the costs of these proceedings, including the costs of both Parties’ legal teams, have been borne by the Parties themselves. The Commission has sought to limit its own costs by minimizing travel and PCA support, by making extensive use of the Internet, and through other measures. Nevertheless, it is mindful that the proceedings have been a financial burden for both Parties.

16, 20, 23, 24, 27, 28, 29, 30, 31 and 32 and Ethiopia's Claims 5, 6 (*jus ad bellum* aspects only), 7 and 8.

5. The Parties shall file their briefs and supporting evidence on Group Number 1 Claims by November 15, 2006 and their reply briefs and evidence by February 15, 2007. The Parties may file any additional documents and evidence, together with a brief (not to exceed 10 pages) explanation of the relevance of the additional material filed, at least 21 days prior to the Hearing. The Hearing will take place on the Group 1 Claims as soon as possible after April 15, 2007, on dates to be set following consultations between the Commission and the Parties. The Commission does not envisage authorizing additional pleadings or extending these filing deadlines.

6. A similar schedule will be established for Group Number 2 Claims following the Hearing on Group Number 1 Claims.

7. A single final Award will be issued on all Claims following the second Hearing. Nevertheless, the Commission will issue guidance on preliminary issues and on other issues as appropriate, following the Hearing on Group Number 1 Claims, in order to assist the Parties in preparing the Group Number 2 Claims.

8. The Commission intends to consult closely with the Parties regarding implementation of this Order through the President's conference calls with the Parties and other means, and may create a Working Group for this purpose. The modalities and schedule in this regard will be established following consultations between the Commission and the Parties.

12. As envisioned in this Order, the Commission created a working group of three members (Commissioners Crook, Paul and Reed) who met informally with the Parties' representatives on July 29, 2006 regarding procedural questions. At that meeting, the Parties both asked to defer to a later stage certain issues they characterized as involving technical, financial and accounting matters. As requested, on August 16, 2006 the Commission issued the following instruction:

Taking account of the recent discussions between the Commission and the Parties, the following matters will not be addressed at the April 2007 hearing and should not be addressed in the Parties' written submissions prior to that hearing:

- (a) Effect of third party donations for replacement or rebuilding: the legal effect to be given to third party payments (including grants, loans, and insurance payments) to compensate for damage illegally caused during the war.
- (b) Technical financial questions. This category might include choosing an approach toward currency conversion, the legal effect (if any) of inflation, interest calculations, etc.
- (c) Attorney's fees (whether they were to be allowed, disallowed, capped, netted out, etc.)

As appropriate, the Commission will provide guidance regarding the handling of these matters at a later time.

13. The Group Number One damages proceedings took place as specified in the Commission's April 13, 2006 Order. Hearings on the Group Number One damages claims were held at the Peace Palace from April 16 to 27, 2007. On April 28, 2007, the Commission met informally with counsel for the Parties, and offered informal guidance intended to assist in preparation of their Group Number Two damages claims.

14. On July 27, 2007, the Commission provided further guidance by means of Decision Number 7 ("Guidance Regarding *Jus Ad Bellum* Liability") and Decision Number 8 ("Relief to War Victims").

15. On May 16, 2007, the Commission set the schedule for the Group Number Two damages claims, culminating in hearings held at the Peace Palace from May 19 to May 27, 2008. After those hearings, on May 28, 2008, the Commission again met informally with counsel for the Parties to discuss remaining procedural issues. The Parties addressed all the deferred issues noted in paragraph 12 above in written or oral submissions.

16. The Commission was keenly aware that the expedited procedures established for the two groups of damages claims would put great pressure on the Parties and their counsel. It also recognized that the Parties' preparation and presentation of their claims, and its own assessment of those claims, would likely be less informed and precise than might be possible following longer, more elaborate, and more expensive proceedings. Nevertheless, the Commission believed that these procedures were appropriate in the circumstances, given the Parties' situations and the Commission's obligation to complete its task within a reasonably short period, as indicated in the December 2000 Agreement.

17. The Commission is pleased to record that both Parties did what was asked of them. All pleadings were filed on time, and both sets of hearings were conducted in a professional and efficient manner. Notwithstanding the great difficulties they faced, both Parties' legal teams carried out the Group Number One and Group Number Two damages proceedings, like previous Commission proceedings, with vigor and in full cooperation with the Commission. The Commission records its appreciation to both Parties and their legal teams for their continued good will and cooperation in this final stage of its work.

### III. THE PARTIES' SITUATIONS

18. In assessing both Parties' damages claims, the Commission has been mindful of the harsh fact that these countries are among the poorest on earth. In both rounds of damages proceedings, both Parties sought amounts that were huge, both absolutely and in relation to the economic capacity of

the country against which they were directed. Ethiopia calculated its Group Number One damages claims against Eritrea to equal nearly 7.4 billion U.S. dollars and its Group Number Two damages claims to equal approximately 6.9 billion U.S. dollars. These amounts are more than three times Eritrea's estimated total national product in 2005, measured on a purchasing power parity basis.<sup>6</sup> Eritrea's claims against Ethiopia, while less dramatic in relation to Ethiopia's larger size and economy, approached 6 billion U.S. dollars.

19. The size of the Parties' claims raised potentially serious questions involving the intersection of the law of State responsibility with fundamental human rights norms. Both Eritrea and Ethiopia are parties to the International Covenant on Economic, Social and Cultural Rights ("ICESCR")<sup>7</sup> and the International Covenant on Civil and Political Rights.<sup>8</sup> Both Covenants provide in Article I(2) that "[i]n no case may a people be deprived of its own means of subsistence." During the hearings, it was noted that early drafts of the International Law Commission's ("ILC") Draft Articles on State Responsibility included this qualification, but that it was not retained in the Articles as adopted. That does not alter the fundamental human rights law rule of common Article I(2), which unquestionably applies to the Parties.

20. Similarly, Article 2(1) of the ICESCR obliges both Parties to take steps to achieve the "full realization" of rights recognized by that instrument. The Commission is mindful that in its General Comments, the Committee on Economic, Social and Cultural Rights has identified a range of steps to be taken by States where necessary, *inter alia*, to improve access to health care, education (particularly for girls) and resources to improve the conditions of subsistence. These General Comments have been endorsed and taken as guides to action by many interested observers and the United Nations' development

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<sup>6</sup> See Human Development Report 2007/2008 (United Nations Development Programme), available at [www.undp.org](http://www.undp.org). The Report includes an index of human development trends ("Human Development Index") in all countries. The "indicators" measure, for example, "public spending," "commitments" to realize the "right to education," or improvements in the "standard of living measured by the PPP [purchasing power parity]." Each country is ranked in accordance with a process that combines these and other indices.

<sup>7</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. p. 3.

<sup>8</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. p. 171.

agencies.<sup>9</sup> Such measures are particularly relevant to the needs of the rural poor in countries like Eritrea and Ethiopia. These matters are considered further in the Commission's Decision Number 7,<sup>10</sup> and in its discussion of compensation owed to Ethiopia for Eritrea's violation of the *jus ad bellum* in the companion Final Award in Ethiopia's damages claim.

21. Awards of compensation of the magnitude sought by each Party would impose crippling burdens upon the economies and populations of the other, notwithstanding the obligations both have accepted under the Covenants. Ethiopia urged the Commission not to be concerned with the impact of very large adverse awards on the affected country's population, because the obligation to pay would fall on the government, not the people. The Commission does not agree. Huge awards of compensation by their nature would require large diversions of national resources from the paying country—and its citizens needing health care, education and other public services—to the recipient country. In this regard, the prevailing practice of States in the years since the Treaty of Versailles has been to give very significant weight to the needs of the affected population in determining amounts sought as post-war reparations.<sup>11</sup>

22. Article 5(13) of the December 2000 Agreement directs that, “[i]n considering claims, the Commission shall apply relevant rules of interna-

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<sup>9</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties Obligations under Art. 2(1) of the International Covenant on Economic, Social and Cultural Rights [ICESCR], U.N. Doc. E/1991/23, Annex III, at p. 86 (1991). A number of subsequent General Comments spell out the obligations of States Parties to achieve “progressive realization” of the particular rights guaranteed by other articles of the ICESCR, such as “the right to education.” All of these can be found in The Compilation of General Comments Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 9 (2006). Examples of these General Comments include General Comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (ICESCR, art. 3); General Comment No. 15, The right to water; General Comment No. 14, The right to the highest standard of health (ICESCR, art. 12); and General Comment No. 13, The right to education (ICESCR, art. 13). See also MAGDALENA SEPULVEDA, THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (2003); CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Audrey Chapman & Sage Russell eds., 2002); MATTHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT (Ian Brownlie ed., 1995); Judith V. Welling, *International Indicators and Economic, Social, and Cultural Rights*, 30(4) HUM. RTS. Q. p. 933 (2008). The Secretary-General urged all UN development agencies to adopt a common “Human Rights Based Approach” to their development missions and, working together, common rights-focused country plans. See Strengthening of the United Nations: An Agenda for Further Change, Report of the Secretary-General, U.N. GAOR, 57th Sess., U.N. Doc. A/57/387 (2002).

<sup>10</sup> Eritrea-Ethiopia Claims Commission Decision No. 7 (“Guidance Regarding *Jus ad Bellum* Liability”) (July 27, 2007).

<sup>11</sup> *Id.*, pp. 6–7.

tional law,” which include rules of human rights law applicable as between the Parties. Accordingly, the Commission could not disregard the possibility that large damages awards might exceed the capacity of the responsible State to pay or result in serious injury to its population if such damages were paid.<sup>12</sup> It thus considered whether it was necessary to limit its compensation awards in some manner to ensure that the ultimate financial burden imposed on a Party would not be so excessive, given its economic condition and its capacity to pay, as to compromise its ability to meet its people’s basic needs.

23. In the circumstances, the Commission concluded that it need not decide the question of possible capping of the award in light of the Parties’ obligations under human rights law.

24. The Parties’ overall economic positions are relevant to determining compensation in another manner as well. In considering both Parties’ claims for violation of the *jus in bello*, the Commission has been mindful of the principle, set out by the Permanent Court of International Justice in *Chorzów Factory*, that the purpose of compensation payable by a responsible State is “to seek to wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”<sup>13</sup> This notion underlies Article 31 of the ILC’s Articles on State Responsibility, that “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”

25. *Chorzów Factory* offers an important reference point for assessing both Parties’ compensation claims. For reasons that are readily understandable, given limits of time and resources, both Parties filed their claims as inter-State claims. Although Eritrea filed claims on behalf of six individuals, neither Party utilized the option, available under Article 5(8) of the Agreement and the Commission’s Rules of Procedure, of presenting claims directly on behalf of large numbers of individuals. Nevertheless, some of both States’ claims are made in the exercise of diplomatic protection, in that they are predicated upon injuries allegedly suffered by numbers of the Claimant

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<sup>12</sup> See William W. Bishop, *General Course of Public International Law, 1965*, in II RECUEIL DES COURS, Tome 115 p. 403 (1965); Richard Falk, *Reparations, International Law, and Global Justice*, in THE HANDBOOK OF REPARATIONS p. 492 (Pablo de Greiff ed., 2006); Christian Tomuschat, *Reparations in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law*, in PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW/LA PROMOTION DE LA JUSTICE, DES DROITS DE L’HOMME ET DU REGLEMENT DES CONFLITS PAR LE DROIT INTERNATIONAL, LIBER AMICORUM LUCIUS CAFLISCH p. 569, at pp. 581 *et seq.* (Marcelo G. Kohen ed., 2007).

<sup>13</sup> *Factory at Chorzów, Merits*, 1928 P.C.I.J. (Ser. A.) No. 17, p. 47.

State's nationals.<sup>14</sup> While the injury in such cases is injury to the State, the extent of injury to affected individuals—insofar as it can be quantified—can play a significant role in assessing the State's injury. In this regard, in its Decision Number 8<sup>15</sup> and elsewhere in this Final Award, the Commission has encouraged the Parties to consider how, in the exercise of their discretion, compensation can best be used to accomplish the humanitarian objectives of Article 5(1) of the Agreement.

26. *Chorzów Factory* teaches that compensation has a limited function. Its role is to restore an injured party, in so far as possible, to the position it would have occupied but for the injury. This function is remedial, not punitive. Accordingly, in situations involving diplomatic protection, compensation must be assessed in light of the actual social and economic circumstances of the injured individuals in respect of whom the State is claiming. The difficult economic conditions found in the affected areas of Eritrea and Ethiopia must be taken into account in assessing compensation there. Compensation determined in accordance with international law cannot remedy the world's economic disparities.

27. Both Parties recognized this, and generally framed their claims in ways that, in the first instance at least, took account of the low incomes and limited property of most of those affected by the war.

#### IV. APPLICABLE LEGAL PRINCIPLES

28. Under Article 5(13) of the Agreement, the Commission must “apply relevant rules of international law” and “shall not have the power to make decisions *ex aequo et bono*.” The following sections consider three elements of general international law affecting these proceedings: (a) the preclusive effect of the Commission's earlier decisions on liability (*res judicata*); (b) the role of evidence and the burden of proof; and (c) the requirement of a legally sufficient connection between wrongful conduct and injury for which damage is claimed.

##### A. *Res Judicata*

29. The international law rule giving binding effect to matters already authoritatively decided (*res judicata*) has particular relevance at this stage of the proceedings. In its earlier Partial Awards, the Commission found that

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<sup>14</sup> Under Article 5(9) of the Agreement, “[i]n appropriate cases, each party may file claims on behalf of persons of Ethiopian or Eritrean origin who may not be its nationals. Such claims shall be considered by the Commission on the same basis as claims submitted on behalf of that party's nationals.” This unusual provision was not utilized. While Eritrea sought to bring claims predicated upon injuries to Ethiopian nationals, it did so on behalf of the State of Eritrea, and not on behalf of the injured individuals.

<sup>15</sup> Eritrea-Ethiopia Claims Commission Decision No. 8 (“Relief to War Victims”) (July 27, 2007).

some claims of violations of applicable international law had been proved, and it dismissed other claims. These findings are final and binding, and define the extent of possible damages. It is not possible at this stage to re-litigate claims that the Commission has decided, or to present new ones. Compensation can only be awarded for injuries now if those injuries bear a sufficiently close causal connection with conduct that the Commission previously found to violate international law.

30. The Commission's affirmative findings of liability are set out in the *dispositifs* at the end of each Partial Award. While some argument about the scope and meaning of those findings is inevitable in the context of a bifurcated proceeding, both Parties have sometimes sought to limit their potential liability (or to broaden the other's liability) by construing the *dispositifs* in artificial ways, advancing technical or restrictive interpretations to narrow the Commission's findings, or urging broad and flexible readings to expand them. The task of the Commission at this phase of the proceedings is not to revise or expand its prior findings on liability, but to apply those findings in determining the appropriate compensation to be awarded. In doing so, the Commission is guided principally by the *dispositifs* of those Awards, construed in accordance with the ordinary meaning of the terms contained therein,<sup>16</sup> taking account of the Parties' claims and arguments leading to the findings and the Commission's appreciation of the facts and legal reasoning as explained in the body of the Awards.<sup>17</sup>

31. In pleading their damages claims, the Parties filed a broad range of new evidence bearing on the quantum of damage associated with the Commission's liability findings. Although the Parties presented these damages claims in broad terms that did not always correspond to the Commission's liability findings, the Commission has considered this evidence strictly within the scope of its liability Awards. In some cases, the Commission has found it necessary to measure the damages phase claims also against evidence offered at the liability phase, leading to discussion of the evidence underlying the liability Awards throughout this Award. The Commission has been cautious to remain within the limits of its liability findings in making its awards of compensation.

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<sup>16</sup> See, e.g., *The Laguna del Desierto* Arbitration (Arg./Chile), (Award), 113 I.L.R. 1, 194, at para. 70 (1995) ("International law provides rules for interpretation of any legal instrument, whether it be a treaty, a unilateral act, an arbitral award or a resolution of an international organization. They include: the natural and ordinary meaning of the words used; their context; and their *effet util.*").

<sup>17</sup> As noted in a recent judgment of the International Court of Justice, "if any question arises as to the scope of *res judicata* attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given." Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 2007 I.C.J. p. 48, at para. 125 (Feb. 26). See also SHABTAI ROSENNE, III *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920–2005* p. 1603 (4th ed. 2006) (discussing the importance attached to written and oral pleadings in ascertaining the scope of *res judicata*).

32. Unlike the Commission's findings of liability, its dismissals of claims, except dismissals for lack of jurisdiction, are not restated in the *dispositifs*. Nevertheless, they also are definitive resolutions of those claims, with *res judicata* effect.

33. The Commission dismissed claims, by both Parties, for failure of proof. These dismissals are conclusive dispositions of these claims for the purpose of these proceedings, but their effect is otherwise limited. Both Parties sometimes have urged that these dismissals reflected an affirmative decision by the Commission that certain events did not occur. This is not correct. Except as indicated in its Awards, the Commission did not make such factual judgments, finding instead only that the claimant Party had not presented sufficient evidence to prove its claim. These findings do not reflect affirmative factual determinations by the Commission that particular events did or did not occur.

## **B. Evidence and the Burden of Proof at the Damages Phase**

34. Evidence necessarily has played a central role in these proceedings. Key issues often have boiled down to proof of facts, not issues of law. It is fundamental to the legal process that judgments regarding facts must be based upon sufficient evidence. This posed special challenges in these proceedings. Both the Parties and the Commission recognize that conclusive proof of facts in a war that began eleven years ago often is not feasible. However, the difficulties of proof do not relieve the Commission of its obligation to make decisions only on the basis of sufficient evidence.

35. At the liability phase, the Commission required clear and convincing proof of liability. It did so because the Parties' claims frequently involved allegations of serious—indeed, sometimes grave—misconduct by a State. A finding of such misconduct is a significant matter with serious implications for the interests and reputation of the affected State. Accordingly, any such finding must rest upon substantial and convincing evidence. This is why the International Court of Justice and other international tribunals require that facts be established with a high degree of certainty in such circumstances.<sup>18</sup>

36. In the hearings on the Group Number One damages claims, Eritrea urged that the Commission continue to utilize a standard of "clear and convincing" evidence. Ethiopia argued that decisions relating to damages should instead be based on the preponderance of the evidence. Like some other courts and tribunals, the Commission believes that the correct position lies

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<sup>18</sup> See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 2007 I.C.J. pp. 76–77, paras. 209–210 ("The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive. . . . In respect of the Applicant's claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.").

in an amalgam of these positions.<sup>19</sup> The Commission has required clear and convincing evidence to establish that damage occurred, within the liability parameters of the Partial Awards. However, for purposes of quantification, it has required less rigorous proof. The considerations dictating the “clear and convincing standard” are much less compelling for the less politically and emotively charged matters involved in assessing the monetary extent of injury. Moreover, the Commission recognizes the enormous practical problems faced by both Parties in quantifying the extent of damage following the 1998–2000 war. Requiring proof of quantification of damage by clear and convincing evidence would often—perhaps almost always—preclude any recovery. This would frustrate the Commission’s agreed mandate to address “the socio-economic impact of the crisis on the civilian population” under Article 5(1) of the Agreement.<sup>20</sup>

37. The present task is not to assess whether the two State Parties committed serious violations of international law. That has been done. Now, the Commission must determine, insofar as possible, the appropriate compensation for each such violation. This involves questions of a different order, requiring exercises of judgment and approximation. As discussed below in connection with particular claims, the evidence regarding such matters as the egregiousness or seriousness of the unlawful action, the numbers of persons injured or property destroyed or damaged by that action, and the financial consequences of such injury, destruction or damage, is often uncertain or ambiguous. In such circumstances, the Commission has made the best estimates possible on the basis of the available evidence. Like some national courts<sup>21</sup> and international legislators,<sup>22</sup> it has recognized that when obligated to determine appropriate compensation, it must do so even if the process involves estimation, or even guesswork, within the range of possibilities indicated by the evidence. Nevertheless, in some cases the evidence has not been sufficient to justify any award of compensation.

38. The Commission also has taken account of a trade-off fundamental to recent international efforts to address injuries affecting large numbers of victims. Institutions such as the United Nations Compensation Commis-

<sup>19</sup> MARK KANTOR, *VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE* pp. 72–73 (2008).

<sup>20</sup> See CHITTHARANJAN AMERASINGHE, *EVIDENCE IN INTERNATIONAL LITIGATION* pp. 241–242 (2005).

<sup>21</sup> See *Chaplin v. Hicks* [1911] 2 K.B. 786, 972 C.A. (where precision or accuracy is not possible in assessing contract damages, “the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach. . . .”).

<sup>22</sup> See UNIDROIT Principles of International Commercial Contracts, *available at* [www.unidroit.org](http://www.unidroit.org), art. 7.4.3, para. (3) (“Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.”).

sion (“UNCC”) and various commissions created to address bank, insurance and slave labor claims stemming from the Nazi era have adopted less rigorous standards of proof, either to show that an individual suffered injury or regarding the extent of that injury. As a trade-off, compensation levels also have been reduced, balancing the uncertainties flowing from the lower standard of proof.<sup>23</sup> While the claims addressed in this Award are State claims, not mass claims, the Commission has in some instances applied similar analysis with respect to claims for injuries or damages that were suffered by large, but uncertain, numbers of victims and where there is limited supporting evidence.

### C. Causation

39. Compensation can only be awarded in respect of damages having a sufficient causal connection with conduct that violates international law. In their written pleadings, and in the Group Number One damages hearings in April 2007, the Parties addressed the nature of the causal connection required by international law between a delict and compensable injury. In Decision Number 7 of July 2007, the Commission addressed the issue of causation, and has been guided in the current proceedings by the principles articulated there. In that Decision, the Commission determined that:

the necessary connection is best characterized through the commonly used nomenclature of “proximate cause.” In assessing whether this test is met, and whether the chain of causation is sufficiently close in a particular situation, the Commission will give weight to whether particular damage reasonably should have been foreseeable to an actor committing the international delict in question. The element of foreseeability, although not without its own difficulties, provides some discipline and predictability in assessing proximity. Accordingly, it will be given considerable weight in assessing whether particular damages are compensable.

The Commission notes that, in many situations, the choice of verbal formula to describe the necessary degree of connection will result in no difference in outcomes. In this regard, both Parties agreed that a significant range of possible damages related to war lie beyond the pale of State responsibility. . . .<sup>24</sup>

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<sup>23</sup> See Jacomijn J. van Haersolte-van Hof, *Innovations to Speed Mass Claims, New Standards of Proof*, in REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES: INNOVATIVE RESPONSES TO UNIQUE CHALLENGES p. 13 (Permanent Court of Arbitration ed., 2006).

<sup>24</sup> Decision No. 7, *supra* note 10, at paras. 13–14.

## V. ASSESSING COMPENSATION AND TECHNICAL FINANCIAL ISSUES

40. As their claims demonstrate, both Parties recognized that the violations of international law identified by the Commission give rise to an obligation to pay compensation.<sup>25</sup> Determining the amount of such compensation, particularly in large inter-State claims such as these, cannot be a mechanical process. In weighing its awards of compensation for damages, the Commission has had to take into account multiple factors, often not subject to precise quantification. It has weighed the nature, seriousness and extent of particular unlawful acts. It has examined whether such acts were intentional, and whether there may have been any relevant mitigating or extenuating circumstances. It has sought to determine, insofar as possible, the numbers of persons who were victims of particular violations, and the implications of these victims' injuries for their future lives.

### A. Currency Conversion

41. The Parties agreed that the Final Awards rendered by the Commission should denominate compensation in United States dollars, and many of their claims for compensation are expressed solely in terms of the U.S. currency.<sup>26</sup> In other instances, the Parties' claims and evidence have reflected amounts denominated in Ethiopian birr, Eritrean nakfa and, occasionally, other currencies. In those circumstances, the Commission generally has made conversions to U.S. dollars utilizing the exchange rate prevailing at the time of the injury underlying the compensation claim. In a few cases, where documents quantifying losses (for example, estimates of rebuilding costs) were prepared some time after the injury, and where there were significant changes in exchange rates, the Commission has utilized the exchange rate prevailing when the quantification was prepared. This has been necessary in order to prevent windfalls to either Party resulting from changes

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<sup>25</sup> See Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. p. 277, 1 Bevans p. 631, art. 3 ("A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation"); Protocol Additional to the 1949 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, art. 91 ("A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation") [hereinafter Protocol I].

<sup>26</sup> Any reference in this Award to amounts claimed in U.S. dollars, where the underlying claim involves amounts denominated in nakfa or birr, is solely for purposes of illustration. Except where otherwise stated, conversions of claimed amounts into U.S. dollars are those provided by a Party, and do not reflect any judgment by the Commission regarding the appropriateness of the exchange rate employed or related matters.

in exchange rates. As a practical matter, this made separate assessments of inflation unnecessary.

42. In the case of Eritrea’s claims, the Commission has utilized the following exchange rates between Eritrean nakfa (“ERN”) and U.S. dollars.<sup>27</sup>

Year	Annual Average ERN:US\$ Exchange Rate
1998	ERN 7.36 = US\$1
1999	ERN 8.15 = US\$1
2000	ERN 9.63 = US\$1
2001	ERN 11.31 = US\$1
2002	ERN 13.96 = US\$1
2003	ERN 13.88 = US\$1
2004	ERN 13.79 = US\$1
2005	ERN 15.37 = US\$1
2006	ERN 15.38 = US\$1

## B. Interest

43. Article 5(14) of the December 2000 Agreement provides “interest . . . may be awarded.” Thus, the Commission has discretion whether or not to award interest. Both Parties asked the Commission to do so. However, the Commission has decided, in the exceptional circumstances presented by these claims, not to calculate and award interest on the amounts awarded to either Party.

44. The Commission has particularly taken into account the fact that the Parties’ claims, and the amounts awarded in respect of those claims, are broadly similar. Accordingly, this is a rare case in which interest on the compensation awarded would not materially alter the Parties’ economic positions following the timely payment by each of the amounts due the other. Further, the amounts awarded in many cases reflect estimates and approximations, not precise calculations resting upon clear evidence. Like some other commissions, the Commission believes that this element of approximation reinforces the decision against awarding interest. Finally, the Commission notes that these proceedings have taken several years, reflecting the magnitude and complexity of the task. Both Parties have been diligent, and the period required does not reflect a lack of cooperation on the part of either. Accordingly, there is no need for pre-award interest to protect either Party from prejudice resulting from dilatory conduct by the other.

<sup>27</sup> As provided in Ethiopia’s Reply Brief on Technical Issues (Aug. 15, 2008), Annex A (from World Bank, World Development Indicators Online).

### **C. Other Technical Issues**

45. The Parties agreed not to request payment of attorneys' fees or costs against each other.

46. The Commission has addressed the effect of third party donations or other third party payments for replacement or rebuilding where such issues arise in specific claims. With few exceptions, the Commission has not awarded amounts reflecting donations or payments not required or expected to be repaid.

## **VI. ERITREA'S GROUP NUMBER ONE DAMAGES CLAIMS**

### **A. The Commission's Liability Findings**

47. In its Partial Awards rendered during the earlier liability proceedings, the Commission decided the extent of Ethiopia's liability to Eritrea with respect to the latter's claims. On the basis of those decisions, this Final Award decides the damages appropriate to compensate Eritrea for each of the Commission's findings of liability. The following discussion addresses Eritrea's damages claims in Group Number One, heard from April 16 to 27, 2007.

#### **1. The Central Front**

48. In its Partial Award dated April 28, 2004, the Commission decided Ethiopia's liability with respect to Eritrea's Central Front Claims Nos. 2, 4, 6, 7, 8 and 22. It found Ethiopia liable to Eritrea for eight specific "violations of international law by its military personnel or by other officials of the State of Ethiopia:"

1. For permitting the looting and stripping of buildings in Tserona Town while it occupied the town from late May 2000 until late February 2001, it is liable for 75% (seventy-five percent) of the total damage caused by looting and stripping in the town;
2. For permitting the looting and stripping of the adjacent Tserona Patriots Cemetery, it is liable for 75% (seventy-five percent) of the total damage caused by looting and stripping of the cemetery;
3. For the destruction of the Sub-Zoba Administrative Building, the Sub-Zoba Health Center, and the Warsai Hotel in Tserona Town;
4. For inflicting damage on the infrastructure of the village of Serha during its occupation of that village, it is liable for 70% (seventy percent) of the total damage inflicted on Serha from May 1998 through February 2001;
5. For failure to take effective measures to prevent rape of women by its soldiers during its occupation of Senafe Town;

6. For permitting looting and stripping in Senafe Town during its occupation, it is liable for 75% (seventy-five percent) of the total damage from looting and stripping suffered in the town between May 26, 2000 and June 2001;
7. For the unlawful destruction of or severe damage to the following thirteen major structures in Senafe Town during the Ethiopian occupation of the town:
  - a. The Electrical Authority (*two buildings*);
  - b. The Ministry of Agriculture (*two buildings*);
  - c. The New Town Administrative Headquarters;
  - d. The Old Town Administrative Headquarters and Offices West;
  - e. The Old Town Administrative Headquarters and Offices East;
  - f. Senafe Secondary School;
  - g. Senafe Hospital;
  - h. Sub-Zoba Administrative and Residential (*three buildings*); and
  - i. Telecommunications Building.

The liability is for 100% (one hundred percent) of the damage to each of these structures, except for the hospital, where the liability is 90% (ninety percent); and

8. For permitting, while occupying the area, deliberate damage by explosion to the Stela of Matara, an ancient monument in the Senafe Sub-Zoba.

## 2. The Western Front

49. In its Partial Award dated December 19, 2005, the Commission decided Ethiopia's liability with respect to Eritrea's Western Front Claims Nos. 1, 3, 5 and 9–13. The Commission found Ethiopia liable to Eritrea for eleven specific "violations of international law committed by its military personnel or by other officials of the State of Ethiopia:"

- a. For permitting looting and burning of buildings and destruction of livestock in the town of Teseney during May and June 2000;
- b. For permitting looting and burning of houses and destruction of livestock in the village of Alighidir and the burning and detonation of the nearby cotton factory and its stored cotton during May and June 2000;
- c. For permitting looting and burning of structures and destruction of livestock in the town of Guluj during May and June 2000, Ethiopia is liable for 90% (ninety percent) of the total loss and damage to property in Guluj during that time;
- d. For permitting looting in the village of Tabaldia during June 2000;
- e. For permitting looting in the village of Gergef during June 2000;

- f. For permitting looting and stripping of buildings and destruction of livestock in Omhajer from May 16, 2000 until the departure of the last Ethiopian forces in September 2000, Ethiopia is liable for 75% (seventy-five percent) of the total property damage in Omhajer during that time;
- g. For permitting breaking, entering and looting of houses, business establishments and government buildings in the town of Barentu during its occupation from May 18 to 26, 2000;
- h. For the destruction of the police station, the courthouse, the Gash-Setit Hotel and Conference Center, and a bakery in the town of Barentu during its occupation;
- i. For permitting looting of buildings and destruction of the police station in the town of Tokombia, and the destruction of the nearby Rothman tobacco plant, during its occupation in May 2000;
- j. For permitting looting of buildings in Molki Sub-Zoba on May 15 to 16, 2000; and
- k. For failure to take effective measures to prevent the rape of women in the towns of Barentu and Teseney.

50. In the same Partial Award, the Commission decided Ethiopia's liability with respect to Eritrea's Claim 21, concerning the Displacement of Civilians. It found Ethiopia liable to Eritrea "for the unlawful displacement of all the residents of Awgaro in violation of Article 49 of Geneva Convention IV."

## **B. Loss of Personal and Business Property**

### **1. Eritrea's Claim**

51. As noted above, the Commission made liability findings involving looting, stripping, burning, killing livestock or other destruction of or damage to individual and business property in Molki Sub-Zoba and eleven specified towns and villages on the Central and Western Fronts. (Zobas and sub-zobas are Eritrean local governmental entities. Molki Sub-Zoba is on the Western Front.) These liability findings involved destruction or damage occurring during Ethiopia's invasion of Eritrea in May 2000 and its subsequent occupation of some areas in Eritrea. Eritrea claimed more than 5.5 billion nakfa for fixed-sum damages in respect of tens of thousands of persons and businesses that allegedly experienced property losses during these events. This amount was divided between households (68%) and businesses (32%). Most of the business claims involved local merchants, cafés and bars, and other similar small businesses

52. Eritrea did not structure these property loss claims to correspond to the Commission's specific liability findings in the Central and Western Front Partial Awards. Instead, the claim in effect grouped together and sought compensation for all of the Commission's findings involving loss of property on the

Central and Western Fronts, except for Eritrea's separate claims for destruction or damage involving 201 identified structures, which are discussed in Section VI.C below. Eritrea then claimed for all of these combined losses, calculating the amount claimed on the basis of data from claims forms collected from more than 28,000 affected households and businesses in the relevant areas of Eritrea. The completed claims forms (which were not introduced into the record), and data derived from sample groups of them, were used to estimate both the claimed number of victims and the average per capita amounts of their injuries. Eritrea then multiplied the estimated number of victims by the estimated per capita amounts to determine its total claim. The claim reflected average losses said to be more than 148,000 nakfa per household surveyed, and more than 543,000 nakfa per business.

53. Eritrea maintained that this approach was appropriate, given the large numbers of persons harmed by Ethiopia's misconduct and the similarity of their injuries. In Eritrea's view, its use of claims forms was in harmony with the Commission's Decisions Numbers 2 and 5.<sup>28</sup> Those Decisions, taken in 2001 before the Parties' claims were filed, established certain elements of a possible mass claims system utilizing claims forms filled out by individual claimants and submitted on their behalf. As matters developed, both Parties elected to file their claims as State-to-State claims, and not to pursue the option of filing mass claims on behalf of individuals. Accordingly, the Commission did not pursue further work on a possible mass claims system.

54. Eritrea's Office of the Legal Advisor designed the claims forms, which were filled out by or for individual claimants participating in local collection programs administered by local officials working in cooperation with Eritrea's lawyers. Claimants swore to the truth of the information contained in the forms, with illiterate claimants being asked to affirm that their statements were truthful. Each completed form received an identifying number.

55. Forms were collected first in the area of Eritrea's Central Front claims, focusing on the towns of Senafe, Tserona and Serha, where the Commission had found serious looting and destruction. A total of 8,445 forms were collected for the Central Front. Eritrea used a different claims form in the area of the Western Front, modified to reflect the Commission's liability findings on the Western Front claims, as well as recommendations by Eritrea's technical adviser. Here, 20,370 forms were collected.

56. In all, 28,815 claims forms were collected: 25,595 claiming loss or damage to personal property, and 3,220 claiming damage to businesses. Individuals could file both household and business claims. Eritrea contended that the total number of claims represented by the forms was consistent with the

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<sup>28</sup> Eritrea-Ethiopia Claims Commission Decision No. 2 ("Claims Categories, Forms and Procedures") and Decision No. 5. ("Multiple Claims in the Mass Claims Process, Fixed-Sum Compensation at the \$500 and \$1500 Levels, Multiplier for Household Claims") (both dated August 2001).

Eritrean National Statistics Office's estimates in 2000 of a population of 29,682 families and 115,867 people in the areas concerned, estimates that it thought were likely lower than the population at the time of Ethiopia's invasion.

57. Eritrea used data from what it determined to be representative sample sizes of 548 business and 540 residential claims forms to determine fixed amounts reflecting average amounts of injury claimed. Eritrea did so because it regarded the pool of more than 28,000 claims forms to be too large to permit the Parties, or the Commission, to assess individual claims. Accordingly, utilizing a consultant's advice, Eritrea determined the sample sizes thought to represent the populations of victims for the Central and Western Fronts. It then used a random-number generator to select individual claims forms to populate these samples. Personnel from Eritrea's Office of the Legal Advisor then analyzed the amounts claimed in the selected forms.

58. The analysis of residential claims forms included amounts claimed to repair or replace lost assets, total lost income, and expenses during displacement. For business forms, the analysis included the greater of the business's value when the damage occurred multiplied by the average of the percentage of the inventory destroyed and the structure destroyed plus the cash looted, or total replacement cost plus lost income plus looted cash. The analysis excluded residential claims over two million nakfa and some claims for lost income, and valued unresponsive or obviously incorrect answers (for example, claims for loss of more than 100% of a claimant's property) at zero. The questions posed in the claims forms were not correlated to the Commission's specific liability findings, and the record does not indicate that anything was done in the analysis process to relate claimed amounts to those findings. There also is no indication that the amounts claimed were verified through sampling of the underlying evidence (if any) or any other means.

59. Based upon its analysis of the sample claims forms, Eritrea derived common average claim amounts for the Central and Western Fronts and applied the averages to the total claims form populations for those regions. Reflecting a total average claimed amount of 543,846 nakfa for business claims, Eritrea arrived at the estimated total of 1,751,183,196 nakfa for those claims. It calculated a total of 3,805,065,870 nakfa for residential claims, reflecting an average claimed amount of 148,664 nakfa.

60. As a partial check on the accuracy of the fixed amounts claimed, Eritrea's Office of the Legal Adviser developed hypothetical "representative price lists" of the household furniture, furnishings and other goods typically found in poor and middle class homes in Eritrea and in the homes of more affluent persons. "Shoppers" from the Office of the Legal Advisor then determined the retail prices of these goods in Asmara. The resulting hypothetical values of household furniture and furnishings substantially exceeded the average values estimated based upon the claims forms.

## 2. Ethiopia's Response

61. Ethiopia objected to Eritrea's forms-based claims for personal and business property on multiple grounds. Ethiopia stressed that the questions on the claims forms were not correlated to the Commission's liability findings, and that the forms solicited claims for types of damage for which the Commission did not find liability. In this regard, Ethiopia noted that the Commission's relevant liability findings primarily involved losses from looting, but that the claims forms also invited claims for other types of property loss, for lost income and business profits, and for other types of damages for which the Commission did not find liability. It also argued that some questions were leading, and that the wording of the questions and the structure of the form invited (and even encouraged) inflated answers and double counting.

62. Ethiopia pointed out that the amounts claimed were extremely high in relation to per capita incomes in Eritrea, contending that the average residential claim was seventy-five times per capita gross national income. It stressed that Eritrea made no effort to check the claimed amounts against supporting evidence; individual claimants were not even asked to provide documentation or support for their claims. In Ethiopia's view, the lack of any requirement to provide supporting documentation, and the absence of any apparent effort by Eritrean officials to verify the amounts claimed, further encouraged claimants to inflate their claims.

63. Ethiopia also calculated Eritrea's claims to be the equivalent of a per capita award amount of US\$5,072 with the business claims included and US\$3,911 without those claims, which Ethiopia viewed as exorbitant. Ethiopia further maintained that the claim forms represented a population group that did not realistically correspond to Eritrea's census data.

64. Ethiopia noted that the Commission's findings were usually stated in terms of specific towns or other locations, and contended that those findings should be construed in a limited and precise way, to apply only to the numbers of persons shown by Eritrea's census to live within the political boundaries of those specific towns or villages.

## 3. The Commission's Conclusions

65. For compelling reasons, including the shortness of time and resources, both Parties elected to file their claims in December 2001 as State-to-State claims, and not to utilize the mass claims procedures envisioned as a possible option in the Commission's Decisions Numbers 2 and 5. However, the Commission did indicate in its communications with the Parties, for example in its letter of August 29, 2001, and at the July 2006 Working Group meeting, that at the damages phase it was prepared to authorize a Party to utilize elements of a mass claims process in appropriate situations.

66. Nevertheless, the claims forms process that Eritrea designed and implemented for these property loss claims has significant weaknesses. Inspection of the forms confirms that they are not correlated to the Commission's findings of liability, and that they address significant elements of damages for which the Commission did not find liability. Some questions are phrased in ways that may have invited inflated damage claims or otherwise elicited unreliable information.

67. The process for determining these property loss claims also seems to have been largely divorced from any underlying evidence. Persons who filled out claims forms were not required to provide supporting evidence or documentation, and any narrative information they did offer apparently was not considered in assessing the amounts claimed. (In the form used for the Western Front, narrative material was relegated to the end of the form.) Thus, the record available to the Commission offers no means to test or verify the very large amounts claimed. This is of particular concern because Eritrea seeks per capita amounts said to reflect the average of thousands of persons' actual damages (subject to a few modest caps), not a reduced amount of fixed-sum compensation.

68. Eritrea's "representative price lists" do not offer a meaningful check on the amounts claimed. These lists reflect the impressions and personal observations of Eritrea's legal staff, not any systematic study of household items or their cost in the affected areas. Further, the prices utilized are those of new goods at retail in Asmara shops, which seem likely to be appreciably higher than the values of used goods in the affected areas.

69. As Eritrea observed during the proceedings, the UNCC and other past mass claims processes have used claims forms to identify and collect information about victims of particular types of injury for whom fixed-sum compensation may be appropriate. However, this typically has been done in claims programs combining a reduced burden of proof with correspondingly reduced fixed-sum compensation levels. These programs also have incorporated measures to test the underlying evidence, at least on a statistical sampling basis, as a check on spurious or inflated claims. In contrast, Eritrea claims high average per capita amounts said to reflect actual losses, without any supporting evidence. This is not sufficient to sustain a claim for 5.5 million nakfa.

70. This leaves the Commission in a difficult position. The evidence at the liability phase proved that many Eritreans did suffer significant losses of property at the hands of Ethiopian forces during and after Ethiopia's 2000 invasion. However, neither that evidence nor the evidence presented from the claims form process quantified the extent of injury or proved entitlement to the large amounts Eritrea now claims. In a commercial arbitration between two private parties, this might warrant dismissal of a damages claim for failure

of proof. The Commission is not prepared to take that step. Just as with some large claims by Ethiopia, where the Commission also has identified serious difficulties, there was widespread injury here. There were significant violations of international law causing harm to many individual victims. In such circumstances, it is not appropriate to dismiss the claim outright. Ethiopia's counsel recognized at the April 2007 hearing that "Eritrea is entitled [to] compensation based on your awards."<sup>29</sup>

71. At the hearing, counsel for Eritrea indicated that the claims forms are in storage, and that, if the Commission did not accept Eritrea's analysis, the Commission could analyze the data in the forms in any other manner thought satisfactory. The Commission does not have time or resources for such a fundamental re-assessment of a Party's claim. It is not the UNCC, with (at peak) staff of several hundred persons and extensive financial resources. Moreover, for the Commission to accept Eritrea's claims forms as evidence and commence to analyze them after the hearing would raise serious due process questions of fairness and equal treatment of the Parties.

72. In the circumstances, the Commission has sought to develop a reasonable estimate of the losses resulting from the injuries it found, taking account of the likely population of the affected areas and estimates of the frequency and extent of loss. This process was unavoidably imprecise and uncertain, but it was necessary given the limitations of the record.

73. In one relevant respect, the Parties' positions did not differ greatly. Both offered broadly similar figures—ranging from roughly 99,000 to 114,000 persons—for the populations of the areas covered by the Commission's liability findings (Molki Sub-Zoba and eleven specified towns and villages). In the Commission's view, losses should be assessed by households, because they largely fell upon households, not individuals. Therefore, the Commission divided the population figures by the approximate number of persons per household, to estimate the number of households potentially affected by conduct for which the Commission found liability.

74. The record is much less clear regarding the frequency and extent of losses. Eritrea claimed average household losses of 148,664 nakfa, but this amount is so much greater than the average per capita income in Eritrea that the Commission finds it unrealistic and unpersuasive. In assessing possible losses, the Commission took account of, among other things, the amounts claimed for similar losses from looting of households in Zalambessa and rural Tigray, as indicated by Ethiopia's evidence. (With respect to the latter, the Commission notes that Eritrea's claim involved losses in villages and towns, where residents were likely to own more goods potentially vulnerable to looting, for example, furniture, shop inventory, sewing machines, small electrical appliances and sheet metal roofing.) Although not legally controlling, the Commission also

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<sup>29</sup> Transcript of the Eritrea-Ethiopia Claims Commission Hearings of April 2007, Peace Palace, The Hague, at p. 862 (Mr. Picard) (April 25, 2007).

considered the amounts established in 2001 as appropriate levels of fixed-sum compensation, should the Parties elect to utilize a mass claims system.

75. The Commission also took into account the seriousness of these losses to the persons who suffered them. Many of those injured were people of modest means who lost all they had, including their means of sustenance. Particularly given many victims' limited resources, the loss of their residential and/or business property left many of them facing protracted destitution and dependency.

76. Taking the foregoing considerations into account, the Commission sought to estimate the appropriate compensation for looting losses utilizing several different approaches, all of which suggested a similar result. Based on its assessment of the record, the Commission awards Eritrea the sum of US\$13,500,000 as compensation for losses of residential and business property attributable to looting or other damage for which Ethiopia was found liable in Molki Sub-Zoba and the eleven towns and villages listed in the Commission's Partial Awards for liability.

### **C. Damage to or Destruction of Buildings**

77. The Commission found Ethiopia liable to Eritrea for the unlawful destruction of or damage to both public and commercial buildings on the Central and Western Fronts during Ethiopia's large-scale military incursion into Eritrea beginning in May 2000. The destruction and damage ran the gamut from the detonation of buildings, to the stripping of doors and windows and other building materials from structures, to the destruction or looting of building contents. Where the Commission concluded that damage in particular locations resulted from multiple causes operating at different times, including causes for which there was State responsibility and other causes (such as shelling or other combat damage) for which there was not, the Commission found Ethiopia liable for an approximate percentage of the damage based on the Commission's best assessment of the evidence. In several cases, the Commission identified specific buildings, including a number of large public buildings, in its liability findings; in other cases, the findings related more generally to buildings in a town, village or sub-zoba.

#### **1. Eritrea's Claim**

78. Eritrea claimed compensation exceeding two billion nakfa plus US\$38 million in connection with its claim for damaged and destroyed structures on the Central and Western Fronts (the "Building Claims").<sup>30</sup> For indicative purposes only, after converting the nakfa amount at the rounded 2005

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<sup>30</sup> Memorial of the State of Eritrea, Damages (Phase One) filed on November 15, 2006 [hereinafter ER Damages Group One Memorial], Spreadsheet Annex.

exchange rate of ERN 15:US\$1, the grand total of Eritrea's Building Claims is approximately US\$180 million.<sup>31</sup>

79. Specifically, in its Damages Group One Memorial, Eritrea sought total compensation of ERN 406,600,878 plus US\$1,918,104 for fifty-four allegedly damaged structures on the Central Front, and ERN 1,762,735,857 plus US\$35,576,750 for 147 allegedly damaged structures on the Western Front.<sup>32</sup>

80. Eritrea devoted extensive attention in its written submissions to supporting and quantifying its claims for actual amount compensation for destroyed and damaged buildings. Eritrea's Damages Group One Memorial contained a 520-page chapter on its Buildings Claims, with specific discussion of the liability basis and evidence for each of 201 individual buildings. The evidence, which varied widely from building to building, included witness statements, property inventories, blueprints, construction contracts, and repair/reconstruction estimates. The evidence cumulatively consisted of two volumes of witness statements and six volumes of documentary evidence.

81. The documentary exhibits included property surveys conducted by Eritrean government entities during or shortly after Ethiopia's occupation of certain areas. These included regional surveys, such as the July 2000 report assessing damages in Gash-Barka to institutions and facilities in the administrative, educational, health, water supply and agricultural sectors, and sector-specific reports, such as the September 2000 survey done by the Eritrea Electric Authority of the Ministry of Energy of Mines in Barentu, Teseney, Adi Quala, Adi Keih and Senafe.

82. Eritrea made separate claims for the twenty-three individual structures identified in the Central and Western Front Partial Awards (excluding the Tserona Patriots Cemetery and the Stela of Matara).<sup>33</sup> As to the Commission's more general findings regarding building destruction and damage in eleven named villages and towns, Eritrea asserted that it had to prove four

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<sup>31</sup> In the course of the Group Number One damages hearings, Eritrea reduced its total damages claims by approximately 450 million nakfa after withdrawing certain evidentiary documents and confirming that others were missing from the record. The reductions affected Eritrea's claims regarding the Barentu Zoba and Sub-Zoba Ministry of Agriculture, Barentu Town Administration Building, Barentu Zoba Gash-Barka Ministry of Health Offices and Warehouse, Barentu Hospital, Teseney Ministry of Agriculture, Tokombia Ministry of Agriculture and Molki Sub-Zoba schools.

<sup>32</sup> The Central Front total does not include Eritrea's claims for destruction of the Stela of Matara or the Tserona Patriots Cemetery, which are addressed separately at Section VI.E. Nor does the total include Eritrea's claim for damages for nine buildings in Awgaro, which the Commission addresses at Section VI.H.

<sup>33</sup> Eritrea combined its claims on several of these 23 structures in Senafe. Eritrea addressed the two Senafe Electrical Authority buildings in one claim; the three Senafe Old and New Town Administrative Headquarters buildings in one claim; the two Senafe Ministry of Agriculture buildings in one claim; and the three Senafe Sub-Zoba Administrative and Residential building claims in one claim. Accordingly, of the total of 201 separate Building Claims, only seventeen are for the 23 separately identified structures.

elements to be eligible for compensation: (a) before the war, the structure did in fact exist; (b) the structure was destroyed or damaged during the war; (c) its damage, destruction, etc., was unlawful; and (d) the amount claimed is appropriate to make the victim whole.

83. Eritrea did not attempt to quantify its Building Claims as of the actual or approximate date of damage. Instead, Eritrea quantified its claims for particular buildings as of various times, based on evidence ranging from the original construction cost (typically multiplied by varying post-war inflation rates) to post-war reconstruction or repair estimates at then-current prices. The majority of the Eritrean nakfa quantum figures date from 2005 and 2006, when Eritrea was preparing its Building Claims for submission to the Commission and obtaining actual and estimated damage figures. The vast majority of the figures presented by Eritrea are estimates, as the government explained it has not been able to afford the costs of reconstructing, repairing and restocking the buildings. As noted previously, Eritrea did not convert its Building Claims made in Eritrean nakfa to U.S. dollars.

## 2. Ethiopia's Response

84. Ethiopia objected generally to the scope and magnitude of Eritrea's Building Claims, and challenged Eritrea's reliance on property inventories and reconstruction estimates prepared post-war with an eye toward litigation and presented without supporting documentation.

85. Ethiopia chose to submit specific defenses to only the fifteen highest-value structures claimed by Eritrea, to "illustrate the evidentiary and analytical problems with these claims."<sup>34</sup> According to Ethiopia, these fifteen structures together accounted for 83% of the total individually assessed damages claimed by Eritrea. Among its illustrative objections, Ethiopia criticized Eritrea's claims for compensation for 100% of the value of property allegedly looted from a damaged building, for example in Senafe, where the Commission limited looting compensation to a lower percentage and where Eritrea admitted that looting had occurred before destruction of the building itself. Ethiopia also objected to Eritrea's requests for the costs of repairing buildings that had been looted or stripped, in addition to the value of the looted or stripped items. As to Eritrea's estimates, Ethiopia offered examples of the far lower values it claimed for Eritrea's destruction of allegedly comparable buildings in its parallel Central and Western Front claims.

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<sup>34</sup> Ethiopia's Counter-Memorial to Eritrea's Damages Phase One Memorial (February 15, 2007), para. 3.5. The fifteen structures included the Stela of Matara, addressed separately in this award at Section VI.E.

### 3. The Commission's Conclusions

86. In quantifying compensation for Eritrea's Building Claims, the Commission has reviewed the basis and evidence for each of the 201 individual claims. As for the twenty-three structures specifically identified and included in the Central and Western Front Partial Awards, the Commission briefly addresses below the claims, defenses and evidence on a building-by-building basis. Ethiopia's Counter-Memorial contained specific defenses for six of these twenty-three structures.

87. As for the more than 175 additional buildings for which Eritrea presented claims under the Commission's broader geographic liability findings, the Commission is able to include an amount for compensation only where Eritrea submitted reasonable and credible proof that the relevant building falls within the relevant liability finding. This required evidence that: (a) the relevant building existed before the war, in the relevant town, village or sub-zoba; (b) the building was damaged or destroyed during the war, in the time period designated in the relevant provision of the award; (c) the damage or destruction was unlawful, within the four corners of the relevant liability finding; and (d) the amount would approximately compensate for actual damages at the relevant time, i.e., applying the *Chorzów Factory* test discussed above.<sup>35</sup>

88. In reviewing the evidence submitted by Eritrea, the Commission found a wide variation in both quantity and quality. Most useful—and, perhaps understandably, most rare—was documentation, in the form of invoices or professional bids, for the actual or estimated costs of reconstruction, repair and restocking of damaged buildings. As in Ethiopia's parallel claims for property damage, the Commission relied on government surveys undertaken during or just after the war to assess the damage to and facilitate the restoration of civilian services (for example, health, education, water and electricity supply), rather than to support potential litigation. Another form of generally (but not always) credible evidence was a detailed statement from a witness with first-hand knowledge (for example, a school official or a court administrator) describing the relevant building and the destruction, looting or stripping (whether the acts or the results), and attaching a detailed list of lost property with values. In comparison, the Commission could give little or no evidentiary weight to property lists or inventories that were unsigned, undated or otherwise lacking authentication, or to patently exaggerated valuations.

89. A particular note is warranted as to compensation for damage to or destruction of churches, mosques and other religious buildings. The Commission is mindful of the central role of religious institutions in the life of Eritreans, and recognizes the concern and distress many congregations experienced from the desecration of those institutions. With regard to the assessment of the values of religious items destroyed or looted which may have unique cultural value, the Commission generally accepts that the religious officials who

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<sup>35</sup> See para. 24 *supra*.

attested to the values of these items would be best positioned to make those valuations.

90. While Ethiopia's decision to offer specific defenses to only fifteen of Eritrea's individually assessed claims (including only six of the twenty-three buildings identified in the liability Awards) is perhaps understandable, it has made the Commission's task of evaluating Eritrea's 201 Building Claims significantly more difficult. The Commission is left with only the most general of defenses, and no defensive evidence, for the vast majority of these claims.

91. To the extent Ethiopia's illustrative defenses raised with regard to the fifteen structures apply to other Building Claims, the Commission has taken such defenses into account in its review. For example, in appropriate cases, the Commission accepts Ethiopia's illustrative objection to Eritrea's practice of seeking 100% of the value of property looted or stripped from a building before that building was damaged or destroyed. Where the Commission limited Ethiopia's liability to a percentage of the damage caused by looting or stripping of buildings, it was because the evidence did not permit the exact apportionment of responsibility. In a few instances, discussed below, Eritrea did claim for the value of contents lost when a building was destroyed or damaged, but for the most part Eritrea expressly alleged that Ethiopia had conducted or permitted looting and stripping of structures before the relevant destruction or damage. Under the circumstances, the Commission has applied the percentage factor for looting and stripping in the relevant location, for example, 75% in Tserona Town, rather than award 100% of the value of the contents of a subsequently destroyed or damaged building.

92. In many of its looting and stripping claims, Eritrea included a damage component for repair or even reconstruction of the relevant structure, to which Ethiopia objected. On the one hand, Ethiopia is correct that Eritrea cannot fairly use the damages phase to convert a liability finding for looting and stripping of a building into liability for outright destruction or serious damage. The Commission was careful to distinguish its liability findings in locations where substantial property destruction and damage occurred, such as Senafe Town and Barentu Town, from locations where the evidence supported liability only for looting, such as the villages of Tabaldia and Gergef. On the other hand, the photographic (and testimonial) evidence at both the liability and damages phases showed that looting and stripping of roofs, doors, window frames and other structural elements of a building could and often did compromise the structural integrity of the building. In reviewing the evidence in individual claims for looting and stripping, the Commission has looked with particular care at whether Eritrea's claims for estimated building repair costs are linked to the nature and scope of the looting and stripping that occurred. So, for example, the costs of re-roofing a building after the original roof was stripped, or the costs of re-framing and plastering walls after the original windows and door frames were ripped out, are allowable. Farther removed, and not allowable, are costs claimed for expanding or updating a building, adding

new water reservoirs outside the building, or reconstructing a building that had eventually collapsed because it had been exposed to the elements without repair.

93. As discussed above at paragraph 30, the Commission does not accept Ethiopia's defenses based on an unreasonably narrow interpretation of words such as "looting" and "stripping" in the Central and Western Front liability findings. The Commission was not exact and could not have been exact in, for example, distinguishing between the looting and stripping of building components. Where the evidence showed frequent looting of roofs, doors, window frames and other building materials, the Commission tended to use the word "stripping," but it did not thereby exclude such actions when using the word "looting." "Burning" of a structure is one method of damage and destruction, but it does not exclude other methods.

94. Nor does the Commission accept, with the exception of Senafe Hospital (discussed below), Eritrea's claims for compensation for the cost of building or renting substitute space following unlawful destruction of or damage to a building. In virtually all such cases, the evidence regarding allegedly leased property was not firmly connected to the function or services previously provided in the destroyed or damaged building. Further, by not including amounts for substitute real estate in the Final Awards for either Eritrea's or Ethiopia's building-related claims, the Commission treats the Parties equally.

95. A preliminary word is necessary on conversion of Eritrea's successful Building Claims from Eritrean nakfa to U.S. dollars. The Commission has followed a different practice here than for Eritrea's other compensation claims. This is because, as noted, Eritrea did not submit evidence of the value of specific buildings as of the date of actual damage or destruction, or submit evidence that would allow the Commission to estimate that value. Instead, Eritrea in most cases provided evidence of the estimated costs in nakfa to repair or reconstruct specific buildings between 2003 and 2006. This is consistent with Eritrea's position that it lacked—and, in most cases, still lacks—sufficient funds to repair or reconstruct those buildings, or replace looted property.

96. Accordingly, rather than apply a flat pre-war ERN:US\$ exchange rate to Eritrea's compensation estimates for later years (when the nakfa was depreciating), the Commission has converted the claims to dollars on a building-by-building basis as of the year for which the repair, reconstruction or replacement cost is estimated. To do so, the Commission has used the average annual official exchange rates, as set out in paragraph 42.

97. This mathematical process, while time-consuming to apply to each of Eritrea's 201 Building Claims, serves two purposes. First, it avoids the windfall to Eritrea that would have resulted if a single wartime exchange rate of 8.8 nakfa or 9.36 nakfa to the U.S. dollar had been used to convert estimates calculated (contemporaneously) in nakfa in later years when the exchange rate exceeded fifteen nakfa to the U.S. dollar. Second, looking to the *Chorzów Factory* test, this process better approximates the amount necessary to put Eritrea

in the position it would have been in but for Ethiopia's unlawful destruction, damage and looting of property, in light of Eritrea's post-war economic inability to repair, reconstruct and replace that property. In the currency conversion process, as well as in other calculations, the Commission has rounded amounts to avoid suggesting greater precision than the evidence allowed.

98. The Commission first addresses the Central Front and then the Western Front Building Claims. The Commission sets out relatively full analyses of Eritrea's claims on the twenty-three specific structures identified in the Central and Western Front Partial Awards, in particular the Senafe Town buildings, as well as other building claims that serve as models for broad categories of claims. The Commission has used the same analytical structure in reviewing all of the other individual claims, most of which are discussed in groups for the sake of economy. Within the groups, the Commission offers examples of successful, unsuccessful and partially successful claims based on the evidence.

#### 4. The Central Front

99. On the Central Front, the Commission found Ethiopia liable for inflicting or permitting damage to buildings in Tserona Town, Serha village and Senafe Town:

- For 75% of the total damage caused by the looting and stripping of buildings in Tserona Town permitted while it occupied the town from late May 2000 until late February 2001;
- For the destruction of the Sub-Zoba Administration Building, the Sub-Zoba Health Center, and the Warsai Hotel in Tserona Town;
- For 70% of the total damage it inflicted on the infrastructure of the village of Serha during its occupation from May 1998 through February 2001;
- For 75% of the total damage caused by the looting and stripping of buildings in Senafe Town permitted during its occupation between May 26, 2000 and June 2001; and
- For the destruction of or severe damage to thirteen major structures in Senafe Town during its occupation of the town: the Electrical Authority (two buildings); the Ministry of Agriculture (two buildings); the New Town Administrative Headquarters; the Old Town Administrative Headquarters and Offices West; the Old Town Administrative Headquarters and Offices East; the Senafe Secondary School; the Senafe Hospital (at 90% of the damage); the Sub-Zoba Administrative and Residential compound (three buildings); and the Telecommunications Building.<sup>36</sup>

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<sup>36</sup> Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22 between the State of Eritrea and the Federal Democratic Republic of Ethiopia (April 28, 2004) [hereinafter Partial Award in Eritrea's Central Front Claims], *dispositif*, Section V.D, quoted in full above at para. 48.

100. Eritrea claimed damages of approximately 413 million nakfa plus US\$3 million in connection with its Central Front Building Claims. For indicative purposes only, after converting the nakfa amount at the rounded 2005 exchange rate of ERN 15:US\$1, the total claimed is approximately US\$30 million.

101. *Tserona Town*. For Tserona Town, the Commission found Ethiopia liable for the destruction of the Sub-Zoba Administrative Building, the Sub-Zoba Health Center, and the Warsai Hotel, as well as for 75% of the total damage caused by looting and stripping of buildings in Tserona Town during Ethiopia's occupation from late May 2000 until late February 2001. After applying the 75% factor, Eritrea sought a total of ERN 70,617,456 plus US\$11,719 in compensation for its Tserona Town Building Claims.

102. *Sub-Zoba Administrative Building*. Eritrea sought compensation of ERN 13,583,136 for the detonation and looting of the Sub-Zoba Administrative Building, which was the main administrative center for Tserona Town and fifteen kebabis serving 36,000 inhabitants. In support of the claim, Eritrea offered estimates dating from 2005 for rubble clearing, repairing damage to the detonated administrative building and several stripped staff residences, replacing building contents, and the rental of a temporary substitute office. Eritrea also included a construction contract and plans reflecting that the administrative building was constructed in 1996–1997 for 583,896 birr. Ethiopia offered no specific defense. On balance, the Commission is prepared to award compensation for 100% of the rubble clearing; only 50% of the estimated cost of rebuilding the administrative office building, because, even with reasonable inflation, the estimate is excessively greater than the original construction cost; and, applying the percentage for looting and stripping in Tserona Town from the Central Front Partial Award, 75% of the value of looted property, including desks and chairs actually replaced in 2002. The Commission awards no compensation for temporary office rental or for alleged stripping damage to staff residences, as the evidence of repair costs was not sufficiently linked to looting or stripping. Applying the 2005 exchange rate for all amounts awarded except the desks and chairs replaced in 2002, for which the 2002 exchange rate applies, the award equals US\$305,000.

103. *Sub-Zoba Health Center*. Eritrea sought compensation of ERN 18,153,295 for the detonation and looting of the Sub-Zoba Health Center, which served a catchment area of 50,000 persons. Based on the contract put into evidence, the Health Center cost 1.6 million birr to construct in 1996. The head of engineering for the Ministry of Health provided an estimate for rebuilding costs of ERN 14,065,895, which he based on the costs of building a standard health center in 1998 of ERN 4,688,631 and the tripling of construction costs by 2006. The evidence also included a 2006 inventory of looted equipment with estimated values, leading to a total looting claim of ERN 3,307,400. The estimates date from 2005 and 2006, at which time Eritrea had not yet been able to start reconstruction. Ethiopia offered no specific defense. On balance,

the Commission is prepared to award compensation for 100% of the estimated cost of rubble clearing; only 50% of the cost of reconstruction, because, even with reasonable inflation, the estimate is excessively greater than the original construction cost; and 75% of the estimated value of the looted contents. Applying 2005 and 2006 exchange rates, the award equals US\$670,000.

104. *Warsai Hotel.* The Warsai Hotel was originally built in 1997–1998 with a loan from the Eritrean Disabled Fighters’ Association for approximately 467,000 birr for construction and 97,000 birr for furnishings. Eritrea sought ERN 3,925,493 for the looting, stripping and detonation of the Hotel: ERN 2,189,938 for clearing rubble and rebuilding, based on 2001 specifications from the Fighters Association; ERN 543,455 to replace furnishings and kitchen equipment as of 1998–1999; and ERN 1,192,100 for lost revenue from 2000 to 2006. Eritrea submitted substantial evidence, including blueprints and receipts, supporting the original costs of both construction and furnishings, including a 28,000 birr Italian espresso machine. Ethiopia offered no specific defense. The Commission considers the rebuilding claim reasonable; the estimate for reconstruction in 2001 is four times greater than the original cost in 1997–1998, which is a more realistic inflation factor than the factor of ten used in other instances. The Commission also considers the property replacement claim reasonable; Eritrea presented invoices for the actual replacement in 2001 of the hotel oven and mixer at ERN 366,980, which is a large percentage of the total ERN 543,455 claimed. The limited economic evidence did not support the claim for lost revenue. After applying the 75% Tserona Town looting and stripping percentage to the property replacement claim, and then applying the relevant 1998 and 2001 exchange rates, the award equals US\$270,000.

105. *Other Tserona Town Building Claims.* The Commission next examines Eritrea’s compensation claims, totaling approximately ERN 35 million plus US\$12,000, for 75% of the damage allegedly caused by the looting and stripping of fourteen other buildings in Tserona Town permitted by Ethiopia from late May 2000 until late February 2001. These consist of claims for damage to the Town Administration Building, Police Station, Courthouse, Water Supply, Generator House, Berhe Tsaeda Elementary School, junior school, Faith (Imnet) Mission Elementary School, Ministry of Agriculture, Eritrean Relief and Refugee Commission (“ERREC”) office, marketplace, Shell/Agip station, Gamia Mosque and Debre Michael Orthodox Church. Ethiopia offered no specific defense to Eritrea’s claims on these buildings.

106. As with other towns and villages, discussed below, the Commission has determined to award all, none or some of the amounts claimed by Eritrea for each of these fourteen buildings. At one end of the spectrum, the Commission finds the claims for the Police Station, Courthouse, Faith (Imnet) Mission Elementary School, ERREC office and Shell/Agip station reasonably supported by witness statements and documentary evidence. Having denied the claim for detonation of the Courthouse at the liability phase, the Commission notes that Eritrea’s claim in this damages phase was limited to ERN

325,316 (US\$32,062 at 1997 and 2005 exchange rates) for looted doors, windows and furnishings.

107. At the other end of the spectrum, the Commission disallows the claims for the Tserona Town Administration Building and Debre Michael Orthodox Church. As for the Administration Building, Eritrea sought ERN 12,697,125 for looting, stripping and allegedly associated damage, an amount some four hundred times the original cost of the building in 1996 (33,281 birr) based on Eritrea's documents. The claim was clearly one for total reconstruction and improvement of an originally modest building, with Eritrea making no effort to connect the reconstruction costs to the effects of looting and stripping. Even the looting claims appeared exaggerated: three photocopiers at ERN 350,000 each, and two typewriters at ERN 250,000 each. As for the Debre Michael Orthodox Church, which Eritrea described as the only building remaining intact in Tserona after the Ethiopian occupation, Eritrea produced no evidence as to the value of looted items, but instead offered "suggestions" based on the estimated values of the contents of Orthodox churches in Senafe and Serha.

108. In the middle of the spectrum, the Commission discounts the claims for the Ministry of Agriculture, junior school and Gamia Mosque by 50% (as well as applying the 75% factor for looting and stripping in the liability Award). The Commission considers the evidence offered to support the claim for the Ministry of Agriculture—inventory lists prepared in 2005 with no underlying documentary support whatsoever—to be insufficient to support the comparatively large claim for more than six million nakfa. The Commission is not convinced, in the case of the junior school, that post-stripping repairs would cost twice the total cost of constructing the school in 1999 or, in the case of the Mosque, that repair costs would equal those for the substantially larger Alsadiaq Mosque in Senafe. The Commission has also corrected the amount for the Tserona Berhe Tsaeda Elementary School, because the documentary evidence combined claims for that school and the Faith Mission Elementary School. The Commission includes compensation for the claims for the Water Supply and Generator House facilities only in the amounts directly attributable to looting (looted pipes and pumps, and electricity poles and wire, respectively) and not donated by UNICEF and UNMEE in post-war reconstruction projects, apparently on a non-reimbursable basis. As for the destroyed marketplace, the United Nations Development Program ("UNDP") provided a substantial rehabilitation grant; absent any indication that Eritrea had to reimburse the UNDP, the Commission limits compensation to 75% of the amount carried by the Sub-Zoba.

109. The Commission awards Eritrea compensation in the amount of US\$775,000 for 75% of the total damage caused by the looting and stripping of the buildings in Tserona Town listed above during the Ethiopian occupation. Adding the amounts awarded for the three structures identified in the

liability Award, the total awarded for Eritrea's Building Claims in Tserona Town is US\$2,020,000.

110. *Serha Village.* The Commission found Ethiopia liable for 70% of the total damage inflicted on the infrastructure of the village of Serha during its occupation from May 1998 through February 2001. After applying the 70% factor, Eritrea sought compensation of ERN 21,860,300 plus US\$54,777 for damage inflicted on ten structures in Serha: the Health Station, Administration Building, Police and Immigration Compound, Generator House, elementary and junior school, Mai Terra Elementary School, Disabled Fighters Bakery and Market, open air market, Shell/Agip station and St. Mary's Orthodox Church. Ethiopia offered no specific defense to Eritrea's claims on any of these buildings.

111. The Commission finds the claims for the Administration Building, elementary and junior school, open air market, Shell/Agip station and St. Mary's Orthodox Church reasonably supported by the witness statements, claim forms and documentary evidence. The Commission discounts the claims for the Police and Immigration Compound and reconstruction of the Health Station by approximately 50% (as well as applying the 70% factor in the liability Award), because of unreasonably inflated reconstruction costs. In the case of the Health Station, Eritrea's own evidence showed that the original construction costs were ERN 323,650 and the costs of building a health station tripled after the war, which would support compensation of ERN 970,950 rather than the ERN 1,986,600 sought. The Commission also discounts the ERN 6,090,000 claim for the looted Generator House by 50%, because the Commission is not convinced that the costs of replacing a generator and 800 telephone poles would increase by ten times between 1997 and 2005. As for Eritrea's claim for ERN 1,374,327 for 70% of the costs for rehabilitation and replacement of furniture for the Mai Terra Elementary School, the Commission reduces compensation by the ERN 790,436 donated by the Lutheran World Federation, apparently without any requirement of repayment. Finally, turning to Eritrea's claim for looting-related damages to the Disabled Fighters Bakery and Market, the Commission disallows the claim for ERN 734,623 worth of looted items belonging to Merkeb Construction Co. for failure of proof: the witness statement from the Fighters Association identified another contractor, and the Merkeb inventory list was not authenticated in any way.

112. The Commission awards Eritrea compensation in the amount of US\$990,000 for 70% of the damage inflicted on the buildings listed for Serha during the Ethiopian occupation.

113. *Senafe Town.* Senafe Town was a major focus of the Commission's findings of property destruction and damage in the Central Front Partial Award. The Commission found Ethiopia liable for the unlawful destruction of or severe damage to thirteen specific major structures during its occupation of the town between May 26, 2000 and June 2001, as well as for 75% of the total damage suffered in the town from looting and stripping of buildings in

the town during the occupation. After applying the 75% factor, Eritrea sought a total of ERN 320,375,509 plus US\$2,494,009 in compensation for its Senafe Town Building Claims.

114. The Commission turns first to the thirteen specific major structures, as set out in the Central Front Partial Award: the Electrical Authority (two buildings), Ministry of Agriculture (two buildings), New Town Administrative Headquarters, Old Town Administrative Headquarters and Offices West, Old Town Administrative Headquarters and Offices East, Senafe Secondary School, Senafe Hospital (at 90%), Sub-Zoba Administrative and Residential complex (three buildings) and Telecommunications Building.

115. *Electrical Authority.* Eritrea sought US\$500,000 for the costs of restoring the two buildings of the Senafe Electric Authority and related equipment. This amount was based on a 2000 report by an Eritrea Electric Authority damage assessment team, and is also the amount of a 2001 World Bank loan to restore electric services and structures in Senafe. Ethiopia did not provide a specific defense. In light of the documentary support provided by Eritrea, the Commission awards the full US\$500,000. Eritrea's unliquidated claim for compensation for unspecified environmental damage is denied.

116. *Ministry of Agriculture.* Consistent with the importance of the agricultural sector in Eritrea (as well as in Ethiopia), Eritrea put substantial emphasis on its claims for loss of Ministry of Agriculture buildings and facilities. For Senafe Town, Eritrea sought compensation totaling ERN 52,128,765 for the destruction and looting of the two Ministry of Agriculture buildings identified in the Central Front Partial Award, namely the central office and the veterinary clinic, as well as for a nursery station, main warehouse and satellite warehouses, poultry farm (actually a storage facility), meeting hall and forestation office. Eritrea's main evidence was a paper prepared in August 2005 by an official of the Ministry of Agriculture for Senafe Sub-Zoba, listing destroyed and damaged buildings and items and their prices; no receipts or other documents were attached. Ethiopia did not provide a specific defense.

117. Turning first to the two Ministry of Agriculture buildings singled out in the Central Front Partial Award, the Commission is prepared to award 100% of the reconstruction costs estimated by Eritrea as of 2005: ERN 2,760,915 for the central office and ERN 3,760,915 for the veterinary clinic. Although Eritrea's quantum evidence was slim, these amounts were consistent with those provided and supported for buildings of similar size and importance. As for the looted contents, which Eritrea described as having been "removed before the buildings were detonated,"<sup>37</sup> the Commission awards 75% of the value claimed, in the combined amount of ERN 4,798,817. The Commission considers the items and prices listed by the Ministry of Agriculture official in his witness statement to be reasonable, including four tractors worth ERN 500,000 each looted from the central office.

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<sup>37</sup> ER Damages Group One Memorial, p. II-49.

118. Eritrea's claims related to the additional Ministry of Agriculture buildings pose several problems. Given that these buildings are not all located in the vicinity of the central office and veterinary clinic, the Commission appreciates that Eritrea limited its claims to 75% of damages allegedly connected to looting and stripping of the additional buildings. However, there are problems with proof of both causation and quantum. Insofar as Eritrea sought compensation for the costs of repairing the buildings, which costs were supported only by single line items in the Ministry of Agriculture report, Eritrea failed to connect structural damage to looting and stripping. The amounts were also high: Eritrea claimed ERN 2,720,600 (equal to the claim for the central office) to repair the poultry farm/storage facility, described by Eritrea as a cement block and plywood building. There are also limits to Eritrea's looting claims for the contents of the additional buildings. Although the Commission accepts Eritrea's explanation that the Ministry of Agriculture had filled its main warehouse as the rainy season approached in May 2000 and so had rented private warehouses around Senafe Town, the fact remains that Eritrea did not even indicate how many such warehouses existed, much less what their contents were or what happened to those contents. On balance, the Commission is prepared to award an additional ERN 8,400,000 for the looting of Ministry of Agriculture facilities in Senafe Town, which represents 50% of the estimated value of contents looted from the main warehouse, nursery station and poultry farm/storage facility.

119. The total compensation awarded for the Ministry of Agriculture buildings in Senafe Town, when converted at the 2005 exchange rate, is US\$1,300,000.

120. *Old Town and New Town Administration Buildings.* At the damages phase, Eritrea combined its claims for the New Town Administrative Headquarters, Old Town Administrative Headquarters and Offices East, and Old Town Administrative Headquarters and Offices West, which were separately identified in the Central Front Partial Award. Eritrea sought a total of ERN 108,351,929 for the destruction of these buildings and the looting of the Old Town buildings and, separately, the looting of the Water Facility Office inside the Old Town complex. Neither the Old Town nor the New Town complex has been rebuilt. In witness statements, the head engineer for Dehub Zoba and his predecessor provided per meter estimates for rubble clearing and reconstruction, leading to estimates for the entire complex of ERN 632,000 for rubble clearing and ERN 20,040,000 for reconstruction. Although blueprints and other original construction documents were no longer available for the Old Town buildings, which were built in the Italian colonial style in the early 1900s, Eritrea estimated rebuilding costs based on square footage. Construction documents reflected that the New Town compound was under construction and was 75% complete when demolished during the Ethiopian occupation. Eritrea provided various inventories supporting its claims for approximately ERN 55 million for the contents of the Old Town buildings

and ERN 27 million for the contents of the Water Facility Office. In its specific defense, Ethiopia charged Eritrea with inflating its claims for rebuilding costs (Ethiopia compared its claim for rebuilding a comparable building in Zalambessa for US\$38,314) and replacing lost items (Ethiopia noted that Eritrea valued a US\$8,000 Leica Total Station optical instrument at some US\$80,000). Ethiopia also objected to Eritrea's seeking 100% of rebuilding costs for the 75% complete New Town buildings, as well as 100% rather than 75% of looting and stripping losses.

121. Turning first to the New Town Administrative Headquarters, the Commission finds the rebuilding estimate of ERN 8 million to be reasonable, and so is prepared to award Eritrea 75% or ERN 6,000,000. There was no claim for looting associated with the New Town complex, presumably because it was under construction and not in use. The Commission awards ERN 11,180,000 for rebuilding the Old Town Administrative Headquarters, recognizing that its historic character cannot be recreated. The looting claims were patently excessive. For example, examination of the inventory of looted electrical goods revealed that the preparer apparently conflated unit prices and total prices, leading to a valuation of ERN 30,000,000 for 600 40-watt lamps; when corrected, the total for electrical goods is closer to ERN 200,000 rather than ERN 49,000,000. A separate inventory of looted items, prepared by the Senafe Town Administrator, did not suffer from such a systematic mistake. Indeed, the Commission appreciates that the administrator took care not to include entries for stripped roofs and doors, which were included in the estimate of rebuilding costs. The Commission can only conclude that the ERN 800,000 price on this inventory for the Leica Total Station (by far the highest unit price on the four-page inventory) was a typographical mistake, and reduce the total by ERN 720,000. The third inventory offered by Eritrea, which listed and valued the pipes, valves, tools and other equipment looted from the Water Facility Office warehouse, also appears reasonable. The Commission is prepared to accept the total valuation of ERN 6,769,543 based on 2001 prices, but not to multiply it by four as Eritrea requested before applying the 75% looting factor.

122. The Commission awards total compensation for the destruction, looting and stripping of the New Town and Old Town Administrative Headquarters and Offices, including costs of rebuilding at 100% for the Old Town buildings and 75% for the New Town buildings, and costs of replacing looted items at 75%, of US\$2,100,000, when converted at the applicable 2000 and 2005 exchange rates.

123. *Senafe Secondary School.* Just before the occupation, the Senafe Secondary School served 2,500–3,000 high school students and was in the process of expanding to house a junior school. Eritrea sought ERN 14,831,230 as compensation for Ethiopia's destruction, looting and stripping of the complex, including amounts for the actual repair of the senior school and estimated reconstruction of the junior school. Ethiopia did not present a specific defense.

124. The Commission finds the evidence supporting this claim to be of mixed quality. Eritrea submitted a certificate of payment for the repairs to the Secondary School, which were completed in 2004 at a reasonable cost of ERN 372,628; the certificate reflected that the work focused on replacing stripped windows, doors and roofing and related structural damage. Eritrea also sought ERN 1,579,822 for furniture and supplies actually replaced between 2002 and 2004, and another ERN 2,678,100 as the estimated cost in 2006 of completing the replacement process. Less reasonable was the comparatively large claim of ERN 7,000,000 to rebuild the junior school expansion; the witness statements reflected that construction was only approximately 75% complete, yet the estimate was for twice the original full contract price of ERN 3,572,252. The Commission limits the compensation for the junior school project to 75% of the original price, or ERN 2,679,189. The Commission denies Eritrea's ERN 3,105,650 claim for property allegedly left by the contractor at the site, because, even assuming a necessary link with the liability findings, the documentary evidence did not support the amount claimed. In total, after conversion of nakfa amounts at the applicable 2000, 2003, 2004 and 2006 exchange rates, the Commission awards Eritrea compensation of US\$520,000 for the destruction, looting and stripping of the Senafe Secondary School.

125. *Senafe Hospital.* Senafe Hospital was an important health facility, which served, according to Eritrea, a catchment of 100,000 people. Eritrea was not able to reconstruct the hospital, but did build a temporary hospital in 2003. Eritrea sought ERN 70,120,652 plus US\$460,369 for 90% of the estimated costs of rebuilding and restocking the hospital and constructing the temporary hospital. Eritrea presented documentary evidence supporting the actual costs of the temporary hospital and the preparatory rubble clearing for rebuilding the hospital proper. Eritrea's evidence for the costs of rebuilding consisted only of two estimates of sixty-five and seventy-five million nakfa in witness statements, one from the head of engineering of the Ministry of Health and one reportedly from a construction company; neither estimate was supported by any bid or contract documents, or even a breakdown. Ethiopia put forward a strong defense, arguing that the rebuilding estimates were vastly inflated compared to Eritrea's 1995 construction costs of approximately 1,000,000 birr to build an extension of Senafe Hospital and to Ethiopia's own claim of US\$363,586 for reconstruction of the hospital in Zalambessa. Ethiopia also charged Eritrea with failing to mitigate its damages by expending ERN 2,451,836 for the temporary hospital rather than building a new one, and objected to Eritrea's claiming 90% rather than 75% of the costs of replacing looted property.

126. As in other instances, the Commission agrees with Ethiopia that the proper discount rate for looting, which Eritrea describes as having occurred before destruction of the building, is 75% rather than 90%. The Commission does not, however, agree that Eritrea failed to mitigate its damages by constructing the temporary hospital for some two million nakfa. Even if, as

discussed below, Eritrea's estimates for rebuilding the comprehensive facilities of Senafe Hospital were too high, the Commission cannot fault Eritrea for spending ERN 2 million to provide health services urgently needed by a large community. In light of this special need, the Commission, in this one instance, awards Eritrea's costs of providing temporary substitute facilities for a destroyed or damaged building.

127. Having just noted the importance of health services in the Senafe region, the Commission finds itself in a difficult position in assessing compensation for damage to Senafe Hospital. Absent any documentary evidence underlying Eritrea's estimates of ERN 65,000,000 and ERN 75,000,000, the Commission returned to the factors set out in the witness statement of the Ministry of Health's head of engineering. As discussed above in connection with the Tserona Town health center, he testified that the costs of building a standard health center in 1998 were ERN 4,688,631 and construction costs (at least in his sector) had tripled by 2006. Assuming that Senafe Hospital had twice the capacity of a health center (the Tserona Town health center had a catchment of 50,000, compared to Senafe Hospital's 100,000), reasonable rebuilding costs would be twice that for the Tserona Town health center, or approximately ERN 28,000,000.

128. In sum, the Commission awards compensation of 90% of the actual costs of building the temporary hospital and clearing rubble for reconstruction, 90% of the estimated reconstruction costs, and 75% of the expense of post-looting restocking. Applying the applicable 2003, 2005 and 2006 exchange rates, the Commission awards Eritrea total compensation in the amount of US\$2,575,000.

129. *Sub-Zoba Administrative and Residential Complex.* The Senafe Sub-Zoba Administrative Office consisted of several administrative buildings around a public square and a separate residence, all built in the old Italian style like the Old Town Administrative buildings. Eritrea's claim for ERN 17,514,713 for the destruction, looting and stripping of the Sub-Zoba Administrative buildings was based on evidence similar to that for the Town Administrative buildings. Eritrea based its estimate for ERN 9,296,000 in reconstruction costs on square meter figures provided by the head engineer for Dehub Zoba. Eritrea also submitted inventories of looted items prepared by an administrative officer, and by representatives of ERREC and the National Union of Eritrean Women ("NUEW"), which had offices in the complex. Ethiopia offered no specific defense. On balance, the Commission is prepared to award compensation of ERN 730,000 for rubble clearing and ERN 8,632,000 for rebuilding the Sub-Zoba Administrative complex, recognizing its historic character cannot be recreated, as well as 75% of the ERN 1,598,450 estimate for looted property. To avoid double-counting, the Commission awards 75% of only one-half of the value claimed for the items on the inventories prepared by ERREC and NUEW, which included building materials. The total award for the Senafe Sub-

Zoba Administrative Office is US\$815,000, after conversion at the applicable 2005 exchange rate.

130. *Telecommunications Building.* The last Senafe Town building singled out in the Central Front Partial Award was the new two-story Telecommunications Building, which was being handed over to the Telecommunications Service of Eritrea (“TSE”) by the contractor in May 2000. Construction of the building had taken eighteen months at a cost of ERN 3,520,000. As the Commission recalls from the many photographs provided in the record and displayed at the liability hearing, the Telecommunications Building was destroyed by detonation, stripped and looted. In the damages phase, Eritrea submitted extensive evidence supporting its claim for ERN 24,276,412 and US\$1,441,241. In addition to the costs of rebuilding and re-fitting the building, Eritrea sought compensation for the costs of replacing the destroyed network infrastructure and completing the looted local loop upgrade, for lost revenue, and for the value of contractor property left at the site. Ethiopia objected to Eritrea’s infrastructure claims, on grounds that they fell outside the Commission’s liability finding. Ethiopia also charged Eritrea with inflating both the rebuilding and property replacement costs.

131. The Commission finds Eritrea’s claim for rebuilding costs to be credible and reasonable. Eritrea presented two similar estimates for rebuilding costs: one from the original contractor himself, who testified that he would charge no less than ERN 8,000,000–9,000,000 for rebuilding the structure as of 2005; and the estimate of ERN 7,617,500 plus US\$130,000 from the TSE. Both were approximately double the pre-war cost of ERN 3,520,000, which the Commission considers reasonable. Accordingly, the Commission is prepared to award the full ERN 7,617,500 plus US\$130,000 sought for rebuilding costs, as well as the full ERN 1,700,000 of estimated rubble clearing costs.

132. The remaining claims are less straightforward. First, as for the value of the contents looted from the Telecommunications Building, the estimated replacement values provided by the TSE estimation were inflated. As pointed out by Ethiopia, Eritrea specifically claimed US\$148,841 as the replacement value in 2000 of certain radio transmission equipment purchased for only US\$5,000 one or two years earlier, and other items in the same valuation list also showed similar, if less drastic, disparities. To compensate for this inflation, the Commission reduces Eritrea’s looting claim by half before applying the 75% looting factor. Second, as for Eritrea’s claims for damage to the network infrastructure and the local loop upgrade, neither of which was situated in the Telecommunications Building, the Commission agrees with Ethiopia that these fall outside of the Telecommunications Building claim. The Commission treats them as separate looting and stripping claims. Finding that these two claims, like the Telecommunications Building looting claim, reflected unreasonable inflation, the Commission again reduces them by half before applying the 75% looting factor. Third and fourth, the Commission

denies Eritrea's claims for lost revenue and for the contractor's property allegedly left at the site as not sufficiently supported by the evidence.

133. The Commission awards compensation for the destruction, looting and stripping of the Senafe Telecommunications Building, and the looting and stripping of related infrastructure and the local loop upgrade, in the total amount of US\$1,735,000, after conversion at the applicable 2000 and 2005 exchange rates.

134. *Other Senafe Town Claims.* Above and beyond the thirteen structures specifically identified in the Central Front Partial Award, Eritrea sought over ERN 33 million and US\$90,000 for 75% of the alleged destruction of or severe damage to another twenty buildings in Senafe Town during the Ethiopian occupation: the Branch Police Department, Courthouse, Ruwiet Elementary School, Senafe Elementary School, Tisha Elementary School, Forto Senafe Elementary School, Mehad Elementary School, Ministry of Education Branch Office, Ministry of Land, Water and Environment, Post Office, slaughterhouse, marketplace, gas stations, Red Sea Corporation, Abubeker Alsadiaq Mosque, Anwar Mosque, Daughters of Charity, St. Joseph Catholic Church, Comboni Sisters Clinic and Orthodox Churches. Ethiopia offered no specific defense to Eritrea's claims on any of these buildings.

135. The strength of these twenty Senafe Town Building Claims varied considerably. Several suffered from an abject lack of evidence. For example, Eritrea sought ERN 941,077 for 75% of the property allegedly looted from the Red Sea Corporation warehouse, on the basis of only a one-page, undated, unsigned and otherwise unauthenticated property list; the line items range from "Building (Damaged)" at ERN 250,000 to "Cassette" at ERN 28.60. Absent any attempt to prove that the warehouse existed in Senafe Town and was looted during the occupation, or to document the contents with authenticated inventories, the Commission cannot award any compensation. Other claims were at best contradictory and at worst misleading. For example, in the claim for ERN 1,225,875 for 75% of the alleged looting damage to the Anwar Mosque, it was not possible to separate estimated amounts for shelling damage and looting damage in the relevant witness statement and Claim Form. The Commission denies any compensation for such claims.

136. Other Senafe Town Building Claims clearly are both credible and reasonable. One example is Eritrea's claim for ERN 998,090 for 75% of the alleged looting and stripping damage to the four-building Tisha Elementary School. Eritrea presented evidence in the form of a Construction Agreement and Certificate of Payment for ERN 439,312 (at 100%) for actual repairs to the school in 2002, which invoice reflected stripping-related rehabilitation rather than new construction. Eritrea based the estimate of ERN 891,474 (at 100%) for replacing looted furniture and supplies on a uniform Ministry of Education elementary school standard, which the Commission finds reasonable. Another example is Eritrea's claim for ERN 495,728 for 75% of the alleged looting and stripping damage to the eleven-room Comboni Sisters Clinic. Eritrea submit-

ted a witness statement from the head of the Clinic (with attached inventory) and a relatively detailed Claim Form, which described both the extensive looting and stripping of the Clinic and the expense incurred in repairing and restocking it (with Catholic Church funds) in 2005. In yet another example, Eritrea limited its claim for damage to the Courthouse to 75% of the Ministry of Justice's estimates of ERN 172,103 (at 1997 prices) to replace thirteen stripped windows and fifteen stripped doors and ERN 284,916 (at 2005 prices) to replace looted furniture and equipment. The Commission is prepared to award the amounts sought for such claims in full.

137. Most commonly, the Commission discounted the amount awarded on the basis of the evidence provided. Eritrea sought almost ten million nakfa for repairs to the Branch Police Department, as to which the Commission explicitly denied Eritrea's claim for unlawful destruction in the Central Front Partial Award. Eritrea supported its looting and stripping claim primarily with a "Specification and Bill of Quantities for Construction Destroyed by Weyane Troops at Senafe," which reflected that the contractor performed substantial new construction work. Although denying that component of the claim, the Commission does award the ERN 83,052 sought for looted furniture and supplies, which was supported by an itemized list prepared by the head of the Senafe Sub-Zoba police force. In Eritrea's claim for ERN 751,688 for 75% of the looting and stripping damage to the Orthodox Churches, Eritrea presented a witness statement from the head of the Churches who described the stripping and looting and attached a relatively detailed 2001 list of the lost property, including religious books by author. However, in his witness statement, the Keshi also testified that the roof, doors and windows of one church—which were included on his list—were destroyed by heavy shelling. The Commission reduces the compensation awarded by the value of those destroyed items. In other instances, where the estimated values for common items, such as tables, chairs, computers and other small electrical items, are significantly higher than average, the Commission has awarded a percentage of the total claimed.

138. The Commission awards Eritrea compensation in the amount of US\$585,000 for 75% of the total damage from the looting and stripping of the buildings listed for Senafe Town during Ethiopia's occupation between May 26, 2000 and June 2001, after conversion at the applicable exchange rates. Adding the amounts awarded for the thirteen structures identified in the Central Front Partial Award, the total awarded for Eritrea's Building Claims in Senafe Town is US\$10,130,000.

139. In sum, the total compensation awarded for Eritrea's Building Claims for the Central Front is US\$13,140,000.

## 5. The Western Front

140. On the Western Front, the Commission found Ethiopia liable for inflicting or permitting damage to buildings in the towns and villages of

Teseney, Alighidir, Guluj, Tabaldia, Gergef, Omhajer, Barentu and Tokombia, and Molki Sub-Zoba:

- For permitting the looting and burning of buildings in Teseney Town during May and June 2000;
- For permitting the looting and burning of houses in the village of Alighidir and the burning and detonation of the nearby cotton factory and stored cotton during May and June 2000;
- For 90% of the total damage caused by the looting and burning of structures and destruction of livestock permitted in the town of Guluj during May and June 2000;
- For permitting looting in the village of Tabaldia during June 2000;
- For permitting looting in the village of Gergef during June 2000;
- For 75% of the total damage caused by the looting and stripping of buildings permitted in Omhajer from May 16, 2000 until the departure of the last Ethiopian forces in September 2000;
- For permitting the breaking, entering and looting of houses, business establishments and government buildings in Barentu Town during its occupation from May 18 to 26, 2000;
- For the destruction of the police station, the courthouse, the Gash-Setit Hotel and Conference Center, and a bakery in Barentu Town;
- For permitting the looting of buildings and destruction of the police station in Tokombia Town, and the destruction of the nearby Rothman tobacco plant, during its occupation in May 2000; and
- For permitting the looting of buildings in Molki Sub-Zoba on May 15–16, 2000.<sup>38</sup>

141. Eritrea claimed damages of approximately 1.8 billion nakfa plus US\$36 million in connection with its Western Front Building Claims. For indicative purposes only, after converting the nakfa amount at the rounded 2005 exchange rate of ERN 15:US\$1, the total claimed is approximately US\$153 million.

142. *Teseney Town*. The Commission found Ethiopia liable for permitting looting and burning of buildings in Teseney Town during May and June 2000. As set out in the Western Front Partial Award, the town did not suffer much damage during the first occupation, although Ethiopian troops did loot large stocks of sugar that had been stored there and stole flour from at least one bakery.<sup>39</sup> It was during the second occupation that looting and burn-

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<sup>38</sup> Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26 between the State of Eritrea and the Federal Democratic Republic of Ethiopia (December 19, 2005) [hereinafter Partial Award in Eritrea's Western Front and Related Claims], *dispositif*, Section. IX.A.2, quoted in full above at para. 49.

<sup>39</sup> *Id.*, para. 29.

ing was widespread.<sup>40</sup> Eritrea sought compensation of ERN 271,625,913 plus US\$3,397,148 in relation to thirty buildings or groups of buildings in Teseney Town: the hospital, Mother and Child Health Center, Sub-Zoba Administration Office, Treasury Office, Sub-Zoba Court and Sharia Court and Public Prosecutor's Office, Sub-Zoba Police Station, Telecommunications facility, Water Authority, Electric Authority, schools, Sub-Zoba Ministry of Agriculture, Ministry of Finance Inland Revenue and Budget Offices, Sub-Zoba People's Front for Democracy and Justice ("PFDJ") Office, Customs Office, ERREC facilities, Land Transport Office, Mining Department, Red Sea Corporation, Sub-Zoba Office for National Union of Eritrean Youths and Students ("NUEYS"), National Union for Eritrean Women, Zula Import/Export Facility and Gash Agriculture farm, Teseney Barka Farming Enterprise, marketplace, Commercial Bank of Eritrea Teseney Branch, Housing and Commerce Bank, gas stations, Eritrucko Share Company, hotels, Catholic Church and Mosque.

143. Ethiopia raised specific objections to three of Eritrea's Teseney Building Claims. With respect to Eritrea's claim for over 128 million nakfa (after the adjustment made at the hearing) for the alleged loss of crops and crop assistance in 2000 following destruction of Ministry of Agriculture facilities, Ethiopia objected that this was a new claim or a claim duplicative of Eritrea's consequential damages claim and, in any event, that any such losses were caused by the war. The Commission is satisfied that Eritrea failed to link its alleged crop and crop-related losses to the burning and looting of the Ministry facilities, as compared to the disruption caused by the war, and so denies the claim in full. Similarly, the Commission accepts Ethiopia's objection to Eritrea's lost profits claim of approximately thirteen million nakfa in connection with damage to the Zula Import/Export Facility and Gash Agriculture farm, finding that lost profits (if they could be proven) were attributable to the war and post-war economy. The Commission also disallows the two million nakfa claim for fruit trees lost due to lack of irrigation, finding no proven geographical nexus between the orchards and looting in Teseney Town. The Commission does, however, award compensation of US\$600,000 (converted at the 2000 exchange rate) for Eritrea's well-documented proof of the destruction of substantial stores of grain and feed and livestock at that facility.

144. Ethiopia also objected, on grounds of lack of proof, to Eritrea's claim for some eighteen million nakfa plus two million dollars for the alleged looting and burning of property owned by the Red Sea Corporation. Ethiopia was correct that the only evidence for this large claim was an undated and unauthenticated chart setting out the type, unit costs and total costs of items allegedly looted. As in other such instances, the Commission cannot award any compensation for this claim. It is certainly credible that the Red Sea Corporation had stocked warehouses at the time of the two occupations, and the record was clear that looting occurred, but an award of compensation must

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<sup>40</sup> *Id.*

rest on something other than an unauthenticated bare-bones inventory of allegedly looted goods and their value. Several of Eritrea's other Teseney Building Claims (for example, in connection with the courts, Telecommunications facility, Electric Authority and Commercial Bank of Eritrea branch) suffered from similarly conclusory and hence insufficient evidentiary support.

145. In comparison, other Eritrean claims for Teseney Town damages were strong. For example, Eritrea supported its claim for ERN 71,633 for the looting of the Sub-Zoba Police Station with a detailed witness statement describing the condition of the facility both before and after the occupations, and an itemized list (circa 2005) supporting the modest and credible looting damages sought. The Commission awards the amount in full, at approximately US\$4,500 at the 2005 exchange rate. The same proved to be the case for the larger claim, at approximately ERN 3.3 million, for the looting and burning of the Teseney Hospital.

146. Also strong were Teseney Town Building Claims that, like claims in other regions (discussed below), were reinforced by the Ministry of Local Government's July 2000 "Report of a Rapid Assessment on the War-Induced Damages of Gash Barka Region" ("Gash-Barka Rapid Assessment Report"). The stated objectives of the Report were "to conduct a rapid assessment on the damages done by the third round Ethiopian offensive on government offices, social services providing institutions and their facilities; and to identify priorities and measures that ha[ve] to be taken in the short-run and the long-run." A team from the Ministry of Local Government made preliminary assessments of the damage to specific government offices, educational institutions, health institutions, water supply and sanitation and agricultural institutions, as well as electric supply, private sector facilities, marketplaces and drainage structures. Annexes set out estimated values in 2000 of some two hundred structures and estimated damages to those structures, broken down for the building, furniture and equipment. Although the Report did not contain back-up documentation for the estimates in the Annexes, the Commission considers the lack of such documentation to be balanced by the fact that the assessment was not prepared for litigation, and by the consistency and reasonableness of the estimates for the various categories of structures.

147. Eritrea's claim for ERN 208,000 for looting-related repairs to the Teseney Mother and Child Health Center, for example, was consistent with the figure in the Gash-Barka Rapid Assessment Report. In other instances, for example in connection with the Teseney schools, the Commission relied upon the building rehabilitation estimates in the Gash-Barka Rapid Assessment Report rather than higher estimates made later, which reflected plans for school expansion or improvement in addition to circa 2000 repair needs.

148. In total, the Commission awards Eritrea compensation in the amount of US\$2,375,000 for the looting and burning of the buildings listed above in Teseney Town during Ethiopia's occupation in May and June 2000.

149. *Alighidir Village.* For the village of Alighidir, the Commission found Ethiopia liable for permitting looting and burning of houses, and the burning and detonation of the nearby cotton factory and its stored cotton, during May and June 2000. Eritrea sought a total of ERN 698,928,601 plus US\$29,293,572 in compensation for its Alighidir Building Claims, all but approximately four million nakfa of which was attributable to the cotton factory.

150. *Cotton Factory.* Eritrea's evidence reflected that the Alighidir cotton factory (technically, the Alighidir Agricultural Development Project) was an extremely significant enterprise in the Gash-Barka region. According to Eritrea, the cotton section of the project was the largest industrial agricultural and handicraft employer in the country and the single largest contributor to the gross domestic product. In addition to cotton farming and processing, the project featured a briquetting factory and crops of sorghum and peanuts. Construction took place after independence in the 1990s, starting with the provision of small plots of farming land to demobilized fighters and rehabilitation of a 1923 diversion weir from the Gash River. Eritrea invested approximately US\$600,000 to construct the briquetting factory and another US\$40,000 for machinery. The contract price to construct the expansive cotton processing facilities, consisting of dozens of buildings and supporting infrastructure, was approximately thirty million birr. Eritrea purchased US\$4,000,000 worth of machinery and supplies for the cotton processing facilities and, just before the Ethiopian occupation in June 2000, was awaiting the arrival of representatives of a U.S. contractor to test the machinery and train employees. Eritrea anticipated substantial revenues, in addition to farming and briquetting revenues, once the cotton processing facilities went on line.

151. Given this background, it is not surprising that Eritrea's single largest Building Claim—by a large order of magnitude—was its claim for ERN 694,810,142 plus US\$29,281,572 for Ethiopia's detonation and burning of the cotton factory and its cotton. As emphasized by Ethiopia, this represented some 40% of Eritrea's total Building Claims.

152. The claim consisted of six components, the first two for damages connected to the destruction of the facilities and the cotton, and the remaining four for "other losses": (a) ERN 110,515,860, as estimated in 2003, to replace all of the machinery, stored cotton and other goods that were destroyed or looted; (b) ERN 191,053,141, also estimated in 2003, to reconstruct all of the facilities and repair looting damage; (c) US\$2 million as compensation for land preparation for the 2000 crop year, which could not be used due to looting of seeds and farm equipment; (d) US\$5,392,400 for aid to factory farmers and employees who became unemployed after the destruction; (e) ERN 318,241,140 for lost revenue through 2006; and (f) US\$21,889,172 and ERN 75,000,000 as compensation for environmental damage caused by the release of pesticides and chemicals, which allegedly killed thousands of livestock and sickened humans. In support of the claim, Eritrea submitted a damage assessment report prepared by Alighidir Agro Industry ("AAI") in July 2000, several witness statements,

original contractor bid forms and other construction contract documents, engineering reports, and a report on environmental contamination prepared by the Eritrean Office of the Legal Advisor in 2006.

153. Ethiopia presented several specific defenses to this claim. As to the destruction of the facilities themselves, Ethiopia submitted that Eritrea would be fairly compensated with payment at the original construction prices. Ethiopia objected to any compensation for the destruction of the diversion weir, which is located at the Gash River far from the cotton factory and the village of Alighidir. As for Eritrea's claims for other losses, Ethiopia challenged them for lack of both proven causation and evidentiary proof. Ethiopia also viewed the farmers' assistance claim as being a new claim and, in any event, falling within Eritrea's separate claim for consequential damages.

154. Having carefully reviewed and weighed the substantial evidence for this important claim, as well as Ethiopia's defenses, the Commission agrees with Ethiopia that the alleged damage to the diversion weir falls outside the liability Award, but does not agree to limit the compensation for the massive destruction of the facilities to the amounts of the original construction contract dating from the 1990s. The Commission considers the best approach to be to use, to a large degree, the figures in the July 2000 AAI Assessment Report, which comprehensively reviewed damage to all of the buildings in the complex and to their machinery and other contents. This report estimated the total costs of rebuilding and re-fitting the complex at ERN 216,573,159. Deducting amounts for lost revenue, for repair of the diversion weir and for a 25% contingency, which the Commission disallows, the total awardable costs for destruction come to approximately US\$12,640,000, converted at the 2000 exchange rate.

155. The Commission denies all of Eritrea's claims for other losses. First, Eritrea fell far short of proving the necessary causation for its US\$2 million claim for lost farmland preparation for the 2000 crop. Eritrea itself admitted that it was the Ethiopian invasion that caused Alighidir farmers to flee their land in May 2000. Second, and similarly, Eritrea did not show that the unemployment underlying its large claim for some US\$5 million for aid to farmers and workers in 2000 was connected to the cotton factory rather than to post-occupation and post-war economic conditions. Third, Eritrea failed to support its huge claim—at over 300 million nakfa, greater than the claims to rebuild and re-fit the cotton factory facilities—for lost revenues between 2000 and 2006. Eritrea failed to separate lost profits from lost revenues or to separate allegedly lost profits for the operating elements of the project (farming and briquetting) from the purely anticipated lost profits for the untested cotton processing facilities. Finally, although it is entirely credible that the detonation and burning of the cotton factory caused the release of toxic chemicals, and although the Commission appreciates the need to ameliorate the resultant environmental damage, the Commission must deny this component of the claim. Regardless of whether the claim is a new claim, the fact remains that it

is supported solely by a report prepared by Eritrea's advocates, who are neither neutral nor environmental experts.

156. In sum, the Commission awards Eritrea compensation in the amount of US\$12,640,000 for the unlawful detonation and burning of the Alighidir cotton factory and its stored cotton during Ethiopia's occupation.

157. *Other Alighidir Building Claims.* Eritrea sought approximately ERN 4 million for the looting and burning of ten other buildings in Alighidir, consisting of: the Alighidir Project Health Center, Town Administration Office, Police Station, Water Supply, Fenkal Elementary and Secondary School, Ministry of Agriculture Branch Office, NUEYS Branch Office, Base Union Office of the National Confederation of Eritrean Workers, Mobil Oil station and Alighidir match factory. Ethiopia offered no specific defense to Eritrea's claims on these buildings.

158. Several of Eritrea's claims for allegedly looted and burned buildings in Alighidir fell short on proof. For example, the Commission disallows the ERN 590,396 claim for damage to the Alighidir match factory, which, although allegedly a major employer in the region, was not included in the experts' reports at the liability phase or described in witness statements at the damages phase; the rough lump sum estimate by a construction company in 2000 contemplated improvements as well as repairs. Similarly, the Commission reduces the ERN 1,372,655 claim for damage to the Town Administration Building by half, because the estimate appeared excessive for an administrative center for a town of only some 1,100 residents. Other claims, for example those for repairs to the Police Station and to replace a looted water pump, were adequately supported.

159. The Commission awards Eritrea compensation in the amount of US\$170,000 for the looting and burning of the buildings listed above in Alighidir during Ethiopia's occupations in May and June 2000. The total awarded for Eritrea's Building Claims in Alighidir, including the cotton factory, is US\$12,810,000.

160. *Guluj Town.* Having found that Ethiopia permitted looting and burning of structures in the town of Guluj during May and June 2000, the Commission found Ethiopia liable for 90% of the total loss and damage to property in Guluj during that time. After applying the 90% factor, Eritrea sought compensation of ERN 9,688,554 plus US\$39,502 in relation to fifteen buildings or groups of buildings in Guluj: the Health Center, Ministry of Health Warehouse, Sub-Zoba Administration, Town Administration Building, Police Station, Courthouse, Water Authority, schools, Sub-Zoba Ministry of Agriculture, Sub-Zoba PFDJ Office, Land Transport Office, Sub-Zoba NUEYS Office, NUEW facilities, gas stations and Catholic Church. Ethiopia offered no specific defense to Eritrea's claims on any of these buildings.

161. With the exception of its claim in connection with the Catholic Church, Eritrea generally supported its Guluj Building Claims for looting

and burning. Compared to claims for other religious institutions, Eritrea based its Guluj Catholic Church claim only on a skeletal property list with a dollar amount of estimated losses. The Commission disallows that claim, and reduces certain others where the quantum evidence did not match the amounts claimed in the Memorial (for example, the claim for repairs to the Courthouse). As in other locations, the Commission relied on the Gash-Barka Rapid Assessment Report for valuation of 90% of the allowable damage to the Guluj schools.

162. The Commission awards Eritrea compensation in the amount of US\$900,000 for 90% of the total loss and damage to the buildings or groups of buildings listed above in Guluj from looting and stripping of buildings during Ethiopia's occupations in May and June 2000.

163. *Tabaldia and Gergef Villages and Molki Sub-Zoba.* The Commission found Ethiopia liable for permitting the looting of buildings, but not property destruction, in the villages of Gergef and Tabaldia in Guluj Sub-Zoba in June 2000, and also in Molki Sub-Zoba on May 15 to 16, 2000. For Tabaldia, Eritrea sought compensation of ERN 545,526 plus US\$900 for the looting of five buildings: the Health Station, Town Administration Building, Water Supply, elementary school and NUEYS Branch Office. For Gergef, Eritrea sought ERN 1,914,224 plus US\$62,250 for the looting of the same five categories of building: the Health Station, Town Administration Building, Water Supply, elementary school and NUEYS Office. Eritrea sought compensation of ERN 5,376,644 plus US\$138,000 for the looting of eleven buildings or groups of buildings in Molki Sub-Zoba: the Derabush Health Station, Enda Gabor Health Station, Jeja Health Station, Molki Town Health Station, Sub-Zoba Administrator's Residence, Water Supply, schools, Ministry of Agriculture, Sub-Zoba PDFJ Office, Sub-Zoba NUEYS Office and Sub-Zoba NUEW office. Ethiopia offered no specific defense to any of these twenty-one Eritrean Building Claims.

164. In general, Eritrea presented sufficient proof of looting and looting-related damages to these buildings. Where the Commission is not satisfied that repairs were necessitated by looting (for example, repairs to the Tabaldia Health Station) or that the replacement estimates were reasonable (for example, estimates for solar panels and generators looted from the Gergef Water Supply, and for pumps looted from the Molki Water Supply), the Commission reduces or disallows compensation. As in other instances, the Commission denies compensation for claims based on unsigned, undated or otherwise unauthenticated evidence (as with the claim for the Gergef NUEYS office) or on missing evidence (as with the claims for the Molki NUEW office and the Tabaldia Town Administration Building).

165. In sum, the Commission awards Eritrea compensation in the amounts of US\$30,000 and US\$225,000 for permitting the looting of the specified buildings in Tabaldia and the indicated buildings in Gergef, respectively, in June 2000; and US\$405,000 for permitting the looting of the listed buildings in Molki Sub-Zoba on May 15 to 16, 2000.

166. *Omhajer Town.* Having found Ethiopia liable for permitting looting and stripping of buildings in Omhajer from May 16, 2000 until the departure of the last Ethiopian forces in September 2000, the Commission found Ethiopia liable for 75% of the total property damage in Omhajer during that time. After applying the 75% factor, Eritrea sought compensation of ERN 19,872,834 plus US\$18,000 in relation to thirteen buildings or groups of buildings in Omhajer: the Health Center, Town Administration Building, Sub-Zoba Office, Police Station, Courthouse, Water Supply, Telecommunications Office, schools, Ministry of Agriculture, Ministry of Finance and Inland Revenue, Immigration and Customs Buildings, marketplace and gas stations. Ethiopia offered no specific defense to Eritrea's claims on any of these buildings.

167. Again, the evidence supporting Eritrea's Omhajer claims varied from building to building. The Commission awards the full ERN 1,193,923 claim for 75% of the damage to the Health Center, which was based on the Gash-Barka Rapid Assessment Report. In comparison, the Commission is not prepared to award the approximately ERN 2.5 million claim for the Courthouse, because Eritrea presented no evidence of the existence of the Courthouse before the occupation and one of its witnesses indicated there was not a courthouse in Omhajer. In several other instances, the Commission discounts the amounts awarded because the evidence reflected estimates for building improvements rather than repairs (for example, in connection with the Police Station and marketplace) or evidence was missing or otherwise insufficient (for example, in connection with the schools, Ministry of Agriculture and Water Supply).

168. The Commission awards Eritrea compensation in the amount of US\$810,000 for 75% of the property damage in Omhajer from the looting and stripping of the listed buildings from May 16, 2000 until the departure of the last Ethiopian forces in September 2000.

169. *Barentu Town.* The Commission found Ethiopia liable for permitting breaking, entering and looting of houses, business establishments and government buildings in Barentu Town during its occupation from May 18 to 26, 2000, and for the destruction of the Police Station, Courthouse, Gash-Setit Hotel and Conference Center and Disabled Fighters Bakery. Eritrea sought a total of ERN 570,782,532 plus US\$971,388 in compensation for its Barentu Town Building Claims.

170. *Police Station.* Eritrea sought compensation of ERN 5,560,283 for destruction and looting of the Zoba Gash-Barka Central Police Station and adjacent police conference building. Eritrea based its rebuilding claim for ERN 4,199,897 on construction contract documents from the Zoba Infrastructure Department (allegedly dating from 2006) and its looting claim for ERN 1,360,385 on a November 2006 Gash-Barka Police List of looted materials said to be included in Eritrea's evidence. Ethiopia offered no specific defense. The Commission denies the looting claim for lack of evidentiary proof, because the Police List is missing from the record. As for the rebuilding claim, the

Commission notes that the Zoba Infrastructure Department construction (“maintenance”) documents were neither dated nor signed, and did not specify whether the relevant work was performed on the Sub-Zoba or Zoba Police Station. However, the Commission located a second set of construction documents in the record expressly for the “maintenance and rehabilitation construction” of the Zoba Police headquarters, dated October 2005, indicating total costs of ERN 1,435,102. Taking this more specific and lower estimate and applying the 2005 exchange rate, the Commission awards US\$95,000 as compensation for the destroyed Zoba Police Station compound.

171. *Courthouse.* According to Eritrea, the Barentu Courthouse contained several different courts, including the Zoba Court, the Sub-Zoba Court and the Sharia Court, serving over 55,000 people. The Courthouse was a two-story structure that had been completed and outfitted shortly before the Ethiopian occupation, during which it was destroyed. Eritrea sought ERN 3,000,000 for the estimated restoration of the building, based on a 2000 Ministry of Local Government assessment, and ERN 111,198 for the replacement of the looted contents, based on detailed inventories forwarded by a judge in 2001. Ethiopia did not present a specific defense.

172. The Commission relied on the Gash-Barka Rapid Assessment Report in assessing Eritrea’s claim in connection with the Barentu Courthouse. Based on the coverage of the Courthouse in the Report, the Commission awards compensation of US\$310,000 (at the 2000 exchange rate) for the destruction of the Courthouse. Having found an apparent calculation error in the lost property inventories, the Commission awards US\$7,000 (at the 2001 exchange rate) for the looted contents. The total award for the destroyed Barentu Courthouse is US\$317,000.

173. *Gash-Setit Hotel and Conference Center.* Eritrea described the privately-owned Gash-Setit Hotel and Conference Center as “the most important economic asset” of Barentu Town. The two-story hotel, which was completed in 1999 at a construction cost of 8.5 million nakfa, had forty-two guestrooms, a large conference center, a restaurant and bar, and recreational facilities, as well as its own generator, water tank, and storage and laundry facilities. Not surprisingly, Eritrea pursued a large claim—ERN 42,871,401 [*sic*] in total—for the destruction and looting of the hotel, broken down into several components. Beyond the estimated costs of rebuilding (ERN 28,025,914) and replacing looted and detonated movable property (ERN 5,363,979), Eritrea pursued four additional damages claims: (a) lost profits through 2006 (ERN 3,607,532); (b) five months of wages and severance paid to employees (ERN 245,000); (c) economic loss to the community (ERN 4,283,578); and (d) lost tax revenue through 2005 (ERN 1,345,398). Eritrea submitted a “Valuation for Reconstruction” report prepared by a construction management consultant hired by the hotel’s owner in 2006, a supplemental witness statement from the owner, and inventories of lost furnishings and other movable property. Ethiopia challenged the magnitude of the rebuilding claims, emphasizing Erit-

rea's own evidence that the building had cost only ERN 8,500,000 to construct shortly before the occupation, and the exceedingly high amounts sought to replace items such as the generator. Ethiopia also objected to all of the additional damages demands as new claims, duplicative claims for consequential damages, or speculative claims.

174. Turning first to the additional damages claims, the Commission does not agree that they are new claims. Given the economic importance of the Gash-Setit Hotel and Conference Center to Barentu Town, which is presumably why it was one of the private enterprises targeted for detonation, damages such as lost profits and severance payment obligations for the owner, lost opportunities to the community, and lost tax revenue to the government were reasonably foreseeable. However, the Commission is unable to award the additional damages for lack of evidentiary proof. The figures for all four of these additional damages claims (including Eritrea's direct claim for lost tax revenue) came from the two-page witness statement of the hotel owner, who offered neither detail nor supporting documents. He stated that the hotel had not yet earned a profit before it was destroyed and indicated a total number of employees (without specific names) different than that included in Eritrea's claim. A demand for almost one million nakfa must be based on more than this to warrant compensation.

175. The situation is different with respect to Eritrea's claims for the costs of rebuilding the hotel and replacing the looted contents. The Valuation for Reconstruction report was a professional and detailed estimate of the costs, in 2006 nakfa, of demolishing and reconstructing the complex. The total of approximately ERN 28 million, as compared to original construction costs of ERN 8.5 million, was consistent with other estimates that construction costs had tripled (at least for major structures) after the war. The Commission does find the estimates for replacing the contents, in particular the large movables such as the generator, pumps, a truck and furniture, to be high compared to other claims, and so reduces the amount claimed by half. The Commission awards compensation in the amount of US\$1,985,000, after conversion at the 2006 exchange rate, for the destruction and looting of the Gash-Setit Hotel and Conference Center.

176. *Disabled Fighters Bakery.* Like the Gash-Setit Hotel, Eritrea highlighted the fate of the Disabled Fighters Bakery, or Sesona Bakery, in Barentu. According to Eritrea, this was one of the many projects funded by the Eritrean War Disabled Fighters' Association, which was created in 1978. The Sesona Bakery prepared and sold large quantities of bread and other baked goods, and also ran an attached bar and restaurant. The bakery was so successful that a second one was planned, and construction materials were reportedly stored in the bakery office. Eritrea presented substantial evidence, including several photographs, of the looting and destruction of the bakery at the liability phase.

177. Eritrea claimed ERN 2,859,435 in damages: ERN 1,047,543 for the looting of movables; ERN 772,200 for the repair of the building, including damage done during looting; and ERN 1,039,692 for lost income through 2004. The owners reportedly were able to reopen in 2004, having replaced basic equipment. Ethiopia offered no specific defense.

178. Considering the significance of the Sesona Bakery claim to Eritrea, the supporting evidence was surprisingly weak. First, Eritrea put in no evidence to support its ERN 772,200 reconstruction claim; the figure appeared as a line item (“Building/1/772,200.17”) on an unsigned and undated list linked to the Disabled Fighters’ Association. Second, Eritrea’s lost profits claim consisted of simple calculations attached to the witness statement of the head of the Association; he multiplied the unsupported monthly pre-war profits amount of ERN 21,660 by forty-eight months, with no discounting, to reach four years of lost profits at ERN 1,039,692. Third, the evidence supporting the ERN 1,047,543 looting claim was confusing. Eritrea put in three inventories: the Association inventory of looted bakery items noted above (ERN 682,870 after deduction of the reconstruction amount); an inventory of bakery items replaced before the reopening of the bakery in 2004 (ERN 165,735) attached to the witness statement of the head of the Association; and an inventory of items belonging to the Association proper that were looted from the office, estimated at ERN 21,900.<sup>41</sup> Given apparent overlap as to claims for office furniture, the Commission reduces the looting award by one-half of the estimated value of the Association bakery inventory. The Commission awards compensation related to the Sesona Bakery only for looting damages, and that in the amount of US\$60,000, at the 2002 exchange rate.

179. *Other Barentu Town Building Claims.* The Commission next examines Eritrea’s compensation claims, totaling approximately ERN 500 million plus US\$1 million, for 75% of the damage allegedly caused by Ethiopia’s permitting the breaking, entering and looting of an additional thirty-eight buildings or groups of building during its occupation of Barentu Town. These consist of claims for damage to the hospital, Sosona Health Station, Zoba Gash Barka Ministry of Health Offices and warehouse, Zoba Gash Barka Administration Office, Zoba Gash Barka Assembly Office, Zoba Gash Barka Treasury Office, Town Administration Office, Governor’s Residence, Sub-Zoba Police Station, Telecommunications facility, Electric Authority, Water Supply, schools, Ministry of Education, Zoba and Sub-Zoba Ministry of Agriculture, Zoba Gash Barka Ministry of Finance and Inland Revenue, Ministry of Labor and Human Welfare, Ministry of Land, Water and Environment, Ministry of Transport and Communication and Land Transport Office, Ministry of Trade and Industry, Zoba Gash Barka Ministry of Information, Zoba Gash Barka General Service Department, Business Licence Office, Zoba Gash Barka Min-

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<sup>41</sup> Eritrea referenced a fourth that is not in the record: Report of damages to Barentu Bakery filed by the Eritrean War Disabled Fighters’ Association, 13 September 2000, cited in ER Damages Group One Memorial, note 767.

ing Department, Post Office, Red Sea Corporation, ERREC facilities, Zoba Gash Barka and Barentu Sub-Zoba NUEYS facilities, National Confederation of Eritrean Workers Office, Zoba and Sub-Zoba NEUW Offices, marketplace, hotels other than Gash Setit Hotel, Commercial Bank of Eritrea, Wejeba Bakery, gas stations, Catholic Offices and St. Michael's Church, Mosque and Administrative Office.

180. Ethiopia raised specific objections to three of Eritrea's claims, which were moderated by Eritrea's withdrawal of missing evidence and amendments to claims in the course of the hearing. In its remaining defenses, Ethiopia objected to the magnitude of the claims in connection with the Zoba Gash-Barka Administration Office and the Zoba and Sub-Zoba Ministry of Agriculture on grounds that Eritrea sought compensation for repairs and looting higher than the estimates in the Gash-Barka Rapid Assessment Report, which Eritrea failed to cite as evidence. In these instances, and in others such as Eritrea's claims in connection with the Barentu Hospital and Zoba Gash-Barka Ministry of Health Offices and Warehouse, the Commission relies upon the estimates in the Gash-Barka Rapid Assessment Report in assessing compensation.

181. Several of Eritrea's Barentu Building Claims fail for lack of proof. One such claim was Eritrea's ERN 10,267,850 claim for looting of the Barentu Health Station, which was based solely on the same documentation that Eritrea agreed to withdraw from the evidentiary record in amending its claim for the looting of Barentu Hospital. For another category of rejected claims, Eritrea offered no evidence of the status and contents of relevant buildings before the occupation, and relied entirely on lists of allegedly looted items to show that looting had in fact occurred; examples included claims related to the Zoba Gash-Barka General Service Department and Mining Department. The Commission also denies claims where there was no proof of quantum, for example, Eritrea's claim for almost US\$600,000 for items allegedly looted from the Telecommunications facility, which was supported only by a few line items in a 2000 list prepared by the TSE. Nor is the Commission prepared to award compensation for alleged damages falling clearly outside the breaking, entering and looting activities for which Ethiopia was found liable in the Western Front Partial Award, for example, Eritrea's claim for Ministry of Land, Water and Environment equipment such as rain gauges and flow water meters allegedly looted not from buildings but from the field.

182. The Commission discounts other claims where the amounts claimed appeared inflated, for example, in Eritrea's claim of more than one million nakfa for looted items (including pension payment documents) from the small Treasury Office in the Police Station.

183. A modest number of Eritrea's Barentu Building Claims were well-supported. To offer a few examples, the Commission awards US\$135,000 (converted at the 2002 exchange rate) for Eritrea's claims for damages caused by the breaking, entering and looting of Barentu schools, which were sufficiently

documented both as to looting and quantum of damages. (The Commission did deduct the ERN 1,574,587 contributed by UNICEF for reconstruction of Nugus Bazem Elementary School.) Similarly, the Commission awards US\$80,000 (converted at the 2000 exchange rate) for replacement of looted items and repair of major damages to the wall and roof of the Wejeba Bakery that occurred when an oven was looted by use of a crane, as evidenced graphically by photographs and witness testimony at the liability phase.

184. The Commission awards Eritrea compensation in the amount of US\$2,083,000 for the breaking, entering and looting of the buildings or groups of buildings listed in Barentu Town during Ethiopia's occupation from May 18 to 26, 2000. Adding the amounts awarded for the four structures identified in the liability Award, the total awarded for Eritrea's Building Claims in Barentu Town is US\$4,540,000.

185. *Tokombia Town.* For Tokombia Town, the Commission found Ethiopia liable for permitting looting of buildings and the destruction of the police station and the nearby Rothman tobacco plant during its occupation in May 2000. Eritrea sought a total of ERN 184,001,029 plus US\$1,655,990 in compensation for its Tokombia Town Building Claims.

186. *Police Station.* Eritrea sought ERN 705,552 for the damage to and looting of the Tokombia Lalai Gash Sub-Zoba Police Station, which consisted of administrative offices, a jail and a residence for the police. Although the Commission found Ethiopia liable for the destruction of the structure, Eritrea sought only the estimated costs (ERN 625,242) of replacing stripped roofs, doors and windows; repairing the walls, floors and ceilings; and replacing sanitary and electrical fixtures. Eritrea also sought ERN 80,310 to replace looted items, including furniture, tools, bicycles, and office and kitchen equipment. These two categories of damages were supported by a set of construction specifications and a detailed inventory, respectively, dating from 2005. Ethiopia offered no specific defense. Finding the damages claim both reasonable and supported by the evidence, the Commission awards full compensation of US\$45,000, after conversion at the 2005 exchange rate.

187. *Rothman Tobacco Plant.* According to Eritrea, the Rothman Tobacco Processing Plant was the largest employer in the Tokombia region. It was a large agricultural and processing facility comprised of tobacco growing fields, buildings and equipment for the commercial sale of tobacco and cigarettes. Photographs of the destroyed plant featured prominently at the Western Front liability hearing, and the Commission found Ethiopia liable for the destruction of the plant. At the damages phase, Eritrea sought ERN 2,024,178 plus US\$1,453,490 for the detonation and looting of the facility. Ethiopia presented no specific defense. Surprisingly, given the economic importance of the Rothman plant in Tokombia, Eritrea based its destruction claim only on a half-page, unsigned and undated document, reportedly setting out the book value—US\$1,453,490—of the plant when British American Tobacco (Eritrea) Share Company purchased it from Gash Cigarette Factory in March 1998. The

Commission denies the compensation claim for destruction of the facilities for lack of evidence. In comparison, Eritrea based its looting claim on the detailed and signed inventory prepared by the general manager of the plant in 2000. The Commission awards compensation for looted property at the plant in the amount of US\$210,000, after conversion at the 2000 exchange rate.

188. *Other Tokombia Town Building Claims.* The Commission next examines Eritrea's compensation claims, totaling approximately ERN 180 million plus US\$200,000, for 75% of the damage allegedly caused by the looting of thirteen other buildings or groups of buildings in Tokombia Town: the Health Center, Lalai Gash Sub-Zoba Administration Office, Sub-Zoba Courthouse, Water Supply, schools, Ministry of Agriculture, ERREC facilities, Sub-Zoba PDFJ Office, Shemshemia Farm, National Confederation of Eritrean Workers Handiworks Shop, NUEYS Branch Office, Total station and vegetable market.

189. The Commission finds virtually all of Eritrea's Tokombia Building Claims seriously deficient. Eritrea's largest claim—five times the amount sought for damage to the Rothman Tobacco Plant—was for over ten million nakfa for physical and economic damage to Shemshemia Farm, a major farm project sponsored by the National Conference of Eritrean Workers on the Gash River. Even assuming Eritrea's claims for allegedly looting-related building repairs and lost profits would be compensable, the Shemshemia Farm itself is outside of Tokombia Town and hence outside of the scope of the Western Front Partial Award. The Commission awards only US\$15,000 for the replacement in 2001 of windows and doors looted from the farm training facility located in Tokombia Town.

190. Ethiopia objected to Eritrea's claim for almost five million nakfa for looting and damage to the Lalai Gash Sub-Zoba Administrative Office, including the costs of repairing buildings in Awgaro to serve as temporary administrative offices and house employees, on grounds that Eritrea was indirectly seeking compensation for damage to buildings in Awgaro despite the Commission's refusal to find liability for such damage. The Commission agrees, and so awards only US\$45,000 for replacement of looted movable property in the Tokombia Administrative Office, consistent with the amount in the Gash-Barka Rapid Assessment Report. In other instances (for example, for the Ministry of Agriculture and schools), the Commission also awards compensation for looting and looted-related property repair amounts consistent with that Report.

191. Where Eritrea's evidence reflected estimated construction costs only distantly connected to wartime looting, the Commission disallows them; for example, Eritrea candidly stated that some four million nakfa would be necessary to rebuild the Tokombia marketplace because "exposure to the elements had exacerbated the damage [of stripping] over time."<sup>42</sup> As in several other regions, the Commission limits compensation for the Water Supply

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<sup>42</sup> ER Damages Group One Memorial, Annex C, p. 3063.

structure to the estimated cost of replacing pumps, pipes and fittings that were looted.

192. Based on its detailed review of the evidence, the Commission awards Eritrea compensation in the amount of US\$475,000 for the looting of the listed buildings in Tokombia Town during Ethiopia's occupation in May 2000. Adding the amounts awarded for the Police Station and Rothman Tobacco Plant, the total awarded for Eritrea's Tokombia Town Building Claims is US\$730,000.

193. In sum, the total compensation awarded for Eritrea's Building Claims for the Western Front is US\$22,825,000.

## 6. Total Award for Building Claims

194. To conclude this section of the Award, the total compensation awarded for Eritrea's Building Claims for the Central and Western Fronts is US\$35,965,000.

## D. Claim for Consequential Damages

### 1. Eritrea's Claim

195. In the damages phase, Eritrea claimed US\$400 million as consequential damages, reflecting US\$500 per person for 800,000 individuals allegedly injured by Ethiopian conduct for which the Commission found liability. Eritrea contended that Ethiopia carried out a concerted and deliberate program to destroy civilian infrastructure in areas that Ethiopian forces transited or occupied during or after their 2000 invasion of Eritrea, causing extensive consequential injury to every resident in these areas, and to some people in adjoining areas. As explained by Eritrea's counsel: "We are positing that virtually everyone in the occupied territories, virtually everyone on the periphery of the occupied territories, everyone within the service area of these essential facilities were injured."<sup>43</sup>

196. Eritrea claimed four types of damage. First, it claimed that many children, and their families, were injured by destruction of or damage to schools and other educational facilities. Second, Eritrea cited economic injury resulting from the destruction of telecommunications and other infrastructure. Third, it maintained that people in affected areas suffered from unemployment, poverty and other injuries from the devastation of the local economy caused by Ethiopian misconduct. Finally, it claimed that its citizens suffered from loss of access to health care due to Ethiopia's destruction or looting of

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<sup>43</sup> Transcript of the Eritrea-Ethiopia Claims Commission Hearings of April 2007, Peace Palace, The Hague, at p. 789 (Professor Brilmayer) (April 24, 2007).

hospitals, clinics, local medical centers, pharmacies, safe water supplies and other infrastructure related to medical care and public health.

197. Eritrea contended that, given this pervasive damage affecting hundreds of thousands of people, it was not feasible to quantify injury to each individual. It therefore asked the Commission to award US\$500 in respect of each resident of large areas of Eritrea. Eritrea emphasized in this regard Article 5(10) of the December 2000 Agreement, authorizing the Commission “to adopt such methods of efficient claims management and mass claims processing as it deems appropriate. . . .” Eritrea contended that for this claim, the Commission should authorize a reduced standard of proof of individual harm, as a trade-off for a significantly reduced level of compensation.

198. Eritrea contended that the character and extent of the destruction of civilian infrastructure by Ethiopian forces proved both that the destruction was intentional, and that it was intended to injure the civilian population. In Eritrea’s view, this established a proximate causal connection between the claimed injuries and Ethiopia’s delicts, because any injury intentionally inflicted must be proximately caused. Eritrea’s counsel contended that it was not necessary for the Commission to have found such intention at the liability phase, and that it could now draw the requisite inferences regarding Ethiopia’s intentions at the damages phase.

199. Eritrea also argued that much of the damage to civilian infrastructure violated Article 54 of Additional Protocol I to the Geneva Conventions (“Protocol I”),<sup>44</sup> prohibiting attacking or destroying “objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas . . . crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population.” (While Protocol I was not in force between the Parties, the Commission has found that it largely reflects customary international law.<sup>45</sup>) In Eritrea’s view, the elements of this claim, especially damage to medical services, fell within the ambit of Article 54 and, cumulatively, Ethiopia’s conduct caused a breakdown of systems required to sustain human life in violation of Article 54.

## 2. Ethiopia’s Response

200. In Ethiopia’s view, Eritrea’s consequential damages claim was largely a reassertion of Eritrean claims that the Commission rejected at the liability phase. However, some of Eritrea’s arguments, particularly its invoca-

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<sup>44</sup> *Supra* note 25.

<sup>45</sup> *E.g.*, Partial Award in Eritrea’s Central Front Claims, para. 23; Partial Award, Central Front, Ethiopia’s Claim 2 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (April 28, 2004) [hereinafter Partial Award in Ethiopia’s Central Front Claims], para. 17.

tion of Article 54 of Protocol I, were said to be new claims inadmissible at the damages phase. (Under Article 5(8) of the December 2000 Agreement, all claims had to be filed by December 12, 2001.) Ethiopia also contended that Eritrea did not present evidence proving that any compensable damage resulted from the conduct alleged.

201. Ethiopia also contended that the relevant populations could not exceed the 98,619 persons identified in Eritrea's census as living in the eleven towns and villages and the partial sub-zoba cited in the Commission's liability findings, rather than the 800,000 persons Eritrea claimed. Ethiopia emphasized in this regard that Eritrea claimed consequential damages for large areas for which the Commission made no liability findings, including some sub-zobas where the Commission rejected Eritrea's claims.

### 3. The Commission's Conclusions

202. *Admissibility.* The Commission does not consider Eritrea's request for consequential damages to be a new claim of liability. Instead, the Commission understands Eritrea to request that, when determining compensation for some of its prior findings of Ethiopia's liability, the Commission should include compensation for these losses as reasonably foreseeable consequences of the unlawful acts in question.

203. Eritrea presented this as a claim for "consequential damages." However, international law does not recognize a separate category of compensable "consequential damages" involving different standards of legal causation or other distinctive legal elements. The concept of consequential damages has a significant role in some national legal systems, but does not exist in others, and so cannot be viewed as a general principle of law. Similarly, the concept has not been recognized in international proceedings as a separate form of compensable injury as Eritrea advocates. The Commission thus does not assign particular legal significance to Eritrea's characterization of certain types of damages as "consequential." It instead examines this claim in accordance with the principles generally applicable in determining damages in international claims. The Commission notes in this regard that this claim seeks large sums *in addition* to those Eritrea claims for the costs of repairing or replacing damaged or destroyed buildings or other infrastructure for which the Commission has found liability.

204. *Education.* As to Eritrea's claim for additional damages reflecting disruption of its education system, the Commission recognizes that many children's education, and their families' plans, were disrupted by damage to schools attributable to Ethiopia. (The record also includes evidence that Eritrean educators and their pupils often displayed admirable initiative and resilience in the face of adversity.) However, Eritrea's Damages Memorial made no serious attempt to identify the number of students affected, to quantify the extent of disruption, or to assess any financial or other consequences. The

argumentation and evidence submitted to support this portion of the claim was anecdotal or conclusory. At the hearing, Eritrea acknowledged the difficulties and uncertainties of attempting to assess any quantum of damages associated with disruption of education.

205. Given the paucity of the record, and the uncertainties of quantifying injury of the kind Eritrea asserts, this component of Eritrea's claim for fixed-sum damages in respect of hundreds of thousands of people fails for lack of proof. The Commission also notes that, in contrast with its arguments regarding medical care discussed below, Eritrea did not contend that international law rules extend special protection to education in the context of armed conflict or its aftermath.

206. *Damage to Electrical and Telecommunications Infrastructure.* Eritrea also claimed additional damages on account of injury allegedly experienced by hundreds of thousands of persons due to the destruction of electrical and telecommunications infrastructure. The supporting argumentation and evidence, presented in less than three pages of Eritrea's Damages Memorial, again was conclusory or anecdotal. The evidence was not sufficient to establish entitlement to compensation going beyond the amounts due for the destruction of the facilities themselves pursuant to Eritrea's other claims. This component also fails for lack of proof.

207. *Adverse Economic Conditions.* Eritrea's claim for additional damages stemming from the generalized decline in economic conditions attributed to Ethiopia's destruction of infrastructure also must fail. Past tribunals have not found generalized conditions of war-related economic disruption and decline to constitute compensable elements of damage, even in the case of some types of injury bearing a relatively close connection to illegal conduct, such as the increase in maritime insurance rates rejected by the Alabama Tribunal. Counsel for Eritrea acknowledged in this regard that the Geneva Conventions and Protocol I do not encompass protection of the economy writ large.<sup>46</sup>

208. *Loss of Access to Medical Care.* Eritrea's claim for additional compensation for injury to the civilian population on account of damage to or destruction of medical facilities for which the Commission found Ethiopia liable requires fuller consideration. The Commission found such liability regarding numerous medical facilities in Eritrea, including substantial damage to all three regional hospitals in the affected areas and to other significant facilities. Ethiopia was found liable for 90% of the extensive damage to the fifty-bed regional hospital at Senafe. It was found liable for allowing "breaking, entering and looting" of government buildings in the town of Barentu, including a second regional hospital that was looted and partially burned. There was liability for allowing looting and burning of the third regional hospital in Teseney. The Commission also explicitly found Ethiopia liable for destruction

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<sup>46</sup> Transcript of the Eritrea-Ethiopia Claims Commission Hearings of April 2007, Peace Palace, The Hague, at pp. 773-774 (Professor Crawford) (April 24, 2007).

of the Sub-Zoba Health Center in Tserona Town. The three regional hospitals were the only facilities in a large area of Eritrea that could treat serious conditions requiring inpatient surgery or other advanced care.

209. The Commission also made findings of liability that embraced looting or destruction of health centers and clinics in other locations. It found liability for permitting looting in Tabaldia (where the Partial Award cited evidence describing looting of appliances, beds and medicines from the medical clinic). It found liability for destroying most of the structures in Guluj, where there was a health center. Comparable findings were made with regard to the entire Molki Sub-Zoba, to the border town of Omhajer, and to the villages of Guluj and Serha, all of which had health centers or clinics prior to the war.

210. The Commission believes that, in these factual circumstances, injuries to Eritrea's nationals resulting from loss of access to medical care on account of unlawful destruction or damage to medical facilities should be considered in assessing compensation. In reaching this conclusion, the Commission has given weight to the extent to which international humanitarian law accords special protection to medical facilities and medical personnel, and to patients needing medical care. These protections were presumably familiar to Ethiopia's military commanders, who, Ethiopia maintained, were all trained in the principles of humanitarian law. They should have led commanders to recognize the likely consequences for civilians of widespread damage to medical facilities and loss of medical supplies.

211. Numerous provisions of humanitarian law highlight the importance of protecting medical facilities and services, and of assuring their ability to operate. Article 18 of the Fourth Geneva Convention<sup>47</sup> provides that “[c]ivilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack, but shall at all times be respected and protected. . . .” Article 20 requires respect and protection for persons solely engaged in operating and administering civilian hospitals. Article 23 requires parties to allow free passage of medical and hospital stores intended for civilians. Article 55 requires an Occupying Power to ensure the availability of medical supplies to the civilian population “to the fullest extent of the means available to it,” and bars requisitioning of such supplies except under limited conditions. Article 12 of Protocol I directs that medical units “be respected and protected at all times and shall not be the object of attack.” (“Medical units” are broadly defined to include civilian hospitals, preventive medicine centers, and other types of civilian facilities.) Article 15 of Protocol I likewise requires that civilian medical personnel be “respected and protected.”

212. These treaty provisions protecting medical facilities, and others like them, appear in instruments concluded between States. However, they do

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<sup>47</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. p. 3516, 75 U.N.T.S. p. 287 [hereinafter Geneva IV].

not exist primarily to protect States' interests or property. Instead, their fundamental purpose is to provide protection to individuals caught up in armed conflict or its aftermath. They cumulatively aim to assure that the wounded and sick "receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition."<sup>48</sup>

213. Eritrea sought to reinforce its claim by invoking Article 54 of Protocol I, dealing with protection of foodstuffs, drinking water supplies, and other objects indispensable to the survival of the civilian population. Ethiopia responded, *inter alia*, that this was an inadmissible new claim. Eritrea in turn insisted that it had previously identified Article 54 as a basis for its claims. Whether or not the earlier pleadings mentioned Article 54, the Commission did not previously find Ethiopia liable for violating that article, and cannot at this late stage assign additional liability based on such a breach. In any case, other provisions of humanitarian law cited above confirm the protection of medical facilities more explicitly than does Article 54, and the Commission need not decide whether that article might provide an additional layer of protection. This is particularly so as there has been no considered briefing or argument by the Parties regarding State practice, negotiating history, commentators' views and other considerations potentially bearing upon the issue.

214. As noted above, Eritrea argued that any injuries a party intends are proximately caused, that the character of the damage to civilian infrastructure showed that Ethiopia intended to harm civilians and that Ethiopia therefore was liable for all the resulting injury to civilians. Ethiopia denied any such intent. Again, it is not necessary for the Commission to pass upon this line of argument. International humanitarian law protects hospitals and other medical facilities and the civilians who depend on them. Where there is widespread unlawful damage to such facilities, particularly in an area where they are few in number, it should be reasonably foreseeable to the forces of the offending party that injury will result to protected persons. The challenge lies in assessing the extent of that injury, not in finding the requisite causal connection.

215. There was evidence showing that Eritrean hospitals drew patients from broad areas, extending well beyond the communities where they were located. However, the record did not provide much detail regarding the number of patients who previously used the damaged facilities or (except in the case of the hospital at Senafe) the length of time they were out of service or operated at reduced capacity. The Commission heard testimony from a senior hospital administrator that during many months while the hospital at Barentu was out of service, many patients had to make difficult journeys to an alternate location, including many persons who were quite ill, women experiencing difficult births, and landmine victims. However, the witness could not quantify how many persons were affected.

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<sup>48</sup> Protocol I, *supra* note 25, art. 10.

216. These limitations of the record have required the Commission to estimate the extent to which Eritrean civilians were injured on account of loss of access to medical care. Taking account of all the relevant circumstances, the Commission awards Eritrea US\$1,500,000 as compensation in respect of injuries to civilians due to loss of access to health care on account of damage to or destruction of Eritrean hospitals and other medical facilities and loss of medical supplies.

## E. Damage to Cultural Property

### 1. Stela of Matara

217. At the liability phase, the Commission found Ethiopia liable “[f]or permitting, while occupying the area, deliberate damage by explosion to the Stela of Matara, an ancient monument in the Senafe Sub-Zoba.”<sup>49</sup>

218. The Stela is a stone obelisk, perhaps 2,500 years old, carved with the symbol of the sun over the crescent moon and an inscription in Ge’ez. The Stela, apparently the only such artifact in Eritrea, is located in the archeological site of Matara (or Metera), near Senafe. It was located close to a road, and was not heavily fenced or otherwise protected. The Commission found that the obelisk was seriously damaged by explosive charges placed at its base during Ethiopia’s May 2000 offensive.

219. The explosion destroyed all of the Stela below ground level and its lower portion above ground. The destroyed section was replaced with locally quarried stone cut to match the previous material, some of which was not original, but the result of earlier repairs. The Stela’s intact upper portion, containing the historic inscriptions, then was attached to the newly cut lower portion. Local and international artisans carried out this work, assisted by UNESCO. This work restored the Stela to substantially its previous appearance, but a significant portion of the original stone was lost.

220. The repair and restoration work cost 450,106 nakfa. Ethiopia accepted this as an appropriate measure of compensation, although it reserved its position regarding the treatment of a US\$25,000 donation from UNESCO and a US\$6,000 World Bank loan used to support the work. It also expressed reservations regarding costs of some work required to repair earlier repairs.

221. Eritrea also claimed US\$8,000,000 as additional compensation for damage to a significant cultural monument. Eritrea chose this amount because it was the amount expended by Ethiopia in its multi-year effort to recover the twenty-four meter tall Obelisk of Axum from Rome. Ethiopia vigorously disputed this additional claim, maintaining that it had no legal basis and was in fact a claim for punitive damages.

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<sup>49</sup> Partial Award in Eritrea’s Central Front Claims, *dispositif*, Section V.D.8.

222. The Commission does not believe that Ethiopia's expenditures for the return of the Obelisk of Axum provide an analogous measure for assessing compensation. At the same time, the Commission believes that serious damage to a significant object of cultural patrimony warrants some award of compensation going beyond the mere costs of attempting to restore the object to its earlier appearance. This is so even though there is no evidence that the decision to damage the Stela involved anyone other than one or more low-ranking soldiers.

223. Accordingly, the Commission awards Eritrea the amounts expended to attempt to restore the Stela, plus an additional amount to reflect, in part, the unique cultural significance of the Stela, for a total award of US\$50,000.

## 2. Tserona Patriots Cemetery

224. The Commission found Ethiopia responsible for permitting the looting and stripping of the Tserona Patriots (or Martyrs) Cemetery, and found it liable for 75% of the total damage caused.<sup>50</sup>

225. Eritrea presented substantial evidence of the desecration of the Tserona Patriots Cemetery at the liability phase. In the damages phase, Eritrea quantified the allowable 75% of this damage at 750,000 nakfa, for looting and stripping the fence, metal vaults, the metal cemetery building (which collapsed), one thousand mango trees that had been planted as memorials, and the caretaker's tools. The 2005 estimate of the necessary repair and replacement costs was skeletal, and documentary evidence showed that the National Union of Eritrean Women funded reconstruction of the fence for ERN 150,896 in 2003. Ethiopia did not present a specific defense.

226. Balancing the relatively weak evidentiary record against the severity of the violation of international law, and noting that total compensation has already been reduced by 25% in the liability Award, the Commission awards the full ERN 750,000 claimed, converted at the 2005 exchange rate to US\$50,000.

## F. Prisoners of War

### 1. The Commission's Liability Findings

227. In its Partial Award dated July 1, 2003 in Eritrea's Prisoners of War Claim 17, the Commission found Ethiopia liable for the following eight violations of international law committed by its military personnel and other officials of the State of Ethiopia:

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<sup>50</sup> *Id.*, Section V.D.2.

1. For failing to take effective measures to prevent incidents of beating or other unlawful abuse of Eritrean POWs at capture or its immediate aftermath;
2. For frequently depriving Eritrean POWs of footwear during long walks from the place of capture to the first place of detention;
3. For failing to protect the personal property of Eritrean POWs;
4. For subjecting Eritrean POWs to enforced indoctrination from July 1998 to November 2002 in the camps at Bilate, Mai Chew, Mai Kenetal and Dedessa;
5. For permitting health conditions at Mai Kenetal to be such as seriously and adversely to affect or endanger the health of the Eritrean POWs confined there;
6. For providing all Eritrean POWs prior to December 2000 a diet that was seriously deficient in nutrition;
7. For failing to provide the standard of medical care required for Eritrean POWs, particularly at Mai Kenetal, and for failing to provide required preventive care by segregating from the outset prisoners with infectious diseases and by conducting regular physical examinations, from May 1998 until December 2000; and
8. For delaying the repatriation of 1,287 Eritrean POWs in 2002 for seventy-seven days longer than was reasonably required.<sup>51</sup>

## 2. The Commission's Conclusions

228. While both Parties requested fixed-sum damages as compensation for certain violations of international humanitarian law that the Commission found during the liability phase in relation to POWs, the Commission has decided on a different manner of assessing the appropriate compensation. To a considerable extent, this decision flows from the Commission's general approach to its determinations of liability. The Commission sees its task not as being to determine liability for each individual incident of illegality suggested by the evidence, but rather as being to determine liability for serious violations of the law. These are usually illegal acts or omissions that were frequent or pervasive and consequently affected significant numbers of victims.

229. The claims before the Commission are the claims of the Parties, not the claims of individual victims. Particularly when deciding damages owing for unlawful treatment of POWs, those damages can appropriately be assessed only for the Claimant State, because fixed-sum damages designed to be distributed to each individual who was a prisoner of war would not reflect the proper compensation for that individual. Different POWs were held under different conditions at various camps for various periods of time. Some were injured in

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<sup>51</sup> Partial Award, Prisoners of War, Eritrea's Claim 17 between the State of Eritrea and the Federal Democratic Republic of Ethiopia (July 1, 2003), *dispositif*, Section V.D.

the camps, and some died of those injuries. Others were affected adversely in other ways that varied from individual to individual. While the Commission encourages the Parties to compensate appropriately the individual victims of warfare, it calculates the damages owed by one Party to the other, including for mistreatment of POWs, on the basis of its evaluation of the evidence with respect to the seriousness of the unlawful acts or omissions, the total numbers of probable victims of those unlawful acts or omissions (where those numbers can be identified with reasonable certainty) and the extent of the injury or damage suffered because of those unlawful acts or omissions.

230. Seriousness of the Violations. While damages must be awarded for all POW violations, the Commission finds that violation numbers 1, 4, 5, 6 and 7 were the most serious and require the heaviest damages. With respect to violation number 1, the evidence fell short of showing that such unlawful abuse was permitted by Ethiopia, but Ethiopia was held liable for failing to take effective measures to prevent it, a failure that had serious adverse consequences for the victims. With respect to violation number 4, the evidence indicated that the segregation of different groups of POWs, accompanied by the enforced indoctrination of Eritrean POWs and the related pressures to make self-criticisms, had long-lasting adverse effects on the mental health of many POWs. With respect to violation numbers 5, 6 and 7, the failure to provide adequate diet and health care for POWs were serious violations that adversely affected all POWs. While the extremely unsatisfactory conditions at Mai Kenetal existed for a limited time, the other inadequacies continued throughout the long detention of many POWs.

231. Numbers of Victims. Approximately 2,600 Eritreans were detained as POWs during the armed conflict. Prior to May 2000 their numbers totaled only a few hundred, but between August 2000 and November 29, 2002 large numbers were held by Ethiopia. The final 1,287 were released seventy-seven days later than they should have been held.

232. Seriousness of Injuries. The evidence indicates that many POWs suffered long-lasting damage to their physical and mental health as a result of the violations of international law from which they suffered.

233. Award. While the POW violations for which Ethiopia is liable were not, as a whole, as serious as were those for which the Commission finds Eritrea liable, the greater number of Eritrean victims must be taken into account. On the basis of the above considerations, the Commission awards Eritrea US\$4,000,000 for the unlawful treatment of Eritrean POWs.

## G. Rape

234. As it did in connection with its limited findings in both Parties' claims of liability for rape, the Commission considers that the question of damages connected to incidents of rape deserves separate general comment. Although the Commission reiterates its gratification that "there was no sug-

gestion, much less evidence, that either Ethiopia or Eritrea used rape, forced pregnancy or other sexual violence as an instrument of war,”<sup>52</sup> the Commission did find evidence that both Parties failed to impose effective measures, as required by international humanitarian law, to prevent “several” rapes of civilian women and girls in certain areas. The Commission, which acknowledged the cultural sensitivities surrounding rape in both countries and the unwillingness of victims to come forward, has no illusion that the record before it reveals the full scope of rape during the extended armed conflict. The Commission is acutely aware that the full number of victims and the full magnitude of the harm they suffered cannot and will not ever be known.

235. It is therefore perhaps predictable that each Party failed to prove its damages claim for rape, either as to a reasonable number of victims or as to a reasonable measure of economic harm. Nor did the Parties provide the Commission with an agreed or useful methodology for assessing compensation.

236. In the Eritrean Central Front and Western Front Partial Awards, respectively, the Commission found Ethiopia liable for “failure to take effective measures to prevent rape of women by its soldiers during the occupation of Senafe Town”<sup>53</sup> and “failure to take effective measures to prevent the rape of women in the towns of Barentu and Teseney.”<sup>54</sup> Rather than proposing victim-specific damages, Eritrea originally proposed that each Party set aside US\$500,000 to US\$1,000,000 for its own locally administered programs for women’s health care and support services in the areas where the Commission found liability for rape. Ethiopia did not agree to self-administered programs and, instead, used its general methodology to claim material and moral damages totaling US\$6,739,641, estimating that 1% of the pre-war female population suffered rape in the affected areas and, as a result, lost 50% of average lifetime earnings and suffered moral damage. Eritrea subsequently requested an award of US\$6,750,000.

237. The Commission cannot assess Eritrea’s final request for relief, because Eritrea presented its number without explanation. The Commission had questioned Eritrea as to the adequacy of amounts as low as US\$500,000–\$1,000,000 to support rape victims. The Commission can only assume that Eritrea made its request for US\$6,750,000 to match the number Ethiopia reached with its mathematical methodology, which the Commission rejects in Ethiopia’s parallel Award.

238. Despite the shortcomings of the Parties’ damages methodologies, the Commission considers that this serious violation of international humanitarian law demands serious relief. Neither symbolic nor nominal damages will

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<sup>52</sup> E.g., Partial Award in Ethiopia’s Central Front Claims, para. 34; Partial Award in Eritrea’s Central Front Claims, para. 36.

<sup>53</sup> Partial Award in Eritrea’s Central Front Claims, *dispositif*, Section V.D.5.

<sup>54</sup> Partial Award in Eritrea’s Western Front and Related Claims, *dispositif*, Section IV.M.2.k.

suffice in the face of the physical, mental and emotional harm known to be suffered by rape victims.

239. Accordingly, the Commission awards Eritrea (as it does Ethiopia in its parallel Award) US\$2,000,000 in damages for failing to prevent the rape of known and unknown victims in the towns of Senafe, Barentu and Teseney. In so doing, the Commission expresses the hope that Eritrea (and Ethiopia) will use the funds awarded to develop and support health programs for women and girls in the affected areas.

## H. Displacement of the Population of Awgaro

### 1. Eritrea's Claim

240. In its Partial Award of December 19, 2005 in Eritrea's Western Front, Aerial Bombardment and Related Claims, the Commission found Ethiopia liable for the forcible displacement of the population of Awgaro during Ethiopia's May 2000 attack on Eritrea:

The Respondent is liable to the Claimant for the unlawful displacement of all the residents of Awgaro in violation of Article 49 of Geneva Convention IV.<sup>55</sup>

Pursuant to this finding, Eritrea requested a fixed amount of US\$500 per person for 3,100 persons allegedly expelled, which totals US\$1,550,000, plus the additional fixed-sum amount of US\$500 per person for lost property.

### 2. Ethiopia's Response

241. Ethiopia agreed that it was appropriate to utilize a fixed per capita sum to determine compensation in this situation, where a defined group of people all suffered similar legal injury. However, it contended that compensation should be determined with reference to a much smaller group of persons, and that the per capita sum should be smaller. In Ethiopia's view, the Commission's finding of liability applied only to persons residing within the legal boundaries of the village of Awgaro, not the surrounding area. Ethiopia cited Eritrean census figures giving the village's 2000 population as 1,154, not the 3,100 persons claimed by Eritrea. It multiplied this number by the average annual income of persons in nearby areas of Ethiopia (US\$182), slightly increased because the average expellee was absent for about thirteen months. On this basis, Ethiopia contended that compensation should be limited to approximately US\$231,000.

242. Ethiopia also objected to Eritrea's seeking additional fixed-sum amounts for lost property for the first time at the damages phase. Ethiopia

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<sup>55</sup> Partial Award in Eritrea's Western Front and Related Claims, *dispositif*, Section VIII.E.2.b.

contended that all of Eritrea's property-related claims were earlier considered and dismissed by the Commission, when it dismissed Eritrea's claims for looting and destruction of property in Lalai Gash Sub-Zoba, where Awgaro is located.

### 3. The Commission's Conclusions

243. The Commission does not agree that its Partial Award should be read in the narrow manner suggested. In the earlier proceedings, the arguments presented were not framed in precise terms matching political boundaries of Awgaro village. Indeed, as the Award noted, Ethiopia did not present rebuttal evidence regarding the event at Awgaro.<sup>56</sup> In light of the uncontested evidence, the Commission understood the term "Awgaro" to describe the general area from which Eritreans were forcibly and wrongfully expelled, as reflected in the Commission's estimate in the Partial Award that "600 families" previously lived in Awgaro.<sup>57</sup> It is not appropriate to construe the Commission's Partial Award now in a narrow manner not based on arguments or evidence previously presented.

244. The Commission finds the most persuasive evidence of the number of persons affected by the illegal expulsion of Eritreans from Awgaro to be the declaration of the relief official who registered the expelled persons in the displaced persons camp to which most of them went after being driven out of their homes. On this basis, the Commission concludes that at least 3,100 persons were wrongfully and forcibly expelled.

245. As for Eritrea's claims regarding the Awgaro expellees' lost property, including real property, the Commission concludes that Eritrea did not raise these separate claims at the liability phase, and the claims are now precluded.

246. The Commission views the forcible expulsion of the residents of Awgaro as a serious and deliberate breach of international law, warranting significant compensation. That is so whether the expulsion decision was made by the individual commander of the Ethiopian armed forces that occupied the town or by higher Ethiopian authority, an issue on which the Commission has no evidence. The Commission therefore awards the full amount sought by Eritrea as compensation for this violation, US\$1,550,000.

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<sup>56</sup> Partial Award in Eritrea's Western Front and Related Claims, para. 140.

<sup>57</sup> *Id.*, para. 139.

## VII. ERITREA'S GROUP NUMBER TWO DAMAGES CLAIMS

### A. The Commission's Liability Findings

247. Eritrea's Group Number Two claims comprise Eritrea's Claims 15, 16, 20, 23 and 24, as well as five individual claims (Claims 27, 28, 29, 30, 31 and 32). The Commission's specific liability findings in the first five claims are reproduced below in connection with the Commission's discussions of those findings. The individual claims also are discussed in a separate section below. The Group Number Two claims involve two general issues affecting several liability findings.

### B. Non-Responsibility for Claims of Nationals; Dominant and Effective Nationality

248. The December 2000 Agreement established this Commission's jurisdiction, but did not create substantive rights. The Parties' claims for violations of international law generally remain subject to any qualifications and limitations applicable under customary international law. Ethiopia contended that Eritrea's claims involving several large groups of people should fail on account of two such limitations. It first contended that claims involving many persons were barred by the customary international law rules precluding a State from claiming in the exercise of diplomatic protection if the injured individual has the nationality of the State against which the claim is made. It also contended that claims involving persons whom the Commission found were dual nationals at relevant times were barred because those persons' dominant nationality was Ethiopian. Ethiopia contended in this regard that most of the dual nationals involved in Eritrea's claims had their strongest family, social and economic ties in Ethiopia at the relevant times. Accordingly, their dominant nationality was Ethiopian, and their claims should therefore be barred.

249. Ethiopia invoked these lines of argument, *inter alia*, against Eritrea's claims for wrongful deprivation of nationality, wrongful expulsion, and residents' losses of property.

250. Eritrea responded, *inter alia*, that in the context of the December 2000 Agreement (which in certain circumstances authorized Eritrea to pursue claims on behalf of persons who are not Eritrean nationals), the rule of dominant and effective nationality could only operate to bar a claim if the injured person's non-Eritrean nationality was continuous from the date of the injury to the date of the claim. It also vigorously argued that Ethiopia should not be able to invoke these limitations on diplomatic protection and State responsibility where Ethiopia itself acted to sever the bond of Ethiopian nationality.

251. The Commission recognizes the continued force of the rule of dominant and effective nationality in many circumstances. However, it

believes that application of the rule must be qualified in situations, such as those presented here, involving claims centered on expulsion or deprivation of nationality by the respondent State. It cannot be that, in such situations, international law allows a State wrongfully to expel persons or deprive them of its own nationality, but then deny State responsibility because of the very social connections or bonds of nationality it wrongfully ended. The Parties reflected this in Article 5(9) of the December 2000 Agreement, where they agreed that “[i]n appropriate cases, each party may file claims on behalf of persons of Ethiopian or Eritrean origin who are not its nationals.” This provision is a compelling indication that the Parties did not view the general rules of diplomatic protection as applying in the unusual circumstances that led to that Agreement.

## C. Deprivation of Nationality

### 1. Introduction

252. In its Partial Award of December 17, 2004 in Eritrea’s Civilians Claims, the Commission found Ethiopia liable for unlawfully depriving four groups of persons of their Ethiopian nationality:

1. For erroneously depriving at least some Ethiopians who were not dual nationals of their Ethiopian nationality;
2. For arbitrarily depriving dual nationals who remained in Ethiopia during the war of their Ethiopian nationality;
3. For arbitrarily depriving dual nationals who were present in third countries during the war of their Ethiopian nationality;
4. For arbitrarily depriving dual nationals who were expelled to Eritrea but who were not screened pursuant to Ethiopia’s security review procedure of their Ethiopian nationality.<sup>58</sup>

253. Eritrea claimed almost US\$2.4 billion as compensation for these violations. It did not directly correlate its claim to the Commission’s liability findings, instead seeking US\$10,000 per capita in respect of each person in four groups of dual nationals:

- 43,319 who allegedly were unlawfully deprived of Ethiopian nationality in connection with their expulsion to Ethiopia (US\$433,190,000);
- 428 who allegedly were deprived of Ethiopian nationality in connection with their expulsion to third countries (US\$4,280,000);
- 36,207 who allegedly were unlawfully deprived of Ethiopian nationality while they remained in Ethiopia (US\$360,270,000); and

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<sup>58</sup> Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27–32 Between the State of Eritrea and The Federal Democratic Republic of Ethiopia (Dec. 17, 2004) [hereinafter Partial Award in Eritrea’s Civilians Claims], *dispositif*, Section XIII.E.

- 156,567 who allegedly were unlawfully deprived of Ethiopian nationality while they were present in third countries (US\$1,565,670,000).

254. Eritrea cannot claim compensation for its own account for the first of the liability findings listed above (for “erroneously depriving at least some Ethiopians who were not dual nationals of their Ethiopian nationality”). At the liability phase, the Commission found that Eritrea’s claims predicated upon injuries inflicted upon persons holding only Ethiopian nationality did not conform to the jurisdictional requirements of the December 2000 Agreement, and could not be the basis for compensation accruing directly to the State of Eritrea.<sup>59</sup>

## 2. Persons Remaining in Ethiopia—“Yellow Card People”

255. The Commission found Ethiopia liable “[f]or arbitrarily depriving dual nationals who remained in Ethiopia during the war of their Ethiopian nationality.” This finding involved a large group of persons residing in Ethiopia who remained there for the duration of the war, but whom the Government of Ethiopia came to regard as solely Eritrean nationals.

256. These persons were not expelled, but they were required to register with Ethiopia’s security authorities and to surrender their passports, identity cards and other official documents identifying them as Ethiopians. They were given distinctive yellow identity cards, and were referred to by both Parties throughout the proceedings (and are referred to here) as the “yellow card people.” Ethiopia did not contend that these persons were the subject of any sort of individualized review process, or were judged to threaten Ethiopia’s security. The evidence at the liability phase indicated that 24,018 yellow cards were issued. At the damages phase, Eritrea contended (without supporting evidence) that the number of persons in this group should be increased by 50%, to 36,000, reflecting persons who were obliged to register, but did not. Ethiopia did not dispute Eritrea’s unsupported claim to this increase of the number to 36,000 because the larger figure supported Ethiopia’s defenses (discussed below) regarding the number of persons who were wrongly expelled from Ethiopia.

257. Eritrea claimed US\$10,000 with respect to each of the yellow card people, or more than US\$360 million. It alleged that substantial compensation was warranted because these people experienced substantial injury on account of their loss of Ethiopian nationality. It referred to the Commission’s finding in the Partial Award that losing Ethiopian nationality could have adverse consequences in terms of the right to hold land and business licenses and obtain passports. Eritrea also cited a witness statement from a yellow card holder, alleging that he and his family were barred from leaving the town of Mekele where they lived, and faced other difficulties and discriminations.

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<sup>59</sup> *Id.*, paras. 19, 20 & 90.

258. Ethiopia responded that the yellow card people had dominant and effective Ethiopian nationality, so that Eritrea could not make a claim with respect to them. (The Commission addressed and rejected this line of argument above.) Ethiopia also argued that it would be anomalous and improper to award compensation to Eritrea in respect of people who were not even in Eritrea and that, in any event, Eritrea failed to prove that the yellow card people actually suffered injury. Ethiopia argued that Eritrea presented only two declarations supposed to show injury. Ethiopia dismissed the one referred to above as “dubious;” the other declarant, a “Mr. Doe,” was said not to be a yellow card person. Ethiopia also maintained that the yellow card people had significant rights and protections under Ethiopian law. In this regard, it introduced evidence that Ethiopia’s post-war legislation allowed them to reestablish their Ethiopian nationality, and that about 2,900 persons in Addis Ababa had done so.

259. As the Commission concluded in its Partial Award in Eritrea’s Civilians Claims, a belligerent in wartime may “lawfully assign significant and sometimes painful consequences to either of a dual national’s nationalities.” Some of the injuries complained of in Eritrea’s sparse evidence addressing injury, such as the loss of public employment by dual nationals holding the nationality of an enemy State in wartime, were not unlawful in the circumstances.

260. Eritrea did not produce evidence sufficient to establish that the yellow card people experienced any economic or social burdens or dislocations justifying an award of compensation, certainly not the US\$360 million Eritrea claimed. Accordingly, Eritrea’s claim for compensation with respect to the yellow card people is dismissed.

### **3. Deprivation of Nationality of Persons Outside of Ethiopia**

261. The Commission found Ethiopia liable “for arbitrarily depriving dual nationals who were present in third countries during the war of their Ethiopian nationality.” Pursuant to this finding, Eritrea sought, in one paragraph of its Damages Group Two Memorial, over US\$1.56 billion. This reflected US\$10,000 per person with respect to each of 156,567 persons. Eritrea calculated this number by taking 66.1% (the proportion of dual nationals indicated in Eritrea’s claims forms) of the 236,864 persons whom the International Organization for Migration tallied as having voted in third countries. About two thirds of these people (155,314) voted in Sudan and the remainder in Saudi Arabia (37,777) or other countries.

262. Eritrea maintained that all of these people were wrongly deprived of their Ethiopian nationality, and fell under the Commission’s liability finding dealing with loss of nationality by persons outside of Ethiopia. However, it did not explain its view that they all lost Ethiopian nationality or submit any evidence in this regard. The Commission infers that Eritrea had in mind

Ethiopia's argument at the liability phase, to the effect that all persons who qualified to participate in the referendum lost their Ethiopian nationality as a result. However, in its Partial Award in Eritrea's Civilians Claims, the Commission rejected this argument. Instead, taking account of the unique circumstances of Eritrea's becoming independent, and of the manner in which Ethiopia continued to treat referendum participants as its nationals, the Commission found that Ethiopians who participated in the referendum process became dual nationals of both countries.<sup>60</sup>

263. Ethiopia responded to this claim by arguing, *inter alia*, that Eritrea unjustifiably expanded the scope of the Commission's liability finding to cover a huge class of people that was not discussed at the liability phase, and that was not contemplated by the Parties or the Commission at that time. Ethiopia contended that Eritrea had originally pleaded its claim to cover a relatively limited number of persons—stranded international businessmen and the like—who found themselves outside of Ethiopia when the war began. In Ethiopia's view, the Commission adopted Eritrea's narrow description of the class of covered persons in its Partial Award.

264. As noted, Eritrea presented no evidence showing that Ethiopia regarded 156,000 persons who voted in the referendum outside of Ethiopia as having lost Ethiopian nationality as the result. Nor was there any evidence showing that they suffered any actual economic or other injury on account of their supposed loss of nationality.

265. Accordingly, the portion of Eritrea's claim involving the supposed loss of nationality by 156,000 persons who voted in the referendum in locations outside of Ethiopia fails for lack of proof.

266. In framing its liability Award, the Commission was guided by the claim as Eritrea presented it. Eritrea indicated at that time that it could not quantify the number of persons covered by this claim. However it cited as illustrations businessmen and other residents of Ethiopia who were temporarily present in third countries when war began, and whom Ethiopia then refused to recognize as its nationals. There was evidence showing that a few such individuals did suffer difficulties and inconvenience on account of Ethiopia's actions. Eritrea submitted declarations by persons who were refused assistance when they sought advice or passports or other consular services at Ethiopian embassies in third countries, including some whose Ethiopian passports were taken and not returned. However, the record did not provide a basis for estimating how extensive such occurrences may have been.

267. Given the severe limitations of the record, the Commission awards compensation in the amount of US\$50,000 in respect of the unknown, but apparently small, number of dual nationals who were arbitrarily deprived of their Ethiopian nationality while present in third countries.

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<sup>60</sup> *Id.*, para. 51.

#### 4. Other Deprivations of Nationality

##### *a. The Parties' Claims*

268. Finally, the Commission found Ethiopia liable for arbitrarily depriving dual nationals who were expelled to Eritrea but who were not screened pursuant to Ethiopia's security review procedure of their Ethiopian nationality.

269. At the damages phase, Eritrea advanced a broadly-framed claim with respect to 43,319 dual nationals who allegedly lost their Ethiopian nationality in connection with what Eritrea saw as their allegedly wrongful expulsion from Ethiopia. Eritrea calculated this number (and the number covered by its closely linked claim for wrongful expulsions, discussed below) starting with information from a database developed by ERREC.

270. The Parties' arguments and evidence regarding this portion of Eritrea's claim frequently conflated Eritrea's claims involving deprivation of nationality and its claims alleging wrongful expulsion. This is not surprising. Many people experienced both loss of nationality and expulsion (either lawful or unlawful), and the same facts are relevant to both types of claims. Both Parties devoted much effort and argument at the hearing to debating alternative ways of calculating the number of persons falling into these two groups. (In Eritrea's view, the groups were identical, so 43,319 persons experienced both wrongful expulsion and wrongful deprivation of Ethiopian nationality.) The following discussion regarding the numbers of persons affected thus is relevant both to the present claim for deprivation of nationality, and to the claim addressed in the next section for wrongful expulsion.

271. The ERREC database included information on 65,535 Eritreans who registered after crossing into Eritrea from Ethiopia between May 1998 and December 2000. ERREC entered registered individuals' personal information into the database, including birthdates, names of accompanying family members, educational status, means of transport to the border, and economic loss. The database originally included persons who left Ethiopia both before and after the Commission's jurisdictional period. However, Eritrea contended that the data was adjusted to remove the latter category before it calculated its damages claim.

272. Eritrea contended that the totals indicated by the ERREC database probably were low, because they did not include rural expellees in remote regions who did not register. However, Eritrea pointed out that its claimed total of 65,535 persons entering Eritrea from Ethiopia was broadly comparable with estimates by outside human rights groups and observers, citing in this regard several observers' estimates ranging from 50,000 to 75,000 persons.

273. Eritrea calculated its claimed number of 43,319 wrongful deprivations of nationality beginning with the 65,535 persons in the ERREC database. This number then was reduced by 14.4%, the proportion of persons who iden-

tified themselves on Eritrea's claims forms as having left Ethiopia voluntarily. (This was necessary because the Commission previously held that it was lawful for Ethiopia to deprive dual nationals who voluntarily went to Eritrea, an enemy State in wartime, of their Ethiopian nationality.<sup>61</sup>) This resulted in 56,098 persons.

274. Eritrea's Damages Group Two Memorial indicated that that this number should then have been further reduced, to eliminate persons Eritrea estimated (again based on its claims forms) to have had only Eritrean nationality. These persons had to be eliminated because they had no Ethiopian nationality to be taken away. Eritrea estimated that 66.1% of the persons in the database were dual nationals, so that the total should have been reduced by about two-thirds. 66.1% of 56,098 is 37,081, which would seem to be the correct number of persons wrongly deprived of their Ethiopian nationality, given Eritrea's premises. However, 37,081 is 14.4% less than the 43,319 Eritrea actually claimed. This suggests that Eritrea may have applied its percentage reduction for dual nationals (66.1%) to the total population in the ERREC database, but did not further reduce this number to reflect persons who left Ethiopia voluntarily.

275. Eritrea also claimed compensation with respect to another estimated 331 persons who were unlawfully expelled by Ethiopia to Kenya and Djibouti, with associated loss of nationality. Eritrea cited an Amnesty International report that there were "hundreds" of such persons, and estimated the actual number to be about 500. Eritrea's Memorial indicated that this estimate was also reduced to eliminate persons who left voluntarily and who had only Eritrean nationality. However, Eritrea again appears to have reduced the amount to eliminate only those who had solely Eritrean nationality, and to have left in the proportion that said they departed voluntarily.

276. Ethiopia contended that the numbers affected by any wrongful loss of nationality were much smaller than Eritrea claimed, and that Eritrea failed to prove actual damage following from any such losses of nationality that did occur.

#### *b. The Commission's Conclusions*

277. The Commission concluded at the liability phase that local authorities in Ethiopia wrongly expelled a considerable number of dual nationals who were not identified through individualized security reviews under the authority of Ethiopia's state security agency, the Security, Immigration and Refugees Affairs Authority ("SIRAA"); those expelled apparently then lost their Ethiopian nationality on account of their presence in Eritrea. However, the record is not clear as to how many persons fell into this group. In assessing the extent of this violation, it has been necessary for the Commission to exclude several

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<sup>61</sup> *Id.*, para. 73.

groups of persons as to whom Eritrea could not claim compensation for loss of nationality.

278. *SIRAA Expellees*. At the liability phase, the Commission held that a substantial number of dual nationals were lawfully expelled and deprived of Ethiopian nationality following the SIRAA screening process.<sup>62</sup> (These persons are referred to hereinafter as “SIRAA expellees.”) The SIRAA process sought to identify persons posing potential threats to Ethiopia’s wartime security. Ethiopia seized the SIRAA expellees’ passports and other documents indicating Ethiopian nationality when they were expelled, and thereafter regarded them as having lost Ethiopian nationality. The majority of these events occurred during the early months of the war.

279. In its Partial Award, the Commission noted that a belligerent has the legal right to expel enemy nationals to their home countries in wartime, including persons who may hold dual nationality. It found that the SIRAA expellees—said by Ethiopia to number 15,475—were lawfully expelled and deprived of their Ethiopian nationality after being identified through the security review process.<sup>63</sup> As these dual nationals were not unlawfully deprived of their Ethiopian nationality, no compensation is due with respect to them.

280. Eritrea acknowledged that its claimed number of wrongful deprivations of nationality might be reduced to reflect SIRAA expellees. However, Eritrea contended that Ethiopia presented evidence documenting the results of SIRAA reviews in just a handful of cases. Absent additional evidence documenting the outcome of such reviews in each of the 15,475 cases, Eritrea asserted that those expulsions (and their associated deprivations of nationality) must be regarded as unlawful.

281. While the evidence supporting the figure of 15,475 SIRAA expellees was limited, it was broadly consistent with statements by Ethiopian security officials regarding the number of expulsions in the record, and indeed was lower than indicated by some of those statements. The figure of 15,475 SIRAA expellees was consistently cited by Ethiopia throughout these proceedings, even though larger figures suggested by some officials’ statements would have been more to its advantage. The figure appears plausible in the circumstances; it reflects about 3% of the 500,000 persons of Eritrean extraction in Ethiopia, a figure cited by both Parties. Taking the record as a whole, while the Commission is not persuaded that the figure of 15,475 is precisely correct, it appears a reasonable indication of the scale of the lawful expulsions and losses of nationality that followed SIRAA security reviews.

282. The Commission was not persuaded by Eritrea’s argument that Ethiopia was obliged to produce evidence regarding the specifics of 15,475 individual security reviews. At least some of these documents could involve problematic issues of state security. Eritrea’s argument also raises a more

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<sup>62</sup> *Id.*, para. 72.

<sup>63</sup> *Id.*, paras. 72 & 82.

important point as well. Throughout these proceedings, both Parties have regularly cited the limitations imposed by the lack of resources and time in designing and presenting their claims, and the Commission has been sensitive to these concerns. It has not required evidence regarding thousands of individual events, evidence that the Parties could not assemble and present, and the Commission could not address, without unacceptable cost and delay. The Commission does not see a reason to adopt a fundamentally different approach with respect to the SIRAA security reviews.

283. Voluntary Departures. The Commission next considered the number of persons who left Ethiopia voluntarily. As noted above, the Partial Award in Eritrea's Civilians Claims held that termination of the Ethiopian nationality of dual nationals who went voluntarily to Eritrea was not arbitrary and unlawful.<sup>64</sup> The Commission did not determine how many persons fell into this category, and the record is particularly unclear in this regard.

284. In its calculations described above, Eritrea estimated, based on its claims forms, that 14.4% of the persons in the ERREC database, or 9,437 persons, left Ethiopia for Eritrea voluntarily. Of these, about two-thirds were said to be dual nationals who stood to lose their Ethiopian nationality because of their decision. For its part, Ethiopia contended that 21,905 family members voluntarily accompanied the SIRAA expellees; that by doing so they voluntarily chose to sever their connections of nationality; and that Ethiopia was justified in regarding them as no longer its nationals. Ethiopia also maintained that many other dual nationals freely chose to leave Ethiopia for Eritrea. Eritrea disagreed, contending that many family members were forcibly expelled along with SIRAA expellees, and that other family members who left for economic reasons after expellees' property was seized or sealed should also be regarded as having been compelled to leave, so that the ensuing loss of Ethiopian nationality was unlawful.

285. The sparse and conflicting evidence in the record does not permit a sure assessment of the number of dual nationals who left Ethiopia for Eritrea voluntarily during the war. The number is certainly larger than that urged by Eritrea, and smaller than that urged by Ethiopia. In any case, many thousands of dual nationals did leave Ethiopia for Eritrea voluntarily. Their resulting loss of nationality was not arbitrary and unlawful, and no compensation is warranted with respect to it.

286. Persons of Sole Ethiopian Nationality. Finally, the Commission considered the extent to which persons who were solely Ethiopian nationals were deprived of that nationality. These included, *inter alia*, many persons expelled from rural areas near the border and some spouses and family members of other expellees who were themselves later expelled. As they were not dual nationals, all these persons became stateless as the result. However, as noted above, because of the manner in which Eritrea presented its claims

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<sup>64</sup> *Id.*, para. 73.

involving persons with sole Ethiopian nationality, it cannot claim compensation based upon injuries to them.<sup>65</sup>

287. Proof of Injury. Considering the totality of the evidence, the Commission concludes that something on the order of 15,000 dual nationals were arbitrarily deprived of their Ethiopian nationality in conjunction with their unlawful expulsion from Ethiopia. However, there was little in the record regarding the practical consequences of this for those affected. Forced expulsion from Ethiopia was for many a wrenching and life-changing event. The associated loss of Ethiopian nationality seems to have been a matter of less practical consequence. Eritrea appears to have received most expellees as its nationals, providing support and identity documents, so few became stateless. Even those persons of sole Ethiopian nationality, such as the rural expellees, seem to have been assisted and given Eritrean identity documents. In the circumstances, the sum of US\$10,000 per capita for loss of Ethiopian nationality requested by Eritrea clearly is excessive and unwarranted.

288. Taking into account the limitations of the record, and in particular the paucity of evidence regarding the practical consequences following from loss of Ethiopian nationality, the Commission decides that satisfaction in the form of the Commission's earlier liability findings constitutes sufficient reparation for Eritrea's claims for compensation for unlawful deprivation of some dual nationals' Ethiopian nationality.

## D. Wrongful Expulsion

### 1. The Commission's Liability Findings

289. In its Partial Award in Eritrea's Civilians Claims, the Commission found Ethiopia liable for the wrongful expulsion of three groups of people. It was found liable:

5. For permitting local farmers, militia or police forcibly to expel rural people, many or most of whom were solely Ethiopian nationals, from rural areas near the border;
6. For permitting the forcible expulsion to Eritrea of some members of expellees' families who did not hold Eritrean nationality;
7. For permitting local authorities forcibly to expel to Eritrea an unknown, but considerable, number of dual nationals for reasons that cannot be established.<sup>66</sup>

290. With respect to the first and second of these groups, the Commission found at the liability phase that Eritrea cannot claim compensation for their wrongful expulsion, but only for direct costs incurred by Eritrea as a

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<sup>65</sup> *Id.*, paras. 19 & 90.

<sup>66</sup> *Id.*, *dispositif*, Section XIII.E.

result of those expulsions. The Commission addresses each of the three groups below, starting with the dual nationals.

## 2. Dual Nationals Wrongfully Expelled

### *a. Number of Expellees*

291. Eritrea appeared to claim compensation in respect of 43,319 people allegedly wrongly expelled from Ethiopia to Eritrea, and the same sum with respect to 331 additional persons expelled to Djibouti and Kenya.<sup>67</sup> These numbers were calculated in the same manner as its claims for wrongful deprivation of nationality, as explained above.

292. Ethiopia contended that Eritrea's method of calculating the number of persons wrongly expelled was flawed, because it did not reflect the Commission's actual liability findings. It recalled in this regard the Commission's holding at the liability phase that Eritrea could not claim compensation in its own right on account of injuries sustained by persons who were solely Ethiopian nationals.<sup>68</sup> In Ethiopia's view, there could not have been more than 7,250 wrongly expelled dual nationals, and the actual number probably was much lower. (Ethiopia's description of the maximum number of dual nationals who might have been wrongfully expelled was variously described as 7,250 and 7,260, reflecting slight variations in the method of calculation.)

293. In calculating the number of persons who might have been wrongfully expelled, Ethiopia took as its starting point the number of persons the International Organization for Migration identified as having participated in the 1993 referendum in Ethiopia, and who could have acquired dual nationality as a consequence (66,022). From this number, Ethiopia subtracted the number of lawful SIRAA expellees (15,475) and the number of yellow card people (36,027—the number of yellow cards issued, as increased by 50% by Eritrea). This left about 14,500 people. Ethiopia estimated that about half of these people left voluntarily, while the other half might have been subject to unlawful expulsion.

294. Eritrea did not accept this method of calculation. However, it contended that, should the Commission adopt Ethiopia's approach, the base number of dual nationals in Ethiopia potentially subject to expulsion would have to be significantly increased. The largest such increase involved children of

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<sup>67</sup> Eritrea's Group Number Two Damages Memorial was not consistent regarding the numbers of persons covered by this claim. The numbers of persons cited above are from the Memorial of the State of Eritrea, Damages (Group Two) filed on December 15, 2007, para. 1.100 [hereinafter ER Damages Group Two Memorial]. However, in a separate table at the end of the Memorial, Eritrea appeared to claim US\$10,000 per capita in respect of 56,098 persons reflected in the ERREC database, plus an additional 428 persons expelled to third States.

<sup>68</sup> See para. 286.

dual nationals born in Ethiopia. Eritrea contended that these children, claimed to number about 70,000, would themselves have acquired Eritrean nationality by operation of Eritrean law, and also would have been dual nationals. Eritrea maintained that the base number also should be increased to include 1,554 persons in Ethiopia who received Eritrean identity cards after the referendum, and 5,278 persons who received Eritrean identity cards but did not vote in the referendum. Ethiopia vigorously disputed inclusion of all of these groups.

295. The Commission does not accept either Party's proposed method for calculating the number of dual nationals who were wrongly expelled. Based on its best assessment of the evidence, the Commission concludes that approximately 15,000 dual nationals were wrongly expelled.

*b. The Parties' Claims*

296. As to the amount of compensation for the wrongful expulsion of dual nationals, Eritrea appeared to claim US\$10,000 per wrongful expellee, without providing supporting evidence. Ethiopia contended that this amount was excessive and unjustified.

297. Eritrea also claimed significant amounts in respect of its expenses in receiving and caring for all three of the groups of persons described above. Eritrea presented this claim in broad-brush terms, describing generally the plight of all expellees arriving in Eritrea and the forms of assistance they were given for up to eight years. Eritrea reported that it provided one-time cash subsidies, temporary food and housing, emergency health care, education and transportation.

298. Eritrea did not relate its claims to the Commission's specific liability findings, but instead divided the expellees into two broad categories: 28,000 rural expellees, a category (without a total number) for which the Commission found liability in Section XIII.E.5 of its Civilians Claims Partial Award, and some 43,187 "urban expellees," a category not used in the Partial Award. Eritrea did not quantify the actual amounts claimed except in a table at the end of its Damages Group Two Memorial, which did not consistently distinguish between expenses claimed for "urban expellees" and rural expellees.

299. Ethiopia denied liability, disputing Eritrea's claims for compensation relating to the expulsion of dual nationals. It disputed the sufficiency of the evidence, and contended that Eritrea claimed grossly exaggerated amounts over an unduly long period for all of the groups it cared for, and claimed for expenses that Eritrea did not actually incur.

*c. The Commission's Conclusions*

300. The Commission notes the exceptional basis of the liability for wrongfully expelled dual nationals in Section XIII.E.7 of its Partial Award in

Eritrea's Civilians Claims. Although the State of Ethiopia could have lawfully expelled enemy Eritrean nationals, including dual Eritrean-Ethiopian nationals, during the war, this is not what happened to this large group of persons. Instead, the Commission found that Ethiopia allowed local authorities to expel an unknown, but considerable, number of dual nationals in violation of international law, thereby engaging State responsibility.

301. Although Eritrea sought to assist these dual national expellees, and some were assisted by family or friends in Eritrea, it is clear that the experience was traumatic and lifechanging for many expellees.

302. In light of these unusual circumstances—a highly disputed record regarding the extent of wrongful expulsion, imperfect evidence, the unusual character of the delict, and the serious character of the event for many of those affected—the Commission awards compensation in the total amount of US\$15,000,000 in respect of the wrongful expulsion of an unknown, but considerable, number of dual nationals by local Ethiopian authorities.

### 3. Rural Expellees

303. Eritrea claimed approximately ERN 1.4 billion and twenty-eight million birr for its alleged expenditures in resettling a large group of rural Ethiopians found by the Commission to have been wrongfully expelled from Ethiopia. The record indicated that Eritrea took substantial measures to assist these people, including creating the new town of Gerenfit to house them, and provided substantial amounts of land to allow them to resume their agricultural way of life. However, while recognizing Eritrea's laudable response to the plight of the rural expellees, the Commission is not prepared to award compensation at such high levels, for several reasons.

304. First and most importantly, Eritrea presented very limited supporting evidence regarding the amount of this huge compensation claim. The values that Eritrea set out in the table at the end of its Damages Group Two Memorial were drawn from the statement of one former ERREC official. Although the Commission has no reason to doubt the veracity of this witness, his statement contained only bottom-line amounts for government-incurred expenses for social services and infrastructure improvements. The witness did not attach, and the record was otherwise devoid of, typical documentation for such significant expenses, for example, ERREC budgets, procurement contracts, receipts or construction plans.

305. Second, the Commission considers that Eritrea did not support its claim for expenses incurred to receive and resettle 28,000 rural expellees. There was no evidence supporting this figure, which fell well outside the 10,000–15,000 range originally suggested by Eritrea at the liability phase. Nor did Ethiopia provide support for its apparent compromise number of 12,500 rural expellees.

306. The Commission is left to make the most reasonable estimate it can using the meager evidence before it. Given the severity of the violation of international law, the Commission accepts the upper limit of Eritrea's original estimate of 15,000 rural expellees. This figure is supported by witness statements that put the number of expellees at the resettlement village of Gerenfit at 11,000 to 13,900 persons, acknowledging that some expellees settled in locations other than Gerenfit.

307. Turning next to the specific categories of expenses claimed, the Commission is prepared to accept those reasonably supported by the record. For example, based on witness statements from a number of rural expellees, the Commission accepts that Eritrea paid approximately 230 nakfa as a one-time cash subsidy to rural expellees. Where the evidence offered minimal documentation to support a category or level of expense, for example, the claim for over 435 million nakfa for temporary housing that was described by a witness as "makeshift," the Commission has reduced the per capita rate proportionately. Where a category appeared to be speculative or based on projected future expenses, for example for the opportunity cost of agricultural land given to expellees and costs anticipated in improving access roads, the Commission awards no compensation. In this regard, the Commission considers that eight years of "temporary" provision of social services, even to agrarian expellees, is excessively long, and finds two to three years to be a more reasonable transition period.

308. On the basis of the considerations above, the Commission awards Eritrea compensation of US\$11,000,000 for expenses it incurred in receiving, caring for and resettling rural Ethiopian nationals wrongfully expelled from Ethiopia.

#### **4. Family Members of Expellees**

309. At no stage of the proceedings was the Commission provided with any estimate whatsoever of how many non-Eritrean family members of SIRAA expellees were also forcibly expelled from Ethiopia. Neither the ERREC database nor the summary of the claims forms supported a figure. Nor were estimates in the record of the number of family members who may have voluntarily departed, a category which included dual nationals as well as solely Ethiopian nationals, of any assistance. Without any basis for even a rough estimate, the Commission dismisses Eritrea's claim for direct costs incurred in receiving this category of wrongful expellees.

### **E. Harsh Conditions of Departure**

310. The Commission found Ethiopia liable for "frequently failing to provide humane and safe treatment to persons being expelled to Eritrea from Ethiopia." Ethiopian authorities required thousands of persons to ride stifling

and crowded buses, under armed guard, on journeys often lasting several days, through extremely hot regions, often with few stops and little food and water. Some had to traverse mined areas between the two armies. These persons then had to cross the border zone on foot, carrying whatever they could. Border crossings often occurred in the hours of darkness.

311. Eritrea claimed US\$92,728,000 as compensation with respect to this liability finding. It contended that 46,364 persons experienced these conditions, basing this number on data from the ERREC database reflecting persons who arrived “by vehicle” and who reported themselves to have “suffered from unlawful conditions of transport.” Eritrea sought US\$2,000 for each of these individuals.

312. Ethiopia responded that the Commission’s liability finding should be read literally and restrictively, to cover only persons who were expelled following SIRAA review or whom Ethiopia acknowledged might have been expelled illegally. In Ethiopia’s view, the total of these two groups (22,735) should be reduced by 25%, since many expellees did not experience harsh conditions. This left a potentially affected group of approximately 15,700 people.

313. While the Commission’s liability finding spoke of the treatment of persons “expelled from Ethiopia,” the Parties’ discussion of conditions of departure was framed by Eritrea’s contention that those who left Ethiopia were expelled, and the Commission reflected this in its liability finding. However, it did not intend by this to exclude other persons who were made to suffer harsh and potentially dangerous conditions of departure. For example, the thousands of spouses and children who accompanied persons lawfully expelled (said by Ethiopia to have numbered about 22,000, all of whom it said left voluntarily) suffered these same harsh conditions on account of Ethiopia’s failure to assure humane and safe conditions. Persons who left Ethiopia voluntarily did not waive their right to humane and safe treatment. The act of boarding the buses did not absolve Ethiopia of its responsibility under international law to try to assure decent treatment and safe passage.

314. Eritrea’s Damages Group Two Memorial also claimed over US\$60 million as compensation for “consequential damages,” reflecting injury alleged to result on account of the “wrongful imprisonment” of many persons prior to their expulsion or departure. As discussed previously in connection with Eritrea’s Group Number One damages claims, the Commission does not recognize “consequential damages” as a separate category of damages under international law.<sup>69</sup> Moreover, the Commission held at the liability phase that Ethiopia’s brief detention of persons who were nationals of an enemy State prior to their expulsion or voluntary departure did not violate international law.<sup>70</sup> This additional claim is unfounded in law and barred by *res judicata*, and is accordingly dismissed.

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<sup>69</sup> See Section VI.D.3 *supra*.

<sup>70</sup> Partial Award in Eritrea’s Civilians Claims, para. 110.

315. Although the harsh transports to the border were limited in duration and generally did not appear to have caused lasting injury, Ethiopia's failure to assure humane and safe conditions of transportation or to avoid frequent and hazardous crossings between the armies on foot were serious matters, warranting appropriate compensation. Accordingly, the Commission awards US\$2,000,000 as compensation for failure to provide humane and safe treatment in transport.

## **F. Property Losses By Persons Previously Residing in Ethiopia**

### **1. The Commission's Liability Findings**

316. The Commission found liability for a series of interconnected Ethiopian actions impairing the property of persons who left Ethiopia during the war. In the Partial Award in Eritrea's Civilian Claims, the Commission found Ethiopia liable:

11. For limiting to one month the period available for the compulsory sale of Eritrean expellees' real property;
12. For the discriminatory imposition of a 100% "location tax" on proceeds from some forced sales of Eritrean expellees' real estate;
13. For maintaining a system for collecting taxes from Eritrean expellees that did not meet the required minimum standards of fair and reasonable treatment; and
14. For creating and facilitating a cumulative network of economic measures, some lawful and others not, that collectively resulted in the loss of all or most of the assets in Ethiopia of Eritrean expellees, contrary to Ethiopia's duty to ensure the protection of aliens' assets.<sup>71</sup>

317. The Commission must first consider a difference between the Parties regarding the scope of these liability findings involving residents' property. The findings were framed in terms of actions affecting "Eritrean expellees." Ethiopia contended that they therefore applied only to the property of the 15,475 persons it acknowledged were lawfully expelled, plus some number of additional persons who might have been unlawfully expelled. In Ethiopia's view, this latter group could have numbered at most about 7,250 persons. In contrast, Eritrea contended that here, as with persons subjected to unlawful conditions of departure, the Commission's findings must be interpreted in light of the arguments presented to the Commission and as to which its findings responded. Accordingly, in Eritrea's view, the Commission's liability findings should apply to all Eritreans who left Ethiopia, including those who left voluntarily.

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<sup>71</sup> *Id.*, *dispositif*, Section XIII.E.

318. Regarding this threshold issue, the Commission concludes that its liability findings are properly understood to relate only to dual nationals who were indeed expelled by Ethiopian national or local authorities—the more than 15,000 SIRAA expellees, plus another group of roughly similar size wrongfully expelled by local authorities without such review. Members of both groups typically were forced to leave Ethiopia precipitously and under conditions that did not allow them to dispose of or protect their property fairly and effectively. They stand in contrast with persons who left Ethiopia voluntarily. These voluntary departees included some significant, although disputed, number of SIRAA expellees' spouses, children or other family members. (Ethiopia claimed that almost 22,000 such family members left voluntarily, a number Eritrea claimed was far too high.) Whatever their number, it appears that property losses affecting expellees' family members would largely be reflected in the claims of individual expellees, who typically were the principal family breadwinners. Many other persons who made the decision to leave Eritrea voluntarily had time and opportunity to make arrangements for the disposition or protection of their property.

## 2. Eritrea's Claim

319. Eritrea did not divide its evidence and arguments among the Commission's four separate property findings listed above, or between those findings involving persons previously resident in Ethiopia and the Commission's separate findings involving nonresidents' property. (The latter are discussed separately below.) Instead, Eritrea made a single extremely large claim for property losses, seeking over ten billion birr, US\$47 million, and additional amounts in nakfa and Saudi rials, for departees' and non-residents' property losses combined. This combined claim emphasized the final liability finding above, regarding the effect of the cumulative network of Ethiopian measures.

320. The measures undertaken by Ethiopia to deprive Eritrean nationals of property included strict enforcement of prohibitions on alien ownership of property, limitations in the period of mandatory sale, rapid forced sales of immoveable property, discriminatory and confiscatory taxation measures, and vigorous loan collections, among others. The forced sales of the Eritreans' property were generally conducted either by the expellee's agent, through tax foreclosure proceedings, or under the auspices of the Eritrean Property Handling Committee, an institution created by Ethiopia to oversee the sale of Eritreans' property. Ethiopia maintained at the liability phase of these proceedings that any residual proceeds from these sales, after deductions for taxes, rents or loan amounts, were placed into restricted accounts in the name of the property owner.

321. The following discussion addresses Eritrea's claims for compensation for property losses by persons who resided in Ethiopia prior to their departure during the war. In its Damages Group Two Memorial, Eritrea con-

tended that the Ethiopian actions and measures involving expellees' property for which the Commission found liability gave rise to "a massive transfer of wealth" from these persons. It contended that in its view, "the documentary records of this financial free-for-all are in Ethiopian hands," so that the burden should fall upon Ethiopia to prove its contentions that Eritreans' property was properly treated or disposed of through "routine and legitimate procedures." Eritrea also maintained that the restricted accounts cited by Ethiopia are not available to the expellees or their legal representatives, and that international law requires that Ethiopia's restrictions on expellees' access to the accounts be lifted following the cessation of hostilities.

322. Eritrea's Damages Group Two Memorial reviewed material in the record said to show that the expellees included many persons of substantial means, and surveyed in detail the Ethiopian measures against Eritreans' property underlying the Commission's liability findings. Eritrea contended that the extent of Ethiopia's measures, and its control of information regarding the disposition of expellees' property, compelled a presumption that Ethiopia was responsible, as the Commission earlier found, for the loss of all or most of the assets in Ethiopia of Eritrean expellees.

323. How much were those assets worth? Eritrea calculated most of its claim by adding together the full amounts of property losses shown on thousands of claims forms filled out by persons in Eritrea. These included 22,372 forms filled out by persons whom Eritrea said previously lived in Ethiopia and were expelled, and 2,244 forms submitted by others who said they left voluntarily. Eritrea indicated that, together with their accompanying minor children, these groups (expellees, voluntary departees and both groups' minor children) totaled 49,278 of the 65,535 persons in the ERREC database.<sup>72</sup> (Eritrea also cited 1,422 claims forms filled out by persons who lived outside of Ethiopia at the time of the war; these are considered separately below, in connection with the Commission's liability findings involving non-residents' property.)

324. Eritrea contended that there should also be compensation with respect to persons who did not fill out ERREC forms and their dependents. Accordingly, Eritrea sought additional fixed-sum compensation of US\$2,000 for each of the remaining 16,257 individuals in the ERREC database (65,535 less the 49,278 persons described above), or approximately US\$32.5 million.

325. Eritrea's Damages Group Two Memorial contained a five-page description of its procedures for collecting and analyzing the claims of the thousands of persons who alleged they lost property on account of Ethiopia's measures. In brief, a claims form was designed and revised by a group of Eri-

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<sup>72</sup> There was an unexplained arithmetical discrepancy of about 1,100 persons in Eritrea's presentation of the number of expellees and their children covered by the claims forms. Eritrea claimed that 22,374 expellees filled out claims forms, and that this group had with them 23,027 minor children. This would suggest that expellees and their children totaled 45,401 persons. However, Eritrea's Damages Group Two Memorial claimed there were 46,547 persons in these groups.

trean lawyers working with a “focus group” of expellees. Forms then were distributed to individuals claiming losses by Eritrean legal personnel working in several Eritrean towns and in an office in Asmara. An Eritrean attorney interviewed each claimant submitting a form to enhance accuracy and completeness. Some claimants provided supporting documents, but there was no requirement to do so. There was no indication that amounts claimed on the forms were checked against supporting evidence, or that there was any system of quality control on the amounts claimed, other than the interview at the time the form was submitted. Eritrea summarized the total amounts claimed on more than 26,000 claims forms on a massive spreadsheet submitted with its Damages Group Two Memorial. Eritrea initially contended that this document (which was available in both paper and electronic form), together with a declaration by members of its legal staff explaining the claims forms process, constituted sufficient evidence to support the full amounts claimed. In its rebuttal evidence prior to the May 2008 hearing, Eritrea submitted about forty of the claims forms, together with some supporting documentation for those forms.

### 3. Ethiopia’s Position

326. As with Eritrea’s claims forms for looting losses, Ethiopia raised multiple objections to Eritrea’s claims forms process. To begin, it maintained that undocumented and untested claims of loss by individuals on claims forms were inherently unreliable, and were not credible evidence of the amounts claimed. Ethiopia recalled in this regard Eritrea’s vigorous objections to Ethiopia’s claims forms at earlier stages of the claims process, and the Commission’s past reservations regarding such forms.<sup>73</sup> It noted that Eritrea’s Damages Memorial and its supporting evidence did not include any of the claims forms or any supporting documentation for the amounts they claimed. In Ethiopia’s view, Eritrea’s spreadsheet summarizing data from its forms was simply not evidence of the claimed amounts of loss.

327. As indicated above, Ethiopia contended that the Commission’s liability findings were limited to losses by expellees, and that claims of loss by others who left voluntarily were not compensable. In its view, compensable property losses had to be limited to adequately documented losses by the 15,475 persons lawfully expelled following SIRAA review and by the smaller group who might have been unlawfully expelled. Ethiopia contended that this latter group could contain at most 7,250 persons, and probably was much smaller.

328. Ethiopia contended that the types of property loss identified on the forms did not correspond to the Commission’s narrow liability findings, and

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<sup>73</sup> Partial Award, Prisoners of War, Ethiopia’s Claim 4 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (July 1, 2003), para. 41.

that the forms asked claimants to include types of loss for which the Commission did not find liability and for which Ethiopia was not responsible. It argued further that some questions on the forms were leading or otherwise invited self-serving and unreliable answers.

329. Ethiopia maintained further that Eritrea's calculations improperly included several hundred duplicate claims forms (Ethiopia cited what it believed to be about 850 of these), as well as 547 filed by persons who obtained Eritrean identity cards after the referendum and who, in Ethiopia's understanding, could not have become dual nationals pursuant to the reasoning of the Commission's decision on Eritrea's Civilians Claim.

330. Finally, Ethiopia represented that the proceeds from forced sales and other asset dispositions were placed in accounts in the Commercial Bank of Ethiopia created for the benefit of the expellees and departees, and that Eritreans had been compensated through those accounts. Ethiopia did not provide any evidence or information regarding the existence of those accounts, their accessibility, or the amounts said to have been deposited. With respect to the private bank accounts of expellees that existed when they were expelled, Ethiopia argued that they remained available to the expellee owners.

#### 4. The Commission's Conclusions

331. Expellees' Economic Circumstances. In assessing Eritrea's claims for residents' property losses, the Commission first considered Eritrea's argument that expellees' overall social and economic circumstances provided substance and credibility to the very large amounts claimed based on the claims forms. The evidence did not provide wholly convincing support for Eritrea's arguments in this regard. Eritrea offered data from the ERREC database indicating that about two-thirds of the expellees came from major urban areas, including 56% from Addis Ababa. Evidence from various sources indicated that the expellees included some businessmen, merchants, professional persons and others who might have had relatively substantial incomes and assets. Nevertheless, these more affluent persons apparently were a modest proportion of all those involved. For example, Eritrea contended that the ERREC database included 28,860 heads of households among its registered population of 65,535 persons. These included 2,182 persons who described themselves as merchants (about 7.6% of the heads of household and about 3.3% of the total population). There were 245 health care professionals (doctors, dressers, nurses and pharmacists—fewer than 1% of the heads of household), and just 114 engineers, programmers and other specialized technical experts. The Commission accepts that some of these persons had—and lost—substantial assets. However, it is not clear that, taken with the much larger proportion of persons on the ERREC database who were not income earners or who engaged in less remunerative occupations, they had and lost property worth more than one billion U.S. dollars.

332. Other evidence reinforced the view that the affected population was more economically diverse, and less affluent overall, than Eritrea contended. Eritrea's evidence included an August 1998 excerpt from an Ethiopian newspaper listing several hundred Eritrean persons and businesses whose assets were frozen. Eritrea suggested that this showed the affected population to have been heavily weighted with persons of means. However, the list also included a significant proportion of persons such as gas station employees, teachers, barber and shoe shop owners, government employees and others who seem unlikely to have had extensive wealth. Eritrea cited ERREC statistics showing that expelled heads of household tended to be better educated than the Ethiopian population at large. However, these same statistics showed that 34% of these individuals were illiterate and fewer than 9% had any post-secondary education. Eritrea also cited ERREC data indicating that the average head of household expelled from Addis Ababa and four other large Ethiopian cities had an average income of just 263 birr a month. This is appreciably higher than average incomes in Ethiopia as a whole, but did not indicate great personal wealth on the part of the population overall. Taken as a whole, the record indicated that expellees probably were somewhat better off economically than most persons in Ethiopia, but it did not support the amounts claimed by Eritrea based on its claims forms.

333. The Commission also has serious reservations regarding the reliability of the amounts of loss claimed through Eritrea's claims forms process. The Commission noted earlier in this Award its doubts regarding the claims form process Eritrea used to quantify losses from looting and property destruction in its Group Number One damages claims.<sup>74</sup> Similar concerns apply here. Any process that invites injured persons to estimate their losses allows them to do so in ways that benefit their interests. Other recent claims processes involving multiple claims for individual injury have adopted various measures to control this. First, the amount of compensation provided has been substantially reduced, often to a much smaller fixed-sum. Alternatively, or in addition, some processes have scrutinized sample claims and their underlying evidence to check the reliability of much larger groups of claims. Eritrea did not utilize either approach here. Instead, it essentially claimed for the full amounts of losses indicated on its claims forms without scrutinizing sample claims.

334. This left the Commission with no means to test the accuracy of the large amounts Eritrea claimed. Eritrea's Damages Group Two Memorial stated that individuals' statements of loss were "supported by" various forms of documents and evidence. However, the record did not show that persons filling out claims forms were required to provide supporting documentation or that amounts stated on the forms were checked against any documentation that was offered. Eritrea submitted only a small, non-randomly selected and

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<sup>74</sup> See Section VI.B.3 *supra*.

statistically insignificant number of claims forms and their supporting documents, and then only as rebuttal evidence.

335. The Commission's reservations regarding the claims form process were reinforced by the size of resulting claims. For example, the 22,372 forms filled out by persons allegedly expelled from Ethiopia apparently generated losses totaling about 8.23 billion birr, plus smaller additional amounts denominated in dollars and nakfa. This equals at least 368,000 birr per form. The 2,248 forms filled out by persons who identified themselves as having departed voluntarily claimed even higher average losses, about 456,000 birr per form. (These latter amounts are not in any event compensable, as Ethiopia is liable only for expellees' losses.) Some individuals among the thousands who filled out forms doubtless experienced losses of these or even much larger magnitudes. However, the Commission does not regard these levels of loss per form as a credible measure of Eritrean damages in the context of the large and diverse population of former residents of Ethiopia.

336. Given the limitations of Eritrea's claims forms as the foundation of its claims for expellees' property losses, the Commission has had to make its best approximation of expellees' aggregate property losses. This approximation may not fully reflect the losses of the small number of persons who had and lost significant wealth. Some of these apparently had the means to document their losses, as the small group of claims forms and supporting documents filed with Eritrea's rebuttal evidence suggests. However, in the absence of a structured presentation of these losses and of the supporting evidence for them, the Commission has no basis to assess how many truly wealthy persons may have been expelled, and the extent of their compensable losses.

337. In estimating the amount of compensation, the Commission has been guided by its earlier assessments of the numbers of dual nationals expelled by Ethiopia, both through the SIRAA process and unlawfully at the hands of local officials. It also has taken account, *inter alia*, of the evidence in the record regarding the value of losses of housing and household property from war-related causes in Zalambessa and other locations in Ethiopia. However, in this regard, it has been mindful that some of those other losses occurred in locations that were less developed and expensive than Addis Ababa and the other urban locations of two-thirds of the expellees' homes.

338. The bank accounts at issue in this claim generally fell into two groups: restricted accounts set up by Ethiopia to deposit the proceeds of liquidated property belonging to expellees, and pre-existing accounts that constituted part of the expellees' property when they were expelled beginning in May 1998. With respect to the restricted accounts, Eritrea's claims were denied.<sup>75</sup> There was furthermore no proof of the total number of these accounts or of the amounts they supposedly hold. Nor was there proof that expellees now have access to them; the evidence was to the contrary. Accordingly, the Commis-

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<sup>75</sup> Partial Award in Eritrea's Civilians Claims, para. 146.

sion did not take them into account in determining the compensation due to expellees for their property losses.

339. As to the personal bank accounts that constituted part of the expellee property at the time of expulsion, Ethiopia had a duty under the *jus in bello* to return these accounts after the war. While, as indicated in the Commission's Partial Award in Eritrea's Civilians Claims, States involved in armed conflict have the right to freeze enemy assets within their jurisdiction and prevent their transfer to an enemy, it remains their obligation to protect such assets for return to their owners or other agreed disposition.<sup>76</sup> However, except for the six individual claims addressed in Section VIII of this Award, and a comparatively tiny handful of individuals identified in Eritrea's rebuttal evidence, there was only a small amount of anecdotal evidence regarding the amounts involved. Accordingly, the Commission has sought to include expellees' bank accounts as an element of the aggregate of expellee property for which it is providing compensation.

340. Based on its analysis of the evidence available in the record, the Commission awards Eritrea US\$46,000,000 as compensation in respect of expellees' losses of property on account of Ethiopia's unlawful actions.

## G. Property Losses By Non-Residents

### 1. The Commission's Liability Findings and Eritrea's Claim

341. In its Claim 24, Eritrea sought compensation for (a) "seizure of vehicles and other movable personal property" owned by persons living outside of Ethiopia, (b) "the going concern value of all businesses owned by non-resident Eritreans that suffered economic loss as a result of the Ethiopian expulsions of Eritrean nationals and persons of Eritrean national origin," and (c) "loss resulting from temporary deprivations, or, in the alternative, to pay full market value for all the real property it expropriated." Eritrea's claim was limited to losses involving non-residents' vehicles, businesses or real property. (At the liability phase, Eritrea expanded this claim to include losses resulting from the diversion of Eritrean-owned cargo to Djibouti. The Commission found the diversion claim was outside of its jurisdiction, because it was not included in Eritrea's claims as filed in December 2001.<sup>77</sup>)

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<sup>76</sup> *Id.*, paras. 151 & 152. See also Article 46 of Geneva IV, *supra* note 47, requiring that restrictive measures affecting protected persons' property "shall be cancelled, in accordance with the law of the Detaining Power, as soon as possible after the close of hostilities."

<sup>77</sup> Partial Award, Loss of Property in Ethiopia Owned by Non-Residents, Eritrea's Claim 24. Between the State of Eritrea and the Federal Democratic Republic of Ethiopia, para. 14.

342. In its Partial Award of December 19, 2005 in Eritrea's Claim 24 for loss of Property in Ethiopia Owned by Non-Residents, the Commission found Ethiopia liable:

1. For failing to provide full compensation for trucks and buses owned by Eritreans that were requisitioned by Ethiopia during the conflict and were not returned to their owners.
2. For creating and facilitating a cumulative network of economic measures, some lawful and others not, that collectively resulted in the loss of all or most of the businesses and immovable property in Ethiopia of non-resident Eritreans, contrary to Ethiopia's duty to ensure the protection of aliens' assets.<sup>78</sup>

343. As noted above, Eritrea's Group Number Two compensation claims did not distinguish between claims for residents' and non-residents' property or conform to the Commission's specific liability findings. In particular, the claim for compensation of nonresidents' losses was not confined to losses of vehicles, businesses and immovable property. Instead, Eritrea contended (without explanation) that "the proper measure of damages under the circumstances is the *total value* of the individual expellee's or nonresident property owners' lost assets." Thus, Eritrea sought compensation for some types of losses not included in its original claim, and for which the Commission did not find liability. The claim for compensation for the "total value" of lost assets, insofar as it embraces non-residents' non-business personal property or other losses not covered by the Commission's findings of liability, was not timely and is hereby dismissed.

## 2. Claims Involving Trucks and Other Vehicles

344. Before the war, heavy trucks carrying dry and liquid cargo were mainstays of Eritrea's and Ethiopia's transportation systems. Eritreans, typically individual entrepreneurs or small family businesses, owned many of these trucks. The trucks often were both the owners' principal asset and their source of livelihood. The record contained multiple accounts by Eritreans who began as drivers or assistant drivers, and who gradually assembled the means to buy progressively newer and better trucks or to add trailers. The loss of a truck brought severe economic consequences for a driver and his family.

345. Before the war, much of Ethiopia's import and export trade passed through the Eritrean ports of Massawa (primarily servicing Tigray) and Assab (serving Addis Ababa and other areas). Freight moved to and from these ports on trucks. Trucks to or from Assab crossed the border at Bure; trucks to or from Massawa crossed at Zalambessa/Serha. Both crossings saw heavy fighting during the war. The Parties did not dispute the significance of truck transportation or the role of Eritrean-owned trucks. The declaration of a senior Ethio-

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<sup>78</sup> *Id.*, *dispositif*, Section V.B.

pian transportation official confirmed that “[p]rior to the conflict, there were many Eritrean owners of trucks who were engaged in transport operations in Ethiopia. This was particularly so in the freight and oil transport sector.”

346. Eritrea presented a substantial amount of credible evidence regarding the seizures of Eritrean-owned vehicles, including more than seventy declarations by drivers and owners, contemporaneous correspondence and lists identifying seized vehicles, and Ethiopian newspaper accounts. Most drivers’ declarations included copies of registration documents proving the existence, type and Eritrean ownership of the seized vehicles. Participants’ accounts of these events sometimes varied regarding precise dates and the numbers of vehicles assembled or taken by Ethiopian authorities at particular places, but the accounts converged on core points and were corroborated by other evidence.

347. The evidence showed that Ethiopian authorities systematically seized many Eritrean owned trucks and buses in Addis Ababa and other cities and on the roads to the border crossings at Bure, Zalambessa/Serha and into Djibouti. The evidence also established that, after the war, these trucks were not returned to their owners, nor was compensation offered or given. However, the evidence did not directly address a central question—the total number of trucks seized without compensation. Accordingly, the Commission was required to resort to estimate and approximation on this key issue, guided by its review of evidence previously adduced.

348. Ethiopia acknowledged that it requisitioned many Eritrean-owned heavy vehicles to meet wartime transportation needs, although it contended that this was temporary and that vehicles later were returned to their owners or were available for owners to collect in Ethiopia. It also contended that only Ethiopian-registered trucks were requisitioned. At the liability phase, the Commission rejected these contentions as unproven.

349. Ethiopia’s Counter-Memorial at the liability phase in opposition to Eritrea’s Claim 24 set out its view of the matter:

61. . . . Ethiopia, amidst an unexpected war, was forced to requisition trucks to be used to transport goods to Ethiopia and for use in defense of the country. It is not an accident that the vehicles requisitioned are trucks, and often, as particularly stressed by Eritrea, fuel trucks. As stated by Eritrea itself, “[t]he transportation market in Ethiopia was for decades largely dominated by persons of Eritrean extraction and this pattern changed little after Eritrean independence.”

. . .

65. In support of Eritrea and in opposition to Ethiopia, many of the owners refused to permit their fuel trucks to be used and hid their trucks in garages and private compounds. Ethiopia was forced to apply Regulation No. 14/84 “Providing for Regulation of the Road Sector” permitting the Ethiopian Roads Authority during an emergency crisis to facilitate the provision of transport services in the country.

66. Ethiopia requisitioned 4000 trucks that were registered in Ethiopia to transport oil and food aid.

350. The evidence showed that Ethiopian soldiers, customs officials or police seized significant numbers of Eritrean trucks at several locations. Beginning in late May 1998, many were taken at Ethiopian checkpoints on the roads to Assab and Djibouti. There were numerous accounts of Eritrean trucks, both inbound and outbound, being stopped and held at Dicheotto. Loaded inbound trucks often were allowed to proceed to Addis Ababa with their cargoes, many under guard, and then were seized after unloading or subsequently. There also were multiple accounts of groups of outbound trucks being held under guard in or near Dicheotto. These accounts described groups of trucks and their drivers, varying in numbers from around twenty to forty, being held at Ethiopian military camps for varying periods. The drivers then were compelled to surrender their trucks, after which they were allowed to make their way to Addis Ababa.

351. Ethiopian soldiers and finance police also stopped and held Eritrean trucks at Mille (or "Mile"). Inbound loaded trucks often were allowed to proceed to Addis Ababa, sometimes under guard. However, some trucks were seized at Mille, and drivers saw their license plates being changed to military plates. At least two trucks were forcibly used to haul freight for officials of the Afar region before being taken over by the Ethiopian military.

352. Other trucks, including many that had carried World Food Program ("WFP") relief grain from Massawa to Mekele, were seized at Adigrat, the first large town south of Zalambessa. The record included thirteen largely consistent accounts of trucks and their drivers being held there under guard early in the war. These accounts described varying numbers of trucks in this group; most placed the number between thirty and forty. Several of these drivers described being forced to haul troops and military material to Zalambessa during this period. Later, all of the drivers were made to turn over their keys, transported to a military camp at Agbe, and held for about six weeks before being allowed to return to Eritrea. The record included an October 1998 letter from Eritrucko, one of the WFP's Eritrean prime trucking contractors, seeking WFP's assistance in recovering 22 of these trucks seized after carrying WFP grain from Massawa to Mekele.

353. There were also four accounts of Eritrean trucks and buses being taken by military or police at Gondor and at Rama.

354. The largest number of Eritrean vehicles appeared to have been seized while parked in or near Addis Ababa. As noted above, many loaded inbound trucks were allowed to proceed to Addis Ababa, often under guard. After unloading, trucks that were not seized were ordered to remain parked in public or private garages. Other drivers parked in garages voluntarily after they learned of the vehicle seizures. In addition, early in the war, Eritrean-licensed vehicles were banned from driving in Ethiopia, a ban later extended to Ethiopian-licensed vehicles owned by Eritreans. At least one large Eritrean

trucking association counseled its members to garage their trucks while matters clarified. Drivers frequently remained with their stored vehicles for weeks or even months.

355. The record included thirty-eight largely consistent accounts by drivers or owners describing how their vehicles, and others owned by Eritreans, were seized from garages. These accounts often included eyewitness descriptions. They were consistent regarding the methods used to locate and seize vehicles, and often described multiple vehicles being taken from a particular garage. Multiple accounts described how soldiers replaced existing license plates with military plates before removing the trucks.

356. *How Many Trucks?* Some drivers who remained with their vehicles in Addis Ababa, and others with vehicles seized elsewhere, unsuccessfully petitioned Ethiopia's Ministry of Transport and other agencies for relief. The record included a petition to the Ministry of Transport, signed by seventy-five owners and drivers, referring to the confiscation of over 140 trucks. These included ninety-four in Addis Ababa, forty-six in Afar (twenty-three at Dicho-otto and twenty-one at Mille), and "an unspecified number" in Tigray. Nine of the seventy-five petitioners were among Ethiopia's seventy-plus declarants.

357. Taken together, the accounts of individual drivers and owners in Eritrea's declarations described the seizure of approximately two hundred trucks and buses, but it appears that the total number was much larger. As noted above, Ethiopia's liability phase evidence included the declaration of the General Manager of Ethiopia's Road Transport Authority stating that "close to 4,000" trucks with Ethiopian license plates were requisitioned, although this official also maintained that "[t]here was no Eritrean registered vehicle . . . involved in this program." (Many Eritrean-owned trucks were registered in Ethiopia.) The first of his statements showed the magnitude of Ethiopia's wartime efforts to obtain heavy vehicles. The second could be true, if the seizure of Eritrean-registered vehicles was conducted under an additional, separate government program.

358. The record also included two articles from the Ethiopian newspaper *Ethiop* suggestive of the number of seized vehicles. One, dated November 25, 1998, referred to ongoing searches for hidden Eritrean trucks, and to 2,000 Ethiopian drivers being called up to replace Eritrean drivers. Of these, "[t]he transport and communications department has stated that it has accepted 1,200 Ethiopian drivers among those who were registered." Assuming that many trucks carried a driver and an assistant (as apparently was common), this suggests that late in 1998—after many Eritrean trucks had been seized—Ethiopia was looking to replace Eritrean drivers in at least six hundred vehicles. A second *Ethiop* article, dated December 3, 1998, described efforts by 2,000 Ethiopian police to search for concealed Eritrean tanker trucks. This article alleged that from 350 to five hundred such Eritrean tanker trucks had been hidden, and that the government had located all but forty-four.

359. Another hint, although of at best limited probative value, can be derived from Eritrea's analyses of data from its claims forms. Eritrea indicated that non-residents claimed losses of about 314 million birr for "moveable property," which included lost vehicles. The Eritrean truck drivers' declarations suggested that there was a steady and predictable market for large trucks; their declarations were largely consistent regarding the values of trucks of particular makes, models and ages. As discussed further below, Eritrea estimated that the average value of the seized trucks was about 327,000 birr. Ethiopia did not rebut this amount and it appeared reasonable to the Commission. Arbitrarily assuming that the 314 million birr claimed for "moveable property" on the claims forms was twice the vehicles' actual value, and dividing 157 million birr by a per-vehicle value of 327,000 birr, the result suggests that the claims forms reflected loss of about 480 vehicles.

360. Despite these indicators, the record did not clearly establish the actual number of seized trucks and buses. Eritrea did not suggest a specific number, or even a range. Eritrea's Claim 24 Memorial briefly contended, without analysis or explanation, that "hundreds" of trucks were stopped on the roads to Assab and Djibouti, and that the total taken was "many times larger" than the "approximately 500" cited in the December *Ethiop* article. However, Eritrea did not further explain or support this contention.

361. Given the limitations of the record, the Commission has to make its best estimate of the numbers of vehicles involved. Taking account of all of the evidence, it concludes that Ethiopia seized at least six hundred trucks and buses that were in Ethiopia and were owned by Eritreans. The actual number may have been higher, perhaps much higher. However, as Eritrea could not indicate or substantiate the actual number involved, it must bear the consequences if the Commission's estimate falls short.

362. Eritrea's written pleadings also failed to calculate the value of the seized vehicles. Accordingly, the Commission asked Eritrea at the May 2008 hearing to identify evidence already in the record regarding their value. Eritrea responded by calculating the average value of a substantial number of individual vehicles identified in its witness declarations, determining the average value to be 327,875 birr as of the time the vehicles were seized. Ethiopia objected to this calculation as new evidence, but did not otherwise rebut it. The Commission considers that this average value appears reasonably representative of the range of vehicle that Ethiopia seized. It also appears reasonable in light of Ethiopia's claim for 850,000 birr for a heavy grain truck of a common size and make that was destroyed in the Adigrat grain warehouse fire. Accordingly, the Commission accepts 327,000 birr as reflecting the average value of the vehicles Ethiopia seized.

363. Accordingly, the Commission awards Eritrea compensation of US\$24,525,000 for the unlawful failure by Ethiopia to return or compensate Eritrea after the war for the vehicles it requisitioned from non-resident Eritreans.

## H. Other Non-Resident Property

364. In addition to seeking compensation for vehicles, Eritrea claimed about 625 million birr for other losses by non-residents on the basis of its claims forms. This portion of Eritrea's claim posed many problems. It was subject to the significant uncertainties in Eritrea's claims form process, as described above. It included all the claimed losses of non-residents, and thus included potentially large losses not included in Eritrea's original formulation of its claim and for which the Commission did not find liability. And, unlike the case of trucks and buses, there was not a substantial body of evidence in the liability record to aid in estimating the extent of loss.

365. The evidence did suggest that several hundred non-resident Eritreans suffered losses of property in Ethiopia on account of Ethiopia's actions during the war. Accordingly, the Commission is reluctant to reject this request for compensation out of hand. Given the limitations of the record, the Commission determined to treat these claims like claims involving expellees' losses of property. Taking account of its best estimate of the number of non-residents who lost property covered by the Commission's liability findings, and adjusting for those who claimed for vehicles, the Commission awards Eritrea US\$1,500,000 as compensation for this group.

## I. Unlawful Detention of Eritrean Civilians

### 1. The Commission's Findings and Eritrea's Claim

366. In its Partial Award in Eritrea's Civilians Claims, the Commission found Ethiopia liable:

9. For holding Eritrean civilians on security related charges in prisons and jails under harsh and unsanitary conditions and with insufficient food, and for subjecting them to beatings and other abuse;

10. For detaining Eritrean civilians without apparent justification, holding them together with prisoners of war, and subjecting them to harsh and inhumane treatment while so held.<sup>79</sup>

367. Eritrea treated these two findings together, claiming US\$40 million as compensation in respect of the wrongful detention of 2,000 Eritrean civilians. This included US\$20 million (US\$10,000 per person) for injury that Eritrea claimed to result from the enforced indoctrination of all 2,000 civilians. Eritrea claimed another US\$6 million (US\$3,000 per person), reflecting injury attributable to inhumane conditions as well as additional per capita amounts reflecting the varying lengths of time that Eritrean civilians were detained or incarcerated.

<sup>79</sup> Partial Award in Eritrea's Civilians Claims, *dispositif*, Section XIII.E.

368. Eritrea's compensation claim involved several separate groups of civilians allegedly wrongfully detained within the scope of the Commission's liability findings. These were all identified in Eritrea's claims at the liability phase, and the Commission's Partial Awards noted that their detentions might entitle Eritrea to compensation at the damages phase, depending on the facts. Eritrea's Damages Group Two Memorial thus included various persons addressed in Eritrea's earlier claims, including truck drivers and their assistants detained during the early months of the war, an imprisoned guard and driver on the service staff of Eritrea's Embassy and the guard's teenage son, and civilians wrongly held as prisoners of war.

369. The presentation of this claim in Eritrea's Damages Memorial seemed largely intended to remind the Commission of its earlier liability Awards and of the evidence underlying them. Eritrea's claim that 2,000 Eritrean civilians were unlawfully detained rested primarily on two reports published in 2000, one by Amnesty International and the other by the U.S. Department of State. These indicated that 1,200 civilians were held in custody by Ethiopia during the war and, according to the State Department report, that "hundreds of others" were held in police stations. In support of its claimed larger number of 2,000, Eritrea cited prisoner of war data and a broad range of witness statements from the liability phase involving POWs, the war fronts, civilians, non-resident property and treatment of diplomats. Eritrea also argued that its estimate of the large number of civilians held with POWs was validated by its analysis of Ethiopia's "ER POW" website, which posted pictures and information regarding numerous Eritreans held by Ethiopia. In Eritrea's view, the information on the website regarding many individuals (age, place of initial detention, descriptions of supposed military units and the like) showed that they were civilians and not legitimate prisoners of war.

## 2. Ethiopia's Response

370. Ethiopia responded, *inter alia*, that Eritrea improperly conflated its detention claims and, in doing so, failed to respect important distinctions drawn by the Commission and the narrow scope of its liability Awards. Ethiopia disputed the numbers of persons detained, contending that Eritrea's reliance on the State Department's solitary reference to "hundreds of others" in detention at police stations was insufficient to support a claim for compensation involving eight hundred people. Ethiopia argued that the "individualized evidence" of POW reports and liability phase witness declarations Eritrea used to corroborate its claim artificially inflated the numbers actually detained. It also contended that the large amounts Eritrea claimed as compensation were unwarranted and unsupported by evidence.

### 3. The Commission's Conclusions

371. The Commission's liability findings addressed two distinct groups of civilians whom Ethiopia held and treated as civilians. The first comprised civilians detained in prisons and jails on security charges under unacceptably harsh conditions. The Commission's Partial Award indicated that the numbers affected were not clear, but it noted the ICRC's report that it had registered 664 civilian detainees and the State Department report, referred to above, that 1,200 were being held. The second group comprised other civilians held in other locations without apparent justification, again under unacceptably harsh conditions. As to this group, the Commission noted multiple accounts of civilians held as POWs or in facilities alongside POWs. However, the Commission did not determine how many persons fell within the reach of its finding.

372. Analysis of the claim was complicated because some civilians captured by Ethiopian military forces were held in the same barracks and camps as prisoners of war, and were treated by Ethiopia in all other respects as POWs. The ICRC apparently registered them as prisoners of war, and they were included among those released when Ethiopia released the POWs. The record did not indicate why or how frequently this occurred. The accounts of some civilians who were held as POWs suggested that Ethiopia regarded their past military service as justification to hold them as captured combatants. In other cases, Ethiopia's reasons were not evident.

373. The liability phase testimony indicated that many civilian detainees were held in locations where POWs were also held. There were accounts of civilians held at Fiche, then moved to Blate and eventually to Dedessa. Several witnesses testified that the civilian detainees were kept separate, although some of them were required to work in caring for prisoners of war.

374. In any case, all of the civilians who were held as POWs were included among the approximately 2,600 persons covered in the Commission's award of compensation for prisoners of war in Section VI.F above. In determining that award of compensation, the Commission was mindful of and took into account the unlawfulness of Ethiopia's detention of civilians as prisoners of war. The Commission does not include these persons a second time in assessing compensation in the current claim.

375. The damages phase did not greatly increase the available information on the number of civilians Ethiopia imprisoned or detained. However, taking the record as a whole, the Commission finds the total of 1,200 civilians reported by Amnesty International and the State Department in their respective 2000 reports on human rights issues to be both credible and the best available evidence of the total number affected. This figure was largely corroborated by the witness declarations offered by Eritrea at the liability phase, in which both detained civilians and POWs testified that civilians were detained at various POW camps. The liability phase declarations offered by Eritrea as proof of further damages did not provide a basis for a higher number.

376. Based on the totality of evidence, the Commission awards Eritrea compensation of US\$2,600,000 in respect of Eritrean civilians who were held on security charges, or for unknown reasons, under harsh and unacceptable conditions.

## J. Diplomatic Claim

### 1. The Commission's Liability Findings

377. Eritrea and Ethiopia each filed extensive claims for injuries sustained by its diplomatic mission and consular post and personnel as a result of the other's alleged violations of the international law of diplomatic and consular relations.<sup>80</sup>

378. In its Partial Awards in the Diplomatic Claims, the Commission noted the Parties' commendable decisions not to sever diplomatic ties throughout the armed conflict, "despite unavoidable friction and even great personal risk for diplomats and staff." Further noting that "this unusual situation has created unusual challenges for the application of diplomatic law," the Commission, in assessing liability, looked to the "foundational principle of diplomatic reciprocity" and applied the critical standard of "the impact of the events complained about on the functioning of the diplomatic mission." On this basis, the Commission made limited findings of liability against each Party for "serious violations impeding the effective functioning of the diplomatic mission."

379. In the case of Eritrea, the Commission found Ethiopia liable for two such serious violations:

1. . . . for violating Articles 36 and 29 of the Vienna Convention on Diplomatic Relations in the course of the departure of Eritrean diplomatic personnel from the Addis Ababa airport in May 1998 by attempting to search the Ambassador's person, searching his hand luggage, confiscating papers from his briefcase and interfering with his checked luggage, and also by searching other departing diplomats and their luggage, without regard to their diplomatic immunities;
2. . . . for violating Article 22 of the Vienna Convention on Diplomatic Relations by entering, ransacking, searching and seizing the Eritrean Embassy Residence, as well as official vehicles and other property, without Eritrea's consent.<sup>81</sup>

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<sup>80</sup> Partial Award, Diplomatic Claim, Eritrea's Claim 20 Between the State of Eritrea and the Federal Democratic Republic of Ethiopia (December 19, 2005) [hereinafter Partial Award in Eritrea's Diplomatic Claim]; Partial Award, Ethiopia's Claim 8 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (December 19, 2005).

<sup>81</sup> Partial Award in Eritrea's Diplomatic Claim, *dispositif*, Section IV.D.1 & 2.

## 2. Eritrea's Claim

380. In its Damages Group Two Memorial, Eritrea largely repeated the background and arguments underlying its diplomatic liability claims. As evidence, Eritrea presented six new witness statements supplementing those filed earlier. Several of the departing diplomats recounted searches and seizures of property not only at the airport but also at their homes, and emphasized emotional trauma and loss of personal items such as family photographs. In a second witness statement, Eritrea's Ambassador described the Residence and his belongings, and estimated the value of lost official and personal property, without supporting inventories or other documentation.

381. Eritrea concluded the relevant chapter of its Damages Group Two Memorial with a claim for unspecified monetary damages for Ethiopian violations that were "systematic, deliberate, and entirely without even a pretense of legality." The chart entitled "Diplomatic Calculations" at the end of the Memorial reflects that Eritrea sought total monetary compensation of US\$2,611,500 and 77,500 birr. In relation to the unlawful entering, ransacking, searching and seizure of the Embassy Residence compound, Eritrea sought US\$237,000 for furniture and appliances (US\$200,000 for the main Residence, US\$25,000 for the guest house, and US\$12,000 for the servants quarters); US\$50,000 for three vehicles; US\$20,000 for equipment pertaining to Embassy function; US\$95,000 for the Ambassador's art collection; US\$17,600 for the Ambassador's personal items (US\$17,000 to US\$20,000 for his wardrobe); and US\$1,000,000 for the "premeditated" and ongoing seizure. In relation to the airport search and seizure of the Ambassador, Eritrea sought US\$100,000 for search of his person; US\$5,000 for search of his luggage; US\$43,800 for seizure of his five checked suitcases; and US\$20,000 for cash and US\$500 for personal items seized from his hand luggage. Finally, for the unlawful search and seizure of sixteen named diplomats, apparently not limited to events at the airport during their departure, Eritrea sought fixed-sums of US\$50,000 for the search and seizure of each person and \$5,000 for the search and seizure of each person's luggage, as well as either the fixed-sum of US\$10,000 or a specific amount for seized property.

## 3. Ethiopia's Position

382. Consistent with its own Diplomatic Claim, Ethiopia took the position that satisfaction is a sufficient form of reparation for Eritrea's claim, because the harm to diplomatic representatives and property was suffered directly by Eritrea or its officials and, in comparison to the harms addressed in the Civilians Claims, was relatively minor. In the alternative, Ethiopia argued that the quantum sought by Eritrea was unwarranted and disproportionate to the Commission's two limited findings of liability. Ethiopia objected in particular to Eritrea's claims for US\$1,000,000 for the "premeditated" seizure of the Embassy Residence and for high fixed-sum damages for each departing

diplomat, the latter being based on alleged “physical abuse and detention” rather than on the Commission’s limited findings as to the attempted and actual searches of the diplomats.

383. At the May 2008 hearing, a representative of Ethiopia expressed regret for the violations of Eritrea’s diplomatic immunities found by the Commission.<sup>82</sup>

#### 4. The Commission’s Conclusions

384. As with all of the Parties’ damages claims, the Commission has carefully reviewed the submissions and supporting evidence in Eritrea’s Diplomatic Claim. Different elements of the claim warrant different awards of reparation.

385. Turning first to the claims for the wrongful searches of departing diplomatic personnel (other than the Ambassador) at the airport, the Commission finds that the proven damage was non-material. It bears reiterating that the Commission did not find Ethiopia liable for seizing property of these diplomats in the course of the wrongful searches at the airport or at their homes before their departure. Without undermining the seriousness of any such searches, which the Commission described as “blatant breaches” of diplomatic immunity in the Partial Award,<sup>83</sup> the fact remains that there was little evidence of the exact number or scope of such searches. Although the evidence referred to interference with some seventeen to thirty departing diplomats, Eritrea presented very few witness statements with details as to what happened at the airport and what property was seized. Eritrea made no attempt to justify the fixed-sums claimed, which—at some US\$65,000 per departing diplomat—far exceed the fixed-sums claimed for many categories of injured civilians.

386. As recognized by the International Court of Justice in the *Corfu Channel* case, where injury is non-material and hence not compensable by restitution or compensation, the appropriate form of reparation for a State’s wrongful act is satisfaction.<sup>84</sup> In the instant case, given Ethiopia’s serious but non-material interference with an uncertain number of departing Eritrean

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<sup>82</sup> Transcript of the Eritrea-Ethiopia Claims Commission Hearings of May 2008, Peace Palace, The Hague, at pp. 44–47 (May 22, 2008).

<sup>83</sup> Partial Award in Eritrea’s Diplomatic Claim, para. 36.

<sup>84</sup> *Corfu Channel Case* (U.K. v. Alb.), Merits, 1949 I.C.J. REP. p. 4, at p. 35. See also *Rainbow Warrior Case* (N.Z. v. Fr.), Award, Apr. 1990, 20 REPORTS OF INTERNATIONAL ARBITRAL AWARDS p. 215, para. 122.

diplomats, the appropriate relief is satisfaction in the form of a declaration of wrongfulness.<sup>85</sup>

387. The Commission turns next to the claims based on Ethiopia's treatment of the Ambassador as he departed Ethiopia from the airport. The attempted search of the Ambassador's person, fortunately prevented by him, was an extremely serious violation of his diplomatic immunity. Almost as serious a violation was Ethiopia's actual search of and seizure of papers and personal property from his briefcase and hand luggage. Relief in the form of satisfaction, specifically in the form of a strong declaration of wrongfulness, is warranted.

388. Monetary relief, however, is not equally warranted. Although the Eritrean Ambassador's testimony was helpful, the Commission would expect claims for the seizure of US\$20,000 worth of Eritrean government cash and US\$500 for personal items in his hand luggage to be supported with documentation going beyond his own statements. Nor is the Commission able to award monetary damages for the US\$40,000 claim for the Ambassador's five checked suitcases, which did not appear at his destination. Even if the Commission were able to assume in the absence of direct evidence that Ethiopia seized the suitcases, Eritrea again did not provide any corroborating documentation supporting the Ambassador's estimated valuation of his personal wardrobe and jewelry.

389. The Commission turns to the last and most serious violation, the Embassy Residence claim. Ethiopia has appropriately conceded, with its expression of regret at the hearing, that Eritrea is entitled to satisfaction in the form of a declaration of the serious wrongfulness of Ethiopia's actions in entering, ransacking, searching and seizing Eritrea's Embassy Residence and seizing both diplomatic property and the Ambassador's personal property.

390. The more difficult question is whether Eritrea is also entitled to monetary compensation for these extremely serious violations of Eritrea's diplomatic premises and property. On the one hand, the Commission finds that the quantum evidence presented is sparse. Other than the Ambassador's two witness statements, Eritrea presented no official or unofficial inventories of either the diplomatic or private property in the Residence; no purchase receipts; no testimony other than a few general statements in witness statements such as the residence "was a huge place and the things inside were very expensive" and "the Ambassador . . . had a great taste for art and a good collection of antiques and related objects." Given the nature and magnitude of the claims, for example, US\$200,000 worth of Residence furnishings including imported Italian and Swedish furniture, and a US\$95,000 private art col-

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<sup>85</sup> Report of the International Law Commission on the Work of its Fifty-Third Session (the Draft Articles on State Responsibility), Apr. 23-June 1, 2001 and July 2-Aug. 10, 2001, U.N. Doc. A/56/10, Commentary to Article 37 of the International Law Commission's Draft Articles on State Responsibility, 2001, pp. 105-107.

lection, the Commission would expect at least insurance inventories. Eritrea made no attempt to explain or justify the US\$1,000,000 claimed for “premeditated” seizure in addition to alleged actual losses. On the other hand, the Commission appreciates that such documentation (at least in part) could have been lost with the seizure of the Embassy Residence. The Commission also accepts that the Residence compound, which consisted of three buildings, would have contained a suitable complement of government-provided furniture, electronics, appliances and vehicles, as well as the Ambassador’s personal belongings. There were several supporting witness statements as to the extent, if not the value, of the furnishings, vehicles and other property in the Embassy Residence compound.

391. On balance, weighing the extreme seriousness of the violation against the paucity of the valuation evidence for such large claims, the Commission determines to award Eritrea US\$155,000, which is approximately 50% of the total amount of US\$307,000 claimed for the contents of the three buildings in the Embassy Residence compound and three vehicles.

392. To summarize, the Commission awards Eritrea US\$155,000 in monetary compensation for violation of Eritrea’s diplomatic premises and property and, as appropriate satisfaction, reiterates its liability findings and declares that Ethiopia violated the Vienna Convention on Diplomatic Relations by (1) attempting to search the Ambassador’s person, searching his hand luggage, confiscating papers from his briefcase and interfering with his checked luggage, and also by searching other departing diplomats and their luggage, in the course of their departure from the Addis Ababa airport in May 1998, without regard to their diplomatic immunities, and (2) entering, ransacking, searching and seizing the Eritrean Embassy Residence, as well as official vehicles and other property, without Eritrea’s consent.

## VIII. INDIVIDUAL CLAIMS

393. Unlike the rest of Eritrea’s claims, which were claims on behalf of Eritrea itself, six claims, numbered 27–32, were filed by Eritrea on behalf of named individuals. Consequently, it is necessary for the Commission to inform the Parties of the amounts of any damages it awards with respect to each of these claims.

394. As a general matter, it should be recalled that, in its Partial Award in Eritrea’s Civilians Claims, the Commission determined the types of claims based on injury to Eritrean civilians for which Ethiopia was liable, and, in paragraph 160 of that Award it held:

This Partial Award applies to all of the claims before it in these proceedings, including Claims 27–32. The Commission’s findings of liability apply fully to those claims to the extent indicated by their particular facts. The application of the Commission’s findings to the facts of each of these claims will be assessed in the future damages phase of these proceedings.

395. Having examined the memorials and supporting documentation submitted by Eritrea for damages in these six claims, the Commission makes the findings below.

### **A. Claims 27 and 28, Hiwot Nemariam and Belay Redda**

396. These two claims are considered together, as they are by husband and wife and are based to a considerable extent on property jointly owned between them.

397. The claim of the husband (Claim 28), who is now deceased, for damages for the allegedly unlawful deprivation of his Ethiopian nationality must fail because he was a dual national who clearly was interrogated and deported by Ethiopian authorities for security reasons. Consequently, his deprivation of Ethiopian nationality was not arbitrary and contrary to international law.<sup>86</sup> The similar claim of the wife (Claim 27), who was also a dual national, was slightly different in that she asserted that, about ten days after her husband's deportation, she was arrested by seven or eight Ethiopian military officers and taken to a kebele detention center where she was detained and interrogated about her alleged involvement with the Eritrean government and, after about three days, was deported to Eritrea by bus, along with seventy others. Although not asserted by Eritrea, those different circumstances might indicate that she was deported by local authorities, rather than by the Ethiopian government and without having been found deportable for security reasons, in which event the resulting deprivation of her Ethiopian nationality would have been arbitrary and unlawful pursuant to the Commission's earlier holding.<sup>87</sup> However, the involvement of military officers, the interrogation about security issues, and the use of fifteen buses for deportation were facts consistent with the involvement of the Ethiopian government and its screening process. Her claim for arbitrary deprivation of her Ethiopian nationality therefore fails for lack of proof.

398. Their claims for damages for their allegedly unlawful expulsion from Ethiopia fail for the same reason.<sup>88</sup>

399. Their claims for damages for unlawful conditions of their detention pending expulsion fail for the reasons given in the Partial Award.<sup>89</sup>

400. In recognition that the physical conditions of their transport to Eritrea failed to comply with the international law requirements of humane and safe treatment, each Claimant is awarded US\$100.

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<sup>86</sup> Partial Award in Eritrea's Civilians Claims, para. 72.

<sup>87</sup> *Id.*, para. 78.

<sup>88</sup> *Id.*, para. 82.

<sup>89</sup> *Id.*, para. 110.

401. Their claims for damages for lack of access to their bank accounts after the end of the war are meritorious. While, as indicated in the Partial Award,<sup>90</sup> States involved in armed conflict have the right to freeze enemy assets within their jurisdiction and prevent their transfer to an enemy, it remains their obligation, as indicated in that Partial Award,<sup>91</sup> to protect such assets for return to their owners or other agreed disposition. These claimants submitted evidence of the existence of substantial bank accounts subsequent to the end of the war in December 2000, as well as evidence of unsuccessful, post-war requests to draw on those accounts. The latest total of those accounts in evidence is 455,322.93 birr, which equals US\$56,915 at an 8:1 exchange rate. In view of Ethiopia's failure to permit these claimants to withdraw that amount, the Commission awards damages in the amount of US\$56,915 to Claimants 27 and 28 jointly.

402. Claimant 28's claim for damages relating to the loss of his investment in the Horn International Bank, like all such claims, is dismissed.<sup>92</sup>

403. Claimant 28's claim for damages for family separation is dismissed for failure of proof.<sup>93</sup>

404. Claimant 28's damage claim with respect to his pension is dismissed for the reasons given in the Commission's Final Award in Eritrea's Pension Claims.

405. With respect to the claims of these two Claimants for damages for the unlawful deprivation of their other properties, the evidence indicated that Ethiopia used its tax collection processes in arbitrary ways that unlawfully caused the loss of the Claimants' dry cleaning and laundry business. Consequently, Ethiopia is liable for that loss.<sup>94</sup> The Claimants asserted that the value of that business property was two million birr, or approximately US\$250,000 at an 8:1 exchange rate. The Commission faces the problem that this valuation, like all of the Claimants' property valuations, was subjective and was made subsequent to their expulsion. Nevertheless, in light of the evidence as a whole, the Commission is convinced that the Claimants' dry cleaning and laundry business was worth at least 50% of the subjective estimate. Consequently, the Commission awards compensation in the amount of US\$125,000 for deprivation of business property to Claimants 27 and 28 jointly.

406. The Claimants' other property damage claims were for personal property, including a residence, household goods and two motor vehicles, which they estimated had a total value of 2,200,000 birr, or approximately US\$275,000. There was adequate evidence of the existence of these properties and, in light of the evidence as a whole, the Commission is convinced that

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<sup>90</sup> *Id.*, para. 146.

<sup>91</sup> *Id.*, paras. 151 & 152.

<sup>92</sup> *Id.*, para. 150.

<sup>93</sup> *Id.*, para. 157.

<sup>94</sup> *Id.*, para. 144 and *dispositif*, Section XIII.E.13.

these properties were worth at least 50% of that subjective estimate. Consequently, the Commission awards compensation in the amount of US\$137,500 for loss of other personal property to Claimants 27 and 28 jointly.

407. In total, the Commission awards Claimants 27 and 28 US\$319,615.

### **B. Claim 29, Sertzu Gebre Meskel**

408. Like Claimants 27 and 28, Claimant 29 was a dual national who lost his Ethiopian nationality and was expelled to Eritrea for security reasons pursuant to the SIRAA security process. Unlike Claimant 28, his wife is not a claimant, although he asserted that she was a co-owner of some of the properties for which he claimed and that her claims should be included with his. However, the Statement of Claim, while summarizing losses suffered by the Claimant and his wife, explicitly named him as the sole claimant. In those circumstances, claims by his wife cannot be addressed as part of this individual claim.

409. Claimant 29's claims for damages for the allegedly unlawful deprivation of his Ethiopian nationality and expulsion from Ethiopia fail for the same reasons as those claims by Claimants 27 and 28.

410. Claimant 29's claim for damages for unlawful conditions of detention pending expulsion fails for the same reasons as those claims by Claimants 27 and 28.

411. Claimant 29's claim for damages for unlawful conditions of transport during his expulsion fails because the evidence indicated that, while he felt cramped during three days of bus travel, he spent one night in a hotel and, in general, appears to have had better transport conditions than most expellees.

412. Claimant 29's claim for damages for inaccessible bank accounts fails because the evidence showed that all were accounts held by his wife. The evidence and submissions did not address or establish whether the Claimant might have any right to access her accounts under Ethiopian law.

413. Claimant 29's claim for lost investments in the Horn International Bank fails for the same reasons as those claims by Claimants 27 and 28.

414. In seeking damages for lost property, Claimant 29 submitted evidence that, prior to his expulsion, he had been the General Manager of Nile Construction Co. in Ethiopia, and he asserted that he was the majority owner of that company at the time of his expulsion. His wife asserted that she was a minority owner of the company and its financial manager. Claimant 29 indicated that another relative, whom he did not name, owned "a few shares." He estimated the value of the assets of Nile Construction Co. at the time of his expulsion as approximately US\$7.8 million, with roughly one-third of that total being for equipment and machinery, one-third for immovable assets, and one-third for accounts receivable. In support of this claim, he submitted trans-

lated documents listing the equipment owned by Nile Construction Co. and documents indicating contractual business with an Ethiopian hospital. Several other documents were also submitted relevant to several other companies that Claimant 29 asserted were owned, in whole or in part, by him and his wife.

415. Other evidence furnished by Claimant 29 indicated that the headquarters of Nile Construction Co. subsequently were taken over by an Ethiopian bank that had made a loan to the company, that the building had been valued at approximately one-third of the value ascribed to immovable properties by Claimant 29, and that the balance of that new value less the unpaid balance of the loan had been put into a bank account in the Claimant's name, which he asserted he is unable to access. Claims for such restricted accounts were dismissed by the Commission in the Partial Award.<sup>95</sup>

416. While Claimant 29 provided more evidence than the other individual claimants as to both the nature and the values of property left in Ethiopia, the fact remains that the values asserted were proposed solely by the Claimant himself. However, by listing the assets of Nile Construction Co., the Claimant did show that it was a substantial and profitable business. He estimated the value of that company at nearly 55 million birr. He also claimed for his residence and household goods, which he estimated to be worth 2,750,000 birr.

417. The Claimant failed to prove the extent of his ownership interests in all of the claimed properties. He appeared to claim for whatever was owned by either his wife or himself. He cannot do that, as his wife, who apparently handled the finances for her husband, is not a claimant on whose behalf Eritrea has presented a claim. Any claims for his wife or anyone else, if they otherwise meet the jurisdictional requirements, may be considered claims by Eritrea, but not claims on behalf of this individual Claimant. However, it appeared undisputed that the Claimant owned at least half of Nile Construction Co., for which he should be entitled to claim. Although lacking objective evidence of that value, aside from the list of equipment and supplies provided by the Claimant and the bank's indication of a lower value, the Commission is nevertheless satisfied from the evidence as a whole that it was an entity of substantial value. Consequently, the Commission awards Claimant 29 compensation in the amount of US\$1,500,000 for loss of his interest in Nile Construction Co.

418. The remaining claims for damages for property loss by Claimant 29 are dismissed for failure of proof.

### **C. Claim 30, Fekadu Andemeskal**

419. Like Claimant 29, Claimant 30 was a dual national who lost his Ethiopian nationality and was expelled to Eritrea for security reasons pursuant to the SIRAA process. Also, like Claimant 29, he brought claims for properties that belonged partly to his wife, who is not a claimant.

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<sup>95</sup> *Id.*, paras. 145 & 146.

420. Claimant 30's claims for damages for the allegedly unlawful deprivation of his Ethiopian nationality and expulsion from Ethiopia fail for the same reasons as those claims by Claimant's 27 and 28.

421. Claimant 30's claim for damages for unlawful conditions of detention pending expulsion fails for the same reasons as those claims by Claimants 27 and 28.

422. Claimant 30's claim for damages for unlawful conditions of transport during his expulsion fails for failure of proof. While Eritrea alleged such conditions, Claimant 30 stated only that he was deported by bus and made no complaint about the conditions.

423. Claimant 30's claim for lack of access to his bank accounts fails because the evidence submitted indicated that access was permitted to those accounts—and they were emptied—by a former employee of the Claimant whose claim to have been authorized by the Claimant to such access was accepted in August 1998 by the bank. Claimant 30 did assert that he did not sign the authorization for that individual, which was dated nearly two months after his expulsion and a copy of which was later sent to him by the Commercial Bank of Ethiopia. The Commission, however, is not in a position to determine the validity under Ethiopian law of that alleged authorization, but, if it was invalid, the Claimant was the victim of a fraud for which Ethiopia is not responsible here.

424. Claimant 30's lost property claim, other than bank accounts, covered properties jointly owned with his wife, which allegedly included a video shop, three photo shops, two houses, cars, musical instruments and household goods, with a total estimated value of US\$3,750,000–\$4,000,000. As Claimant 30's wife is not a claimant and, as the extent of her ownership of the claimed properties is unknown, the Commission faces difficulty in determining what percentage of any total damage award would properly be owed to the Claimant. Greater difficulty, however, arises from the almost complete lack of evidence from which actual damages can reasonably be assessed by the Commission. Neither the net income, if any, actually obtained from the four shops, nor the value of their furnishings, equipment and supplies, was indicated, let alone supported by evidence. Whether the shops were rented or owned by the Claimant was not indicated. Instead, Claimant 30 simply proposed a subjective property valuation of US\$750,000 for each of the shops. Similarly, the values ascribed to the other properties were not supported by evidence of their acquisition cost, market value or other indicia.

425. While the Commission does not doubt that the Claimant's lawful expulsion from Ethiopia caused him financial losses, it cannot hold Ethiopia liable to pay him an arbitrary amount of damages the extent of which is utterly unsupported by evidence. Consequently, Claimant 30's claim for compensation for property loss is dismissed for failure of proof.

#### **D. Claim 31, Mebrahtu Gebremedhin**

426. Claimant 31's situation is somewhat different from the other individual claimants in that he and his wife (who is not a claimant) were dual nationals who were not expelled. They were U.S. permanent residents who were visiting Ethiopia, and at the airport leaving voluntarily, when they were detained and interrogated and had their Ethiopian nationality revoked. It seems clear that they were told by Ethiopian officials that they would have been arrested and expelled to Eritrea like other dual nationals with similar backgrounds if they had not had U.S. permanent residence cards and tickets for a flight out of Ethiopia. They had their Ethiopian passports confiscated, and they were informed that they could not return to Ethiopia.

427. Claimant 31's claims for damages for the allegedly unlawful deprivation of his Ethiopian nationality and expulsion from Ethiopia fails for the same reasons as those claims by Claimants 27 and 28.

428. Claimant 31's claim for approximately 40,000 birr, which he asserted were in two bank accounts, one in his name and one in his wife's name, were not supported by documentary evidence, but his assertions were sufficiently consistent and credible to permit the Commission to award him US\$2,500 for his bank account claim.

429. With respect to loss of property other than bank accounts, Claimant 31 claimed for a house that he had rented out, one car and household goods, with an estimated total value of US\$75,000. He acknowledged that his wife was co-owner of the house and car. The evidence showed that the house was sealed and put up for sale by Ethiopia. The Claimant acknowledged that he did not know whether the house was sold or what happened to the car and household effects. On the basis of the evidence as a whole, the Commission is convinced that these properties were worth at least 50% of the subjective estimate. Consequently, in view of his half ownership of them, it awards the Claimant US\$18,750.

430. In total, the Commission awards Claimant 31 US\$21,250.

#### **E. Claim 32, Mebrat Gebreamlak**

431. Claimant 32 claimed as a surviving widow on her own behalf and on behalf of her late husband, who died on October 23, 2001. The Claimant submitted an Eritrean judicial decree declaring her rights of inheritance of his properties, which the Commission accepts. However, the Commission does not accept her right to claim for personal injuries allegedly suffered by her late husband. As neither Eritrea nor Claimant 32 asserted otherwise, the Commission assumes that she and her husband were dual nationals. He was arrested, deprived of his Ethiopian nationality, and expelled from Ethiopia for security reasons. Claimant 32 and her children left Ethiopia soon thereafter by air to

Djibouti, because she had been told by officials that she would soon be expelled like her husband and that she should sell her property.

432. Claimant 32's claims for damages for the allegedly unlawful deprivation of her Ethiopian nationality and expulsion from Ethiopia fail because she left Ethiopia voluntarily, albeit after threats of expulsion.<sup>96</sup>

433. The claim for damages for inaccessible bank accounts is meritorious, although the evidence was unclear as to the amounts involved. The Commission is satisfied that at least 800,000 birr is in three personal accounts. Applying an 8:1 exchange rate, the Commission awards Claimant 32 US\$100,000 for inaccessible bank accounts.

434. Claimant 32's lost property claim, other than for bank accounts, covered the assets of the Feruth International Trading Company, which the Claimant and her husband evidently formed in 1983, as well as certain personal property. They stated that, together, they owned 100% of Feruth, which apparently imported truck parts and was one of the biggest exporters of civet, a perfume fixing agent. They also claimed partial ownerships in several other Ethiopian companies. Before he died, the Claimant's husband estimated the value of their assets as follows: Feruth, approximately US\$250,000; their 45% interest in Lion Travel and Tour Safaris, approximately US\$96,000; and other property, approximately US\$45,000. The Claimant stated that she had authorized an agent in Ethiopia to sell one of their two cars, but had not heard whether that had happened.

435. While it seems clear that Claimant 32 had the right to claim damages with respect to all property in Ethiopia owned by either her or her late husband, the Commission is nevertheless left with the problem that the valuations were all subjective ones made by her late husband after his expulsion. The Commission concludes that the evidence was insufficient to justify an award of damages with respect to all but one of these properties. The exception is the claim for loss of the assets of the Feruth International Trading Company, which was wholly-owned by the Claimant and her husband. The Commission is convinced that the assets of that company were worth at least 50% of the subjective estimate. Consequently, the Commission awards Claimant 32 compensation of US\$125,000 for the lost interest in that company.

436. In total, the Commission awards Claimant 32 US\$225,000.

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<sup>96</sup> *Id.*, paras. 73, 94 & 95.

## IX. AWARD

The Commission awards Eritrea the following compensation for Ethiopia's violations of the *jus in bello*:

1. US\$13,500,000 for losses of residential and business property on the Central and Western Fronts in Serha, Senafe, Teseney, Alighidir, Gulu, Tabaldia, Gergef, Omhajer, Barentu and Tokombia, and Molki Sub-Zoba;
2. US\$35,965,000 for damage to and destruction of buildings on the Central and Western Fronts in Serha, Senafe, Teseney, Alighidir, Gulu, Tabaldia, Gergef, Omhajer, Barentu and Tokombia, and Molki Sub-Zoba;
3. US\$1,500,000 in respect of injuries to civilians due to loss of access to health care on account of damage to or destruction of Eritrean hospitals and other medical facilities and loss of medical supplies;
4. US\$100,000 for damage to cultural property, specifically US\$50,000 for damage to the Stela of Matara and US\$50,000 for damage to the Tserona Patriots Cemetery;
5. US\$4,000,000 for mistreatment of prisoners of war;
6. US\$2,000,000 for failing to prevent the rape of known and unknown victims in the towns of Senafe, Barentu and Teseney;
7. US\$1,550,000 for forcible expulsion of the population of Awgato;
8. US\$50,000 in respect of the unknown, but apparently small, number of dual Eritrean-Ethiopian nationals who were arbitrarily deprived of their Ethiopian nationality while present in third countries;
9. US\$15,000,000 in respect of the wrongful expulsion of an unknown, but considerable, number of dual nationals by local Ethiopian authorities;
10. US\$11,000,000 for receiving, caring for and resettling rural Ethiopian nationals wrongfully expelled from Ethiopia;
11. US\$2,000,000 for failure to provide humane and safe treatment for persons being expelled from Ethiopia;
12. US\$46,000,000 for expellees' losses of property on account of Ethiopia's wrongful actions;
13. US\$24,525,000 for Ethiopia's failure to return or provide compensation after the war for vehicles it requisitioned from non-resident Eritreans;
14. US\$1,500,000 for other property losses of non-resident Eritreans;
15. US\$2,600,000 for imprisoning Eritrean civilians on security charges or detaining them for unknown reasons, under harsh and unacceptable conditions; and
16. US\$155,000 for violation of Eritrea's diplomatic premises and property;

17. As determined at the liability phase, the Commission considers its finding that Ethiopia unlawfully deprived dual Eritrean-Ethiopian nationals of their Ethiopian nationality to be appropriate reparation for the violation.
18. As determined at the liability phase, the Commission considers its finding that Ethiopia unlawfully interfered with Eritrea's departing diplomats to be appropriate reparation for the violation.
19. All of Eritrea's other claims on its own behalf are dismissed.
20. For claims filed by Eritrea on behalf of named individuals, the Commission awards the following amounts:
  - a. US\$319,615 for Hiwot Nemariam and Belay Redda, for failure to provide humane and safe treatment in transport from Ethiopia, lack of access to bank accounts, and unlawful deprivation of property;
  - b. US\$1,500,000 for Sertzu Gebre Meskel, for unlawful deprivation of property;
  - c. US\$21,250 for Mebrahtu Gebremedhin, for lack of access to bank accounts and unlawful deprivation of property; and
  - d. US\$225,000 for Mebrat Gebreamlak, for lack of access to bank accounts and unlawful deprivation of property.
  - e. The claim of Fekadu Andremeskal is dismissed.
21. In addition to the award of satisfaction to Eritrea for all of the Commission's liability findings, the total monetary compensation awarded to Eritrea in respect of its own claims is US\$161,455,000. The amount awarded in respect of claims presented on behalf of individual claimants is US\$2,065,865.

At the conclusion of these lengthy proceedings and the issuance of this Final Award, and the parallel Final Award in Ethiopia's claims against Eritrea, the Commission reiterates its confidence that the Parties will ensure that the compensation awarded will be paid promptly, and that funds received in respect of their claims will be used to provide relief to their civilian populations injured in the war.

[Signed] PRESIDENT HANS VAN HOUTTE

[Signed] GEORGE H. ALDRICH

[Signed] JOHN R. CROOK

[Signed] JAMES C.N. PAUL

[Signed] LUCY REED