ERITREA ETHIOPIA CLAIMS COMMISSION

FINAL AWARD

Ethiopia's Damages Claims

between

The Federal Democratic Republic of Ethiopia

and

The State of Eritrea

The Hague, August 17, 2009

By the Claims Commission, composed of:

Hans van Houtte, President
George H. Aldrich
John R. Crook
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FINAL AWARD—Ethiopia's Damages Claims
between the Claimant,
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TABLE OF CONTENTS

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I. Introduction

1. With this Final Award in Ethiopia's claims for damages, and its companion Final Award in Eritrea's damages claims, the Eritrea-Ethiopia Claims Commission largely completes its work.[1] 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.[2]

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

[1] 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.

[2] *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.")

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claimed.[3] 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 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 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 Ethiopia and Eritrea, 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").[4] 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."

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[3] Manley O. Hudson, International Tribunals p. 197 (1944).

[4] The Commission's previous work is described in its Awards, available on the website of the Permanent Court of Arbitration, 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.

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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 Ethiopia's claims:

- Prisoners of War (Ethiopia's Claim 4) (Partial Award, July 1, 2003);
- Central Front (Ethiopia's Claim 2) (Partial Award, April 28, 2004);
- Civilians Claims (Ethiopia's Claim 5) (Partial Award, December 17, 2004);
- *Jus Ad Bellum* (Ethiopia's Claims 1–8) (Partial Award, December 19, 2005);
- Western and Eastern Fronts (Ethiopia's Claims 1 & 3) (Partial Award, December 19, 2005);
- Ports (Ethiopia's Claim 6) (Final Award, December 19, 2005);
- Economic Loss Throughout Ethiopia (Ethiopia's Claim 7) (Partial Award, December 19, 2005); and
- Diplomatic Claim (Ethiopia's Claim 8) (Partial Award, December 19, 2005).

7. The Commission's liability findings on Ethiopia's claims are reproduced at relevant points in the text below. The Awards listed above resolved the extent of Eritrea's liability with respect to all of Ethiopia's claims for Eritrea's violation of the *jus in bello,* that is, the international law governing the conduct of the armed conflict by the Parties. The extent of liability for Eritrea's violation of the *jus ad bellum,* that is, the international law governing the resort to armed force by a State, was not fully resolved by the Commission's Partial Award on that subject. The scope of those *jus ad bellum* damages, and the amounts of compensation appropriate for both *jus in bello* and *jus ad bellum* liability, 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

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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.[5] 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.

[5] 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.

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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, 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.

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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

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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.[6] 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 Ethiopia and Eritrea are parties to the International Covenant on Economic, Social and Cultural Rights ("ICESCR")[7] and the International Covenant on Civil and Political Rights.[8] 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 Internation-

[6] *See* Human Development Report 2007/2008 (United Nations Development Programme), *available at* 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.

[7] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. p. 3.

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

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al 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) in the Covenants, 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 agencies.[9] 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,[10] and in its discussion below of compensation owed to Ethiopia for Eritrea's violation of the *jus ad bellum*.

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 Com-

[9] 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).

[10] Eritrea-Ethiopia Claims Commission Decision No. 7 ("Guidance Regarding *Jus ad Bellum* Liability") (July 27, 2007).

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mission 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.[11]

22. Article 5(13) of the December 2000 Agreement directs that, "[i]n considering claims, the Commission shall apply relevant rules of international 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.[12] 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."[13] 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-

[11] *Id.*, pp. 6–7.

[12] *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).

[13] Factory at Chorzów, Merits, 1928 P.C.I.J. (Ser. A.) No. 17, p. 47.

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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 State's nationals.[14] 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[15] 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 Ethiopia and Eritrea 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

[14] 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.

[15] Eritrea-Ethiopia Claims Commission Decision No. 8 ("Relief to War Victims") (July 27, 2007).

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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 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,[16] 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.[17]

31. In pleading their damages claims, the Parties filed a broad range of new evidence bearing on the quantum of damage associated with the Com-

[16] *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*.").

[17] 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*).

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mission'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.

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

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International Court of Justice and other international tribunals require that facts be established with a high degree of certainty in such circumstances.[18]

36. In the hearings on the Group Number One damages claims, Ethiopia argued that decisions relating to damages should be based on the preponderance of the evidence. Eritrea urged that the Commission continue to utilize a standard of "clear and convincing" evidence. Like some other courts and tribunals, the Commission believes that the correct position lies in an amalgam of these positions.[19] 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.[20]

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

[18] *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.").

[19] Mark Kantor, Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence pp. 72–73 (2008).

[20] *See* Chittharanjan Amerasinghe, Evidence in International Litigation pp. 241–242 (2005).

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courts[21] and international legislators,[22] 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 Commission ("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.[23] 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

[21] *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. . . .").

[22] *See* UNIDROIT Principles of International Commercial Contracts, *available at* 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.").

[23] *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).

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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. . . .[24]

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.[25] 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 Ethiopia's

[24] Decision No. 7, *supra* note 10, at paras. 13–14.

[25] *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].

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claims for compensation are expressed largely in terms of the U.S. currency.[26] The Commission generally has made conversions to U.S. dollars utilizing the official exchange rate prevailing at the time of the injury underlying the compensation claim. In a few cases, where evidence quantifying losses (for example, estimates of rebuilding costs) was 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 evidence was prepared. This has been necessary in order to prevent windfalls to either Party resulting from changes in exchange rates. As a practical matter, this made separate assessments of inflation unnecessary.

42. While Ethiopia presented its claims in dollars, it often submitted evidence denominated in Ethiopian birr. Eritrea pointed out that the exchange rate Ethiopia used to convert those values into dollars was 6.8819 birr to the dollar, which Eritrea contended was unrealistic and inflated the dollar amounts indicated by the evidence. The Commission agrees, noting that the applicable official rate during the period of the war, from May 1998 to December 2000, was approximately 8:1. Consequently, in the case of Ethiopia's claims based on evidence denominated in birr, Ethiopia's presentations of the claimed dollar amounts reflect an exchange rate more favorable to the Claimant than the rates utilized by the Commission.

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 com-

[26] 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.

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plexity 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.

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. The Commission's Liability Findings and the Structure of Ethiopia's Damages Claims

47. In its Partial Awards rendered during the earlier liability proceedings, the Commission decided the extent of Eritrea's liability to Ethiopia with respect to the latter's claims for violation of the *jus in bello* on the Central, Western and Eastern Fronts of the war. The Commission also found Eritrea to be liable for violation of the *jus ad bellum*. On the basis of those decisions, this Final Award decides the damages appropriate to compensate Ethiopia for each of the Commission's findings of liability.

A. The Central Front

48. In its Partial Award dated April 28, 2004, the Commission decided Eritrea's liability with respect to Ethiopia's Claim 2, involving the Central Front. It found Eritrea liable to Ethiopia for nine specific "violations of international law committed by its military personnel or by other officials of the State of Eritrea:"

> 1. For permitting in Mereb Lekhe Wereda frequent physical abuse of civilians by means of intentional killings, beatings and abductions, as well as widespread looting and property destruction in the areas that were occupied by its armed forces from May 1998 to May 2000;
>
> 2. For permitting in Ahferom Wereda frequent physical abuse of civilians by means of intentional killings, beatings, abductions and wounds caused by small-arms fire, as well as widespread looting and property destruction in the areas that were occupied by its armed forces from May 1998 to May 2000;
>
> 3. For permitting in Gulomakheda Wereda frequent physical abuse of civilians by means of intentional killings, beatings and abductions during

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the invasion in June 1998 and less frequent, but recurring, physical abuse of civilians and frequent looting and destruction of civilian property in the areas that were occupied by its armed forces from June 1998 to June 2000;

4. For permitting the looting and stripping of Zalambessa Town;

5. For the deliberate, unlawful destruction of 75% (seventy-five percent) of the structures in Zalambessa Town;

6. For permitting in Irob Wereda a recurring pattern of excessive violence by Eritrean soldiers against civilians, including frequent beatings and intentional killings, and frequent severe beating and other abuse of civilians taken into custody, as well as widespread looting and property destruction in the areas that were occupied by its armed forces from May 1998 to June 2000;

7. For failing to take effective measures to prevent rape of women by its soldiers in Irob Wereda;

8. For failing to release civilians taken into custody in Irob Wereda and to provide information regarding them; and

9. For failing to take all feasible precautions to prevent two of its military aircraft from dropping cluster bombs in the vicinity of the Ayder School and its civilian neighborhood in the town of Mekele on June 5, 1998, and for the resulting deaths, wounds and suffering by civilians and the physical damage to civilian objects.

B. The Western Front

49. In its Partial Award dated December 19, 2005, the Commission decided Eritrea's liability with respect to Ethiopia's Claim 1, involving the Western Front. The Commission found Eritrea liable to Ethiopia for seven specific "violations of international law committed by its military personnel or by other officials of the State of Eritrea:"

a. For permitting frequent beatings of civilians in Tahtay Adiabo Wereda;

b. For permitting the frequent abduction of Ethiopian civilians from Tahtay Adiabo Wereda to Eritrea and for unexplained disappearances;

c. For permitting the looting of property in areas in Tahtay Adiabo Wereda occupied by Eritrean armed forces;

d. For permitting the frequent abduction of Ethiopian civilians from Laelay Adiabo Wereda to Eritrea and for unexplained disappearances;

e. For permitting the looting of property, in particular livestock, in areas in Laelay Adiabo Wereda occupied by Eritrean armed forces;

f. For permitting the frequent abduction of Ethiopian civilians from Kafta Humera Wereda to Eritrea and for unexplained disappearances; and

g. For permitting the looting of property and livestock in areas in Kafta Humera Adiabo Wereda where Eritrean armed forces were present.

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C. The Eastern Front

50. The Commission also decided Eritrea's liability with respect to Ethiopia's Claim 3, involving the Eastern Front, in its Partial Award dated December 19, 2005. The Commission found Eritrea liable to Ethiopia for five specific "violations of international law committed by its military personnel or by other officials of the State of Eritrea:"

> a. For permitting intentional and indiscriminate killings of civilians in Dalul and Elidar Weredas from June 11, 1998 to December 12, 2000;
>
> b. For failure to take effective measures to prevent the rape of women in Dalul and Elidar Weredas;
>
> c. For permitting beatings of civilians in Dalul and Elidar Weredas;
>
> d. For permitting the looting and destruction of property in Dalul and Elidar Weredas; and
>
> e. For abduction, forced labor and conscription of civilians in Dalul Wereda.

D. Ethiopia's Damages Claims Structure

51. Ethiopia did not present its pleadings with respect to compensation for damages individually for each of these liability findings. In its Damages Group One Memorial, Ethiopia assembled these *jus in bello* liability findings, along with others, into six large groups, claiming fixed-sum damages in some groups and actual amount damages in others. (Ethiopia also claimed large amounts for Eritrea's violation of the *jus ad bellum*. These claims are discussed below in Section XI.)

52. Ethiopia's six groups of claims are for:

- Fixed-sum damages for injuries and deaths inflicted upon Ethiopian nationals;
- Fixed-sum damages for loss of Ethiopian nationals' property;
- Actual amount damages for damage to the town of Zalambessa, damage to hundreds of churches and government facilities in Ethiopia, and damages allegedly suffered by numerous Ethiopian entities and government agencies;
- Material damages resulting from Eritrea's aerial operations in Mekele, use of landmines, and harm to natural resources and the environment;
- Damages in respect of prisoners of war; and
- Moral damages.

53. The Commission first addresses Ethiopia's claims for moral damages in Section VII below. The Commission then addresses the fixed-sum damages claims in Section VIII; the actual amount claims, including claims for *jus in bello* damage to public property, in Section IX; and Ethiopia's other *jus in bello*

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compensation claims, that is, those with respect to prisoners of war, Ethiopian nationals in Eritrea, and Ethiopian diplomatic agents and facilities, in Section X. Ethiopia's *jus ad bellum* claims are addressed in Section XI.

VII. Moral Damages Claims

A. Ethiopia's Claims

54. Ethiopia contended that, in addition to damages determined in accordance with these general principles, the Commission should award an enormous separate increment of damages to reflect moral injury. In its Group Number One damages claims, Ethiopia claimed an amount it converted to equal more than US$5.1 billion as moral damages, roughly 70% of its total Group Number One claims. In its Group Number Two damages claims, Ethiopia combined its claims for actual and moral damages, and generally did not clearly set out or summarize the amounts sought as moral damages. To the extent they can be identified, moral damages appear to constitute more than US$600 million of the total Group Number Two claims.

55. Ethiopia alleged that "[m]oral injuries were suffered by hundreds of thousands of Ethiopians and by the State itself." In its view, each of these individuals experienced physical pain and suffering, mental anguish or other interference with their "ability to enjoy life and to function normally in the world" because of Eritrea's actions. It also urged the Commission to consider Ethiopia's national interests and international standing in assessing the moral injury inflicted upon its nationals. These included such factors as the seriousness of Eritrea's illegal use of force (described as "the launching of an aggressive war"), "the refusal of the responsible State to acknowledge wrongfulness of the action," harm to Ethiopia's "integrity, unity and standing in the international community," and "the continuing threat to the population and State of Ethiopia from Eritrea's threats of force."

56. Ethiopia claimed moral damages with respect to a very large number of people, perhaps as many as one and a half million. It calculated the claim by multiplying together several components, beginning with Ethiopia's estimates of the number of victims of selected breaches of international law.[27] (As discussed below, the Commission questions many of these estimates.) The population estimates were multiplied by the average number of persons in families in the affected areas (either 4.4 or 5.8), on the theory that all of a victim's family members suffered moral injury equivalent to that of the original victim. The result, the number of persons said to experience moral injury, was

[27] In Ethiopia's Group Number One damages claims, these included all persons allegedly affected by Eritrea's *jus in bello* violations involving injuries to persons; persons killed or injured by the bombings near the Ayder School; almost 350,000 internally displaced persons; and other deaths and injuries Ethiopia attributed to Eritrea's violation of the *jus ad bellum,* such as casualties from landmines.

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multiplied by "a base impact value" of US$374, said to equal the weighted average of incomes in Tigray and Afar for the two years of the war.

57. The resulting sum was then multiplied another time, by the sum of several "severity factors" with assigned numerical values ranging from a "7" to a "15." The severity factors were weightings that in Ethiopia's view reflected the relative severity of Eritrea's offenses. For each of the large number of people for whom it claimed moral damages, Ethiopia added together severity factors of "2" (for Eritrea's illegal use of force) and "3" (for Eritrea's "refusal to acknowledge wrongfulness; refusal to agree to non-repetition"), plus at least one other factor. Other severity factors involved killing ("4"); offenses that were frequent and pervasive, indicating an intent to inflict moral injury ("3"); offenses "shocking to the conscience" ("3"); or that involved affronts to the person involving honor and reputation ("2"). A few groups had aggregate severity factors of only "7," but most groups' severity factors ranged from "10" to "15." This process resulted in enormous claims.

58. Ethiopia contended that moral damages for victims and their families are a well-established element of the law of State responsibility. It emphasized the jurisprudence of the Inter-American Court of Human Rights, noting that Court's role as a proponent of substantial reparation for victims of rights violations.[28] Ethiopia cited numerous cases in which the Inter- American Court awarded substantial moral damages to individual victims, and also to family members in death or disappearance cases. It also cited the practice of the UNCC, which allowed compensation for certain types of moral injury where there was proof of underlying injury. Ethiopia maintained that the per capita totals calculated using its approach were "extremely modest" in comparison with awards rendered by other tribunals.

B. Eritrea's Response

59. Eritrea contended that Ethiopia's moral damages claims were unprecedented and lacked foundation in fact or law. Eritrea agreed that moral damages sometimes can be an element of compensation for a breach of international law affecting individual dignity and rights. However, in its view, such damages must be assessed as part of a tribunal's overall assessment of the nature and extent of the injury wrought by a violation. For Eritrea, moral injury is personal, and requires assessment of individual circumstances or, at most, of the circumstances of identifiable groups (such as prisoners of war) known to have had similar experiences. Moral damages cannot be added as an additional element to reflect the supposed egregiousness of a State's conduct, in the manner of treble damages under some national laws. Doing so makes them punitive damages, which are not available in international law.

[28] *See* Tomuschat, *supra* note 12, at pp. 579, 582–84.

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60. Eritrea denied that claims could be based on "unnamed, unidentified, percentage-based victims and their unnamed, unidentified statistically-generated next of kin." Ethiopia's "severity factors" were said to lack legal or logical foundation. Eritrea also responded to Ethiopia's suggestion that it had experienced moral injury in its own right (as opposed to in the right of diplomatic protection), arguing that international law does not authorize monetary compensation for moral injury to the State. As Ethiopia did not claim a separate amount of compensation for any moral damage to the State in its own right, the Commission need not make any decision in this regard.

C. The Commission's Conclusions

61. The Commission has great reservations regarding Ethiopia's moral damages claims. These claims seek billions of dollars, amounts wholly disproportionate to Eritrea's limited economic capacity. They realistically could not be paid, or could be paid only at unacceptable cost to Eritrea's population for years to come. Large per capita awards of moral damages may be logical and appropriate in some contexts involving significant injuries to an individual or to identifiable members of small groups. The concept cannot reasonably be expanded to situations involving claimed moral injury to whole populations of large areas.[29]

62. In any case, as explained below, the Commission does not accept many of the estimates of populations and of the frequency of injuries underlying these claims. It also rejects the use of "family multipliers" to increase the claims five-fold. Not every family member suffers moral injury equal to that of a victim, without reference to the type of injury or other individual circumstances. Such assessments must be fact-based, reflecting particular circumstances, as the jurisprudence of the Inter-American Court of Human Rights illustrates. That Court's decisions frequently differentiate among family members, reflecting variable factors such as the degree of relationship and dependency.

63. The Commission also does not accept the mechanical use of "severity factors" to swell the claim. This system has no precedent in international law. The factors themselves, and the manner of their application, are questionable. Two of the factors (Eritrea's illegal use of force and its supposed refusal to acknowledge wrongfulness) involve matters bearing upon inter-State relations. These might be relevant to certain claims for damage purely to the State, but not to assessing moral injury to individuals; in any case, the unlawful use of force is the basis for Ethiopia's separate *jus ad bellum* claim. Some of Ethiopia's other factors might be germane to assessing moral injury to individuals, but the numeric values given them, and the mechanical addition of multiple factors, are arbitrary and without legal foundation.

[29] *Id.*, p. 584.

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64. Ethiopia denied that it sought punitive damages, but its moral damages claims, at the very least, bear the appearance of such a request. It is true, as Ethiopia argues, that the amounts generated by its system are no larger per capita than some moral damages awards made by the Inter-American Court and other tribunals in cases involving many fewer people. However, Ethiopia claims these high damages in respect of every one of more than a million unidentified persons. The moral damages awards of the courts and tribunals Ethiopia cites reflect a painstaking assessment of detailed records in individual cases. There can be no such assessment in a claim involving huge numbers of hypothetical victims.

65. In appropriate cases, the Commission has weighed some of the considerations identified by Ethiopia, such as the gravity of a particular type of violation, and the extent and consequences of the resulting human injury, in determining the damages to be awarded. However, it has done so as an integral element of its damages awards, not by using a separate calculus of "moral damage." Accordingly, Ethiopia's multiple claims for moral damages as an additional and separate increment of damages are dismissed.

VIII. Fixed-Sum *Jus in Bello* Damages Claims

A. Deaths and Injuries

66. This section addresses Ethiopia's first group of claims, for fixed-sum damages for injuries and deaths suffered by Ethiopian nationals in violation of the *jus in bello.* Ethiopia claimed US$434,726,251 for such injuries, on the three fronts of the war (Western, Central and Eastern). Ethiopia presented this claim in a manner that did not directly correspond to the Commission's liability Awards. The Commission regards its specific findings of liability as the necessary starting point for assessing liability. Accordingly, here, as with some other claims, it has had to "deconstruct" the claims to assess whether they are covered by the earlier liability findings.

67. Ethiopia contended that many thousands of individual Ethiopians were victims of wrongful conduct. Their injuries occurred years ago, often in remote locations. In Ethiopia's view, it was not financially or practically feasible—either for the claimant State or for the Commission—to assemble and assess evidence regarding each of thousands of individual events. Instead, Ethiopia urged a damages assessment methodology involving a degree of approximation.

68. Ethiopia's claims (like Eritrea's) are inter-State claims. However, Ethiopia (like Eritrea) contended that the compensation due to a claimant State often could be assessed by establishing a fixed-sum with respect to each person suffering a particular violation. This sum would then be multiplied by the number of victims, giving the total compensation allegedly due for each type of violation. Ethiopia contended that where individuals suffered multi-

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ple types of violations, additional fixed-sums should be available in respect of each type. Ethiopia adopted this approach for its damages claims for deaths and injuries, for certain property losses, for moral damages, and for injuries to prisoners of war.

69. In formulating its fixed-sum compensation claims, Ethiopia made several interconnected judgments. Depending on the type of claim, these could include judgments regarding:

- the amount of fixed-sum compensation per victim for various violations (i.e., killings, beatings, rapes, etc.);
- the populations in the areas in Ethiopia where particular violations occurred;
- the percentage of each such population suffering a particular violation;
- in the case of claims for moral damages, the extent of increases to reflect the impact of violations on members of victims' families.

70. Ethiopia indicated that the Commission could modify any of these judgments as to any particular claim, but urged that its basic approach was reasonable and legally appropriate in the circumstances, not as a "mass claims technique," but rather as an appropriate method to quantify compensation for the claiming State.

1. Ethiopia's Claims

71. To calculate its claim for offenses against persons, Ethiopia divided the Commission's relevant liability findings into groups it believed involved offenses of similar gravity warranting the same fixed per capita sum. Ethiopia identified five such groups: (a) intentional killings; (b) rape; (c) beatings and wounds caused by small arms fire; (d) abductions; and (e) forced labor and conscription.

72. *Fixed Compensation Amounts.* Ethiopia claimed varying percentages of projected lifetime earnings of rural people in Tigray or Afar as fixed compensation amounts. Lifetime earnings were calculated starting with the average annual per capita income in each region, as derived from census data. They were said to be 1,255 birr (which Ethiopia converted to equal US$182) for Tigray or 1,385 birr (US$201) for Afar. Ethiopia then estimated victims' average remaining life span, by subtracting the median age of all Ethiopians from the average projected life span of all Ethiopians of median age. The difference was multiplied by per capita annual income, giving a notional lifetime earnings figure said to equal US$5,060 for persons in Tigray and US$5,588 in Afar. These amounts were not discounted to present value or adjusted in any other manner.

73. Ethiopia next estimated the impact of various violations on projected lifetime earnings. It estimated fixed compensation for a killing to equal a lifetime's earnings. A rape was estimated to cause injury equal to 50% of

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lifetime earnings; beatings and wounds were also estimated at 50%; abductions at 75%; and forced labor and conscription at 85%. Accordingly, the base amount sought in respect of a death in Tigray was US$5,050, and for a beating, US$2,530. Ethiopia maintained that these estimated percentages were "reasonable" in light of the evidence in earlier proceedings and the nature of each type of injury. However, it presented no new evidence or analysis to support these estimates, nor did it relate them to evidence previously on record.

74. *Frequency of Injuries.* Ethiopia next estimated the number of victims of each type of injury, based on the pre-war populations of the geographic areas covered by the Commission's liability findings. Ethiopia's liability claims were often presented on the geographic basis of weredas, and the Commission's liability Awards typically found that in a particular wereda, certain types of violations occurred. (Weredas are local governmental entities described by Ethiopia as roughly comparable to U.S. counties. They are divided into kebeles, smaller areas of perhaps one hundred square kilometers, said roughly to correspond to a U.S. township or smaller area. Kebeles are divided into tabias.)

75. Ethiopia began by identifying the weredas where the Commission found specific types of violations. It then identified the kebeles within each wereda where it believed these occurred. These included both kebeles near the front lines, and others away from the lines that allegedly suffered from depredations by Eritrean patrols or other conduct unlawful under the *jus in bello*. Ethiopia estimated the population of each affected kebele, taking population figures from Ethiopia's 1994 census, increasing them to reflect nation-wide average increases in population since 1994, and making further adjustments to reflect some changes in kebele boundaries. In the aggregate, Ethiopia contended that almost 242,000 people were potentially exposed to Eritrean violations of one kind or another.

76. After estimating the populations of areas affected by the war, Ethiopia estimated the percentage of each such population that suffered specific types of violations. Ethiopia maintained that significant proportions of each population suffered abuses, although its estimates varied to reflect differences in the Commission's findings regarding particular weredas. Thus, Ethiopia contended that in most affected kebeles, Eritrean forces unlawfully killed fully 9% of the pre-war population. The percentage of alleged killings was lower (7%) in Gulomakheda Wereda, and higher (12%) in Irob Wereda. In all, Ethiopia calculated that Eritrean forces unlawfully killed 13,394 people. It asserted that for the Commission to find fewer unlawful killings would "render its awards regarding this violation virtually meaningless."

77. In a similar vein, Ethiopia asserted that over a third of the relevant populations (almost 83,000 persons) suffered beating or wounding at the hands of Eritrean forces. (Half of the people in Ahferom Wereda were said to have been beaten or wounded, but only 30% in Gulomakheda Wereda.) Ethiopia also claimed that 1% of the pre-war female population suffered rape in those

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areas where the Commission found Eritrea liable for allowing rape to occur (236 women); and that many thousands of people suffered abductions, forced labor or conscription.

78. Ethiopia presented no new evidence supporting its allegations that there were well over 100,000 victims, nor did it directly relate them to specific evidence previously in the record. Instead, it argued that the Commission's previous liability findings authoritatively established that various violations were frequent and pervasive in kebeles affected by the war. In Ethiopia's view, these findings established "serious violations of the law by the parties, which are usually illegal acts or omissions that were frequent or pervasive and consequently affected significant numbers of victims." Ethiopia contended that this was sufficient to establish that violations occurred over wide areas and with the frequency it asserted.

2. Eritrea's Response

79. Eritrea vigorously disputed all aspects of Ethiopia's damages claim, beginning with Ethiopia's proposed compensation amounts. Eritrea questioned both the manner in which Ethiopia calculated lifetime earnings, and the appropriateness of using them as a measure of compensation. Eritrea urged that Ethiopia's proposals to calculate damages based upon percentages of lifetime earnings were wholly arbitrary and without foundation in the record.

80. Regarding the frequency of injury, Eritrea vigorously contested Ethiopia's population estimates, maintaining, *inter alia,* that Ethiopia significantly overstated the areas where Eritrean forces were present, and that the areas Ethiopia now claimed in the damages phase to have been occupied by Eritrea were larger than those cited in the earlier liability proceedings. Eritrea also contended that populations near the front had been greatly reduced because tens of thousands of Ethiopians were internally displaced on account of the fighting, and because thousands of ethnic Eritreans were forcibly expelled from border regions of Ethiopia, or left of their own accord. Eritrea attacked Ethiopia's estimate of the percentage of the population suffering particular types of injuries, viewing them as artificial and without foundation in the record.

81. In Eritrea's view, particularly given the much-reduced populations remaining in affected areas following the expulsions of ethnic Eritreans and departures for camps for internally displaced persons ("IDPs") and other locations in Ethiopia, Ethiopia's estimates of thousands of killings, beatings and other violations were wholly implausible. Eritrea cited several reports prepared by Ethiopian officials included in Ethiopia's earlier liability phase evidence listing far fewer violations than those now claimed. It also presented a detailed review of the hundreds of declarations, signed claims forms and other evidence submitted by Ethiopia in the earlier proceedings. Eritrea contended that this earlier evidence often contained few—if any—refer-

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ences to violations in many locations where Ethiopia now claimed they were frequent, many times indicating only one or two violations in areas where Ethiopia now claimed hundreds.

3. The Commission's Conclusions

82. The claims here are inter-State claims, not claims on behalf of specific individuals. Any compensation goes to the claimant State, not to injured individuals (although the Commission remains confident that the Parties are mindful of their responsibility, within the scope of the resources available to them, to ensure that their nationals who are victims of the conflict receive relief). Thus, the Commission's task differs from that facing, for example, the UNCC, which considered claims on behalf of named individuals.

83. The Commission recognizes that the overall approach described by Ethiopia may be a useful reference for assessing compensation in inter-State claims, if properly applied in appropriate cases. It may provide a rough measure of a State's injury where a group of its nationals of known size has suffered similar injuries. Some of the techniques proposed by Ethiopia have been used in modern mass claims processes designed to compensate individuals involving widespread injury, utilizing relaxed standards of evidence combined with reduced compensation amounts reflecting these lower evidentiary burdens.[30] In recognition of this, Chapter Three of the Commission's Rules of Procedure, covering "Mass Claims Procedures," gave the Parties the option of filing large numbers of individual claims for fixed amount damages, although neither Party did so.

84. However, Ethiopia proposed something different. It did not claim reduced compensation amounts reflecting a lesser burden of proof. Instead, it sought fixed amounts said to reflect the full extent of the injuries suffered by its nationals. This creates many difficulties. The amounts claimed per individual largely rest on estimate and hypothesis. Further, the approach does not permit verification or checking regarding the claimed number of victims (the "claimant class"). Other modern procedures, such as those of the UNCC and in Chapter Three of this Commission's Rules of Procedure, require that members of the claimant class be identified in a way that allows later random sampling of the evidence or other measures to verify whether class members suffered the qualifying injury or otherwise were properly included. Ethiopia, however, defined its claimant classes in the abstract, multiplying population estimates by estimates of the percentages of those populations thought to have suffered particular violations. This leaves the Commission with no way to verify the analysis. It cannot sample the evidence regarding the particular individuals

[30] *See* REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES: INNOVATIVE RESPONSES TO UNIQUE CHALLENGES (Permanent Court of Arbitration, ed., 2006).

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said to belong to a claimant class, because no individuals were identified, and there was no supporting evidence.

85. The Commission accepts that a system involving fixed amount compensation in respect of multiple victims requires approximation, but—particularly in claims seeking many millions of dollars—approximation must be based on more than subjective assertions of "reasonableness."

86. *Base Compensation Amounts.* The Commission also has doubts regarding specific elements of Ethiopia's analysis, beginning with the use of estimated lifetime earnings as a basis for determining compensation for offenses involving persons. In the case of deaths or lifelong disabilities, projected lifetime earnings may be an appropriate reference. The case for using them is far less compelling for injuries such as a beating that leaves no physical impairment, a few hours or days of forced labor, or other similar violation without lasting physical effects. Moreover, Ethiopia's estimates of the value of lifetime earnings in Tigray and Afar appear significantly inflated. The estimates of future income were not discounted to present value, nor were they adjusted for factors such as the possible effect of aging on earning power.

87. *The Affected Population.* Ethiopia's population estimates also appear to overstate significantly the number of persons potentially at risk. For example, the relevant population must be reduced to take account of the approximately 15,000 rural Ethiopians of Eritrean ancestry who were expelled from border areas, most of them early in the war.[31] It also must be reduced to reflect the tens of thousands of persons internally displaced from locations near the fighting fronts, and for whom Ethiopia separately claimed compensation in its *jus ad bellum* claims. IDPs may have suffered greatly on account of their displacement to places away from the front, but their relocation significantly reduced their risk of injuries or abuses at the hands of Eritrean forces.

88. In its *jus ad bellum* damages claims, Ethiopia contended that, at its peak, internal displacement in the Western and Central Front areas in Tigray totaled about 316,000 persons. Thousands more were internally displaced in Irob and Afar. There is a fundamental incongruity between Ethiopia's *jus ad bellum* claim of massive internal displacement, and the present claim that the entire pre-war population remained in areas close to the front, exposed to abuses by Eritrean forces. The large numbers of victims asserted in both claims cannot be correct. In this regard, the Commission notes that Ethiopia presented much detailed evidence in its *jus ad bellum* claim, showing significant internal displacement, including much documentation from international organizations and other outside observers. Given this evidence, the Commission believes that a large proportion of the populations of the kebeles at or near the front lines joined the ranks of the internally displaced, and were

[31] Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27–32 Between the State of Eritrea and The Federal Democratic Republic of Ethiopia (December 17, 2004) [hereinafter Partial Award in Eritrea's Civilian Claims], at p. 20.

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largely absent from their homes when Ethiopia contended they were at risk of Eritrean violations. Moreover, the Commission believes that Ethiopia claimed large numbers of violations in areas that were at substantial remove from the fighting fronts, and that were exposed—at most—only to episodic raids by small groups of Eritrean forces.

89. Ethiopia's rebuttal arguments—that IDPs might have suffered injury before they left their homes, while they were fleeing, or while returning to their homes to check on their livestock or other property—did not resolve these difficulties. The record indicated that some IDPs were injured in these circumstances, but it did not show that such events were so frequent as to alter the overall picture. In this regard, the evidence included several accounts of men who were shot by soldiers during hours of darkness while nearing Eritrean positions or attempting to re-enter occupied villages. These circumstances raise questions about whether those deaths involved a *jus in bello* violation.

90. The available evidence permits only rough judgments as to how many Ethiopians may have remained in villages and farms close to the fighting fronts, at risk of Eritrean *jus in bello* violations against their persons. The numbers clearly were much smaller than Ethiopia now claims. The population potentially exposed to such violations was far smaller than the 242,000 persons claimed by Ethiopia—perhaps half, but probably fewer.

91. The Commission also does not accept Ethiopia's estimates of the large percentages of the vulnerable population who allegedly experienced violations against their persons. These estimates are not supported by the record or by the Commission's liability findings. The Commission did sometimes conclude that particular types of violations were "frequent" in particular weredas, but this is far short of finding that 40% of the total pre-war population of a large area was beaten or shot, or 9% killed.[32] "Frequent" is a term whose meaning depends upon context. The frequency of violations falling within the Commission's liability findings must be based on evidence, not assertion or artificial exegesis of liability Awards.

92. The Commission also notes that Ethiopia's population is predominantly made up of women and children. With the exception of rape (discussed separately below), the accounts of killings or attacks on persons contained in the record overwhelmingly involved attacks involving adult or adolescent males. Whatever the frequency of attacks may have been on men and adolescents, the record did not support Ethiopia's claim that women and children suffered similar rates of deaths or injuries.

93. Lacking additional evidence to support Ethiopia's claims that Eritrean violations resulted in thousands of deaths or injuries, the Commission has had to make its own appraisal of the evidence previously adduced. The

[32] Counsel for Ethiopia also contended that the Commission found that certain violations were "pervasive," but the *dispositifs* of the Commission's Partial Awards only used the term once, concerning a violation involving Eritrea's treatment of prisoners of war.

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Commission found Eritrea to be liable for the following relevant violations on the Central Front in areas occupied by its armed forces from May 1998 to May 2000:

> 1. For permitting in Mereb Lekhe Wereda frequent physical abuse of civilians by means of intentional killings, beatings and abductions . . . ;
>
> 2. For permitting in Ahferom Wereda frequent physical abuse of civilians by means of intentional killings, beatings, abductions and wounds caused by small-arms fire . . . ;
>
> 3. For permitting in Gulomakheda Wereda frequent physical abuse of civilians by means of intentional killings, beatings and abductions during the invasion in June 1998 and less frequent, but recurring, physical abuse of civilians . . . ;
>
> . . .
>
> 6. For permitting in Irob Wereda a recurring pattern of excessive violence by Eritrean soldiers against civilians, including frequent beatings and intentional killings, and frequent severe beating and other abuse of civilians taken into custody . . . ;[33]

94. On the Western Front, Eritrea was found liable for permitting "frequent beatings of civilians in Tahtay Adiabo Wereda."[34] For the Eastern Front, the Commission found liability:

> a. For permitting intentional and indiscriminate killings of civilians in Dalul and Elidar Weredas from June 11, 1998 to December 12, 2000;
>
> . . .
>
> c. For permitting beatings of civilians in Dalul and Elidar Weredas; and
>
> . . .
>
> e. For abduction, forced labor and conscription of civilians in Dalul Wereda.[35]

a. Killings

95. The Commission begins with the most serious of these violations, Ethiopia's claim that 13,935 civilians were killed intentionally or otherwise in violation of the *jus in bello* on the three fronts of the war. There is no doubt that unlawful, intentional and indiscriminate killings of civilians occurred, as the Commission found. Men or boys caring for livestock in the fields appear

[33] 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], *dispositif,* Section V.D.

[34] Partial Award, Western and Eastern Fronts, Ethiopia's Claims 1 & 3 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (December 19, 2005) [hereinafter Partial Award in Ethiopia's Western and Eastern Front Claims], *dispositif,* Section VI.F.2.

[35] *Id.*, *dispositif,* Section VII.F.2.

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to have been particularly frequent victims. There were multiple accounts in the record, many by eyewitnesses, describing how raiding parties of Eritrean soldiers shot named individuals and stole their animals. Such killings were very serious offenses, and deserve an award of significant damages, as well as universal condemnation.

96. Nevertheless, Ethiopia's claim regarding the frequency or extent of such killing was fundamentally at odds with the numbers of civilian deaths from all causes reported by relief organizations and Ethiopian officials in evidence submitted previously. These reports often referred in general terms to deaths of civilians, usually from artillery fire or landmines (for which Ethiopia made separate *jus ad bellum* claims discussed below). They made no mention of thousands of civilians supposedly killed intentionally or indiscriminately by Eritrean soldiers. The Commission would have expected Ethiopian officials and relief organizations to have investigated and described such mass killings in detail, had they occurred to anything like the extent now claimed.

97. Reports by Ethiopian officials and Ethiopian and international aid agencies that address casualty figures indicated a quite different picture regarding the number of civilian deaths—from all causes—related to the war. A report by an international aid group cited in Ethiopia's Central Front Memorial described five hundred civilian deaths from all causes in Tigray as of August 2000. Another report cited a total of forty civilian deaths in Gulomakheda. A third from June 1999 cited 241 civilian deaths caused by artillery fire; there was no mention of intentional killings by Eritrean soldiers. Numerous declarations by kebele or tabia administrators or other Ethiopian local officials described wartime casualties in their areas of responsibility; these are discussed further below in connection with Ethiopia's *jus ad bellum* claims. With few exceptions (particularly in Irob), these local officials' accounts made no mention of intentional killings of civilians by Eritrean soldiers. Taken together, the reports and accounts of Ethiopian officials indicated that the total number of civilian deaths was far below the number Ethiopia now claims were intentionally killed.

b. Beatings and Woundings

98. Ethiopia claimed that 82,223 people suffered from beating, wounding or other forms of physical abuse at the hands of Eritrean forces. The evidence in the record again fell far short of supporting this claim. There was a sufficient number of credible accounts by local residents describing persons being beaten or wounded to justify the Commission's holdings that such beatings were frequent. However, there were no reports suggesting physical assaults on more than 80,000 Ethiopians, or describing large numbers of people receiving medical care or suffering lasting disabilities on account of such events. A few witness statements by local priests or officials listed much smaller numbers of victims; one such document listed eighty-five persons who were "injured or

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tortured" in Irob over the course of the war. Taken as a whole, the evidence again fell far short of supporting the enormous numbers of victims claimed by Ethiopia.

c. Abductions and Disappearances

99. Ethiopia claimed that 20,354 people were abducted on the Western, Central and Eastern Fronts. As noted above, the Commission found that civilians were abducted in Mereb Lekhe, Ahferom and Gulomakheda Weredas. In Irob Wereda, the Commission found Eritrea to be liable for "frequent severe beating and other abuse of civilians taken into custody," and for "failing to release civilians taken into custody in Irob Wereda and to provide information regarding them." For the Eastern Front, the Commission found liability for "abduction, forced labor and conscription of civilians in Dalul Wereda." On the Western Front, the Commission found Eritrea liable for permitting the frequent abduction of Ethiopian civilians, and for unexplained disappearances, from Tahtay Adiabo, Laelay Adiabo and Kafta Humera Weredas.

100. The evidence again identified numbers of abductions and disappearances far short of those now claimed. An official from the town of Zalambessa listed seventeen persons "disappeared" or abducted from the town, which had a pre-war population the Commission estimated at 7,000 to 10,000. A June 1999 assessment by the Tigray Regional Bureau of Planning and Economic Development stated that 641 civilians were abducted from Tigray. Some accounts by local officials and priests provided additional detail; a declaration by a priest in Irob Wereda listed twenty-nine named individuals said to have been abducted. Not all abductions resulted in disappearances. Several accounts described how groups of persons taken away by Eritrean forces during the war subsequently returned, either with the assistance of the International Committee of the Red Cross ("ICRC") or on their own. The evidence fell far short of sustaining Ethiopia's claim that over 20,000 persons were abducted.

d. Forced Labor and Conscription

101. As noted above, the Commission found liability for the "abduction, forced labor and conscription of civilians in Dalul Wereda," located in the north of the Afar region. Ethiopia claimed that 9,443 persons were made to perform forced labor or were forcibly conscripted there, based on the assumption that 40% of the population in the occupied areas of that wereda were subject to these violations. Ethiopia weighted the value of these harms separately, seeking one year's earnings for those forced to perform labor and 85% of lifetime earnings for those forcibly conscripted, contending that a higher amount was justified to account for the risk to one's life of being conscripted to military service. Ethiopia estimated that two-thirds of this population group was required to do forced labor and that one-third was conscripted.

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102. At the liability phase, Ethiopia submitted testimony of several witnesses who performed forced labor, some for brief periods of a few days and others for up to a year. This included a broad range of labor, including cooking for soldiers, building roads, digging trenches, building fortifications and farming. Ethiopia similarly submitted testimony of Ethiopians who alleged they were taken to Eritrea's military training camp at Sawa and forced to serve in the Eritrean military. Eritrea had claimed much of the territory it had occupied in this region as its own and by some witness accounts locals were told they were Eritrean citizens prior to and at the time of conscription. Many of those who testified that they were conscripted stated that they were also required to perform labor either prior to or during the period of conscription. While the liability phase evidence showed that forced labor and conscription occurred, it does not support Ethiopia's claim of over 9,000 victims. In the Commission's view, this evidence indicated a considerably smaller quantum of persons subject to forced labor and conscription.

e. Award

103. Given the manner in which Ethiopia presented its claims, the Commission has had to make its best estimates of the gravity and extent of Eritrea's *jus in bello* violations on the three fronts involving death, physical injury, disappearance, forced labor and conscription of civilians based on the evidence previously in the record. In doing so, it has given important weight to the seriousness of the offenses against life and human dignity proved at the liability phase. Based on its analysis of the evidence, the Commission awards Ethiopia US$11,000,000 in respect of these claims.

B. Rape

104. 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 suggestion, much less evidence, that either Eritrea or Ethiopia used rape, forced pregnancy or other sexual violence as an instrument of war,"[36] 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

[36] *E.g.,* Partial Award in Ethiopia's Central Front Claims, para. 24; 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], para. 36.

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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.

105. 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.

106. Ethiopia used its general methodology to liquidate its *jus in bello* damages claims for Eritrea's liability, as found by the Commission in its Partial Awards, for "failing to take effective measures to prevent rape of women by its soldiers in Irob Wereda"[37] and for "failure to take effective measures to prevent the rape of women in Dalul and Elidar Weredas."[38] In a three-step process, Ethiopia (a) estimated that 1% of the pre-war female population suffered rape in Irob, Dalul and Elidar Weredas, totaling 236 women; (b) estimated the resultant injury at 50% of the total average lifetime lost earnings in Tigray and Afar; and (c) added large moral damages intended to reflect the gravity of the injury to victims and their families. On this basis, Ethiopia sought material damages of US$637,821 and moral damages of US$6,101,820, for a total award of US$6,739,641 for damages connected to rape. (In Section VII above, the Commission addresses and dismisses Ethiopia's claims, calculated using a legally unjustified and mechanistic methodology, for large separate awards of moral damages in this and other claims.)

107. Even with the extremely rough approximations necessarily underlying the damages phase, the Commission is surprised that Ethiopia claims that only 1% of the relevant female population suffered rape. This percentage appears unduly low in light of the social stigma of reporting rape and the comparatively large number of women and girls in the vulnerable population. Nor can the Commission accept that estimated lifetime earnings have any usefulness in this context, or equate the financial impact of a rape with that of a beating. The relevant population is also impossible to ascertain, as it would be that which remained in occupied areas.

108. Eritrea originally proposed that each Party set aside US$500,000 to US$1,000,000 of its own funds for its own locally administered programs for women's health care and support services in the areas where the Commission found liability for rape. When Ethiopia did not agree to this proposal, Eritrea requested an award of US$6,750,000, without explanation of the amount. As set out in the parallel Final Award for Eritrea, the Commission cannot assess Eritrea's unexplained methodology, but can only assume the amount was intended to mirror Ethiopia's.

[37] Partial Award in Ethiopia's Central Front Claims, *dispositif,* Section V.D.7.

[38] Partial Award in Ethiopia's Western and Eastern Front Claims, *dispositif,* Section VII.F.2.b.

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109. Despite the shortcomings of both Parties' damages methodologies, the Commission considers that this serious violation of international humanitarian law demands serious relief. Neither symbolic nor nominal damages will suffice in the face of the physical, mental and emotional harm known to be suffered by rape victims.

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

C. Loss of Ethiopian Nationals' Property

111. In the liability phase, the Commission found that Ethiopian civilians frequently lost property to looting or unlawful destruction by Eritrean forces. On the Central Front, Eritrea was found liable for "widespread looting and property destruction in the areas that were occupied" by Eritrean armed forces from May 1998 to May 2000 in Mereb Lekhe, Ahferom and Irob Weredas. The Commission found such looting and property destruction to have been "frequent" in Gulomakheda Wereda.

112. On the Western Front, Eritrea was found liable for permitting the looting of property in areas in Tahtay Adiabo Wereda occupied by Eritrean armed forces; for permitting looting, in particular of livestock, in such areas in Laelay Adiabo Wereda; and for permitting looting of property and livestock in areas in Kafta Humera Adiabo Wereda where Eritrean armed forces were present. On the Eastern Front, Eritrea was found liable for permitting the looting and destruction of property in Dalul and Elidar Weredas. Thus, the Commission found Eritrea liable for frequent destruction of property in six weredas, and for looting in nine.

1. Ethiopia's Claims

113. Ethiopia claimed US$30,073,424 on account of looting in the areas covered by the Commission's liability findings described in the preceding paragraphs, estimating that 75% of the population in the "front line" kebeles in all nine weredas lost all of their property to looting by Eritrean forces. It also claimed US$24,879,342 on account of destruction involving real property, estimating that 35% of the population of the "front line" kebeles in the six weredas where the Commission found property destruction suffered such damage.

114. Ethiopia calculated its *jus in bello* property claims in a manner similar to that used in its corresponding claims for injury to persons. Ethiopia began with the same estimates of the populations of the "front line" kebeles.

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It estimated that 75% of these persons lost all of their personal property to Eritrean looting. No additional evidence was offered to support this estimate. Instead, Ethiopia contended that Eritrean forces were present in the affected areas for substantial periods, giving them ample opportunity to loot. Ethiopia also estimated that 35% of these persons had all of their houses and other real property destroyed. Again, no new evidence was offered to support this estimate. Ethiopia instead argued that Eritrea destroyed "the vast majority" of the social and economic infrastructure in affected areas, and "there is no evidence to suggest that Eritreans destroyed a significantly lesser amount" of civilian property.

115. Ethiopia estimated per capita losses of property from looting based upon official government statistics. These indicated average individual holdings of personal property (including livestock, a major form of wealth, and crucial for many families' survival) to be US$78 per capita in Tigray and US$683 in Afar. Ethiopia calculated the value of damaged or destroyed real property based on pre-war government data indicating the average value of houses in Tigray (17,753,70 birr, said to equal US$2,580) and Afar (14,325,14 birr, said to equal US$2,082). These averages were multiplied by the number of houses in the kebeles where real property was damaged, giving the total value of all houses in these areas. Ethiopia then divided this amount by the areas' populations, giving a per capita amount reflecting the value of real property, which Ethiopia converted to equal US$506 per person in Tigray and US$339 in Afar. These per capita amounts were later multiplied by the estimated number of injured individuals (that is, the 35% of the total population in the affected areas) to give the amount claimed for damage to property.

116. Ethiopia's Damages Group One Memorial contended that there were 71,301 houses in Tigray "in the areas where destruction occurred," with another 5,707 in Afar. This totaled slightly over 77,000 houses in the affected areas. Ethiopia estimated that 35% of the total value of all these houses was destroyed by conduct found to violate the *jus in bello;* it offered no new evidence to support this estimate. The estimate did not allocate the assumed damage among houses that were wholly destroyed, partially destroyed, or suffered only modest damage. Ethiopia claimed US$24,879,342 for this damage, equaling approximately US$925 per house.

2. Eritrea's Response

117. Eritrea vigorously contested the amount of Ethiopia's claims for property damage, *inter alia,* recalling its earlier objections to Ethiopia's portrayal of the relevant areas and populations, and maintaining that the estimated frequency of injuries rested on assumption and conjecture, not evidence.

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3. The Commission's Conclusions

118. The Commission will not repeat its earlier comments regarding Ethiopia's method for calculating its *jus in bello* claims for injury to persons. Similar concerns apply here. Ethiopia claimed large amounts, but key factors in computing them—particularly, the assumed frequency of losses attributable to Eritrean conduct—were not based upon evidence in the record. The Commission also has substantial doubts regarding Ethiopia's estimates of housing values. In the areas of rural Tigray and Afar most affected by the war, occupants often build their own houses, using local materials; damage often could be repaired or replaced by the occupants' labor utilizing local materials. Losses of livestock and agricultural implements could pose a much greater threat to victims' welfare and security, but, in the case of Tigray, such losses seemed to be a small part of Ethiopia's claim.

119. Given these difficulties, the Commission again made its own review of Ethiopia's evidence in the earlier proceedings, seeking to approximate the extent of losses caused by looting, or involving damage to or destruction of real property, falling under the Commission's *jus in bello* liability findings.

a. Looting

120. The available evidence regarding the extent of losses from looting by Eritrean forces was fragmentary and imprecise. However, the number of IDPs provides one reference point for assessing how many people may have been affected. Many thousands of IDPs left behind property such as livestock, metal roofs, household goods, furniture, hand tools, farm implements, grain stores and beehives, all vulnerable to looting. The record included many accounts describing how IDPs left their farms and villages to avoid the conflict, frequently under conditions making it difficult to safeguard property and livestock. Many returned home to find that all of their goods were gone.

121. Such losses of property could be devastating for those affected. Many looting victims lost their means of subsistence and were left destitute, with overwhelming economic and psychological consequences. At best, such victims were left wholly dependent on assistance from government agencies or international relief agencies, which were themselves struggling to meet needs with limited resources.

122. However, not all IDPs lost everything. The record includes accounts of IDPs who brought along at least some of their livestock and goods, or who were able to move their livestock to more secure areas. In this connection, the evidence showed that many thousands of IDPs in Tigray left homes in areas potentially exposed to shelling at government urging in late 1998 or early 1999, when there was no heavy fighting in the vicinity and both people and property could be evacuated in an orderly way.

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123. The pre-war population of areas exposed to looting provides another, albeit imprecise, reference point. The Commission previously addressed Ethiopia's contentions regarding the number of persons potentially exposed to *jus in bello* violations involving killings or other abuse by Eritrean forces.[39] Ethiopia contended that this group numbered about 242,000 people. However, the Commission concluded that this estimate had to be reduced to remove thousands of rural expellees of Eritrean origin. The same adjustment is necessary here. Ethiopia should not be able to claim for looted property left behind by persons with Eritrean antecedents who were expelled from Ethiopia. The number must be further reduced to reflect many thousands of people living in areas at some distance from the fighting fronts, where looting by Eritrean soldiers—if it occurred—was less frequent and extensive. However, it is not necessary to make adjustments to take account of displaced persons. As discussed above, much IDP property remained after the owners departed, leaving it at risk of looting.

124. Estimating the extent of looting damage is further complicated because many property losses by IDPs and by persons who remained in their homes resulted from other causes. There was evidence that many animals were lost to starvation, shelling or other causes unrelated to looting. Much property was lost to shelling or other battle damage, for which there is no *jus in bello* liability. And, Ethiopian civilians and soldiers surely engaged in some looting. In its Partial Award on Eritrea's claim for looting losses in the largely deserted border town of Tserona, the Commission addressed this problem by finding Ethiopia to be liable for only a percentage of losses from looting.[40] The Commission will adopt a similar approach here. Overall, however, the Commission concludes that IDPs in particular lost much property to looting by Eritrean forces.

125. Estimating the Value of Looted Property. The available evidence is also sketchy regarding the value of personal property and livestock lost, although it underscores the poverty of many residents of rural Tigray and Afar. In calculating its looting claim, Ethiopia utilized government data indicating that the average person in Tigray had property, including livestock, worth 535.69 birr, which Ethiopia converted to equal US$78. This suggests property worth roughly 3,200 birr for a family of six in Tigray. This is broadly consistent with other evidence in the record. A 2000 World Bank/International Development Association document described a package of basic household items provided to beneficiary households in Tigray and Afar, including dining utensils, sleeping materials and water containers, all valued at about 600–800 birr. An Ethiopian government study of damage to residents of Zalambessa estimated average property losses at 10,268 birr per household. These were town dwellers, who typically had larger and better-equipped houses, with more furniture, electrical appliances, and other forms of valuable property not owned by rural

[39] *See* Section VIII.A *supra*.

[40] Partial Award in Eritrea's Central Front Claims, paras. 67 & 69.

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people. A June 1999 Ethiopian government damage assessment estimated the value of looted or destroyed property of displaced persons up to that time at 33.9 million birr. This estimate appears not to have included animals or farm implements, which were significant elements of the IDPs' total losses.

126. As noted above, loss of livestock, tools and other property required for subsistence placed many poor rural families in dependency and despair. Taking this into account, and in light of the gaps and uncertainties in the evidence, the Commission concludes that US$12,000,000 fairly reflects the value of property lost to looting by Eritrean soldiers.

b. Destruction of and Damage to Houses and Real Property

127. The Commission has sought throughout to treat Ethiopia's damages claims based on the *jus in bello* separately from those based on the *jus ad bellum*. This has been difficult in the case of Ethiopia's claims for damage to housing and real property. Ethiopia made parallel claims for such injury based on both legal grounds, but did not allocate particular damage to one or the other. Further, the geographic areas covered by Ethiopia's parallel claims for damage to housing and real property largely overlapped, as do the claims' factual foundations.

128. The Commission did not make liability findings explicitly addressing damage to houses or real property, although it made several findings of liability for destroying property. On the Central Front, Eritrea was found liable for "widespread . . . property destruction" in areas occupied by Eritrean armed forces from May 1998 to May 2000 in Mereb Lekhe, Ahferom and Irob Weredas. Property destruction was found to be "frequent" in Gulomakheda Wereda. On the Western Front, the Commission found insufficient evidence of unlawful property destruction. On the Eastern Front, Eritrea was found liable for permitting destruction of property in Dalul and Elidar Weredas. Thus, the Commission found Eritrea liable for property destruction in six weredas on the Central and Eastern Front. Ethiopia did not address the Commission's specific findings in framing its *jus in bello* compensation claim for damage to houses and real property.

129. The Commission rejected as unproven Ethiopia's claim that Eritrea engaged in shelling that was indiscriminate or otherwise contrary to the *jus in bello*. Accordingly, destruction of property due to shelling is not compensable under the *jus in bello*.

130. Ethiopia described both its *jus in bello* and *jus ad bellum* claims as embracing damage to houses and to other forms of real property. However, the relevant discussion in Ethiopia's Damages Group One Memorial and at the hearing focused on houses, and the Commission's analysis responds to the claims as Ethiopia pleaded them. Accordingly, the Commission sought to assess the extent of damage to houses falling within the scope of its *jus in bello* liability findings for the Central and Eastern Fronts.

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131. Ethiopia's Damages Memorial contended that there were 71,301 houses in Tigray "in the areas where destruction occurred," with another 5,707 in Afar. This totaled slightly over 77,000 houses in the affected areas. Ethiopia estimated that 35% of the total value of all these houses was destroyed by conduct found to violate the *jus in bello;* it offered no new evidence to support this estimate. The estimate did not allocate the assumed damage among houses that were wholly destroyed, partially destroyed or suffered only modest damage. Ethiopia claimed US$24,879,342 for this damage.

132. Ethiopia's earlier evidence, including reports from Ethiopian government sources and damage assessments by international relief agencies, shows that wartime damage to houses, while substantial, was far less extensive than Ethiopia now claims. An August 1999 assessment cited in Ethiopia's Central Front Memorial identified 7,684 destroyed homes. Post-war assessments by United Nations and international relief agencies frequently referred to a World Bank assessment identifying about 16,400 houses in Tigray as having been damaged or destroyed by all causes; a January 2002 UN Emergencies Unit for Ethiopia assessment estimated that about 35% of these 16,400 were completely destroyed. However, later assessments suggested that initial estimates of the number of houses damaged or destroyed may have been high. The January 2002 assessment mission reported "that only 33% (5,586 houses) of the housing units counted in the preliminary assessment (16,848) were in fact eligible for repair or reconstruction."

133. As noted, Ethiopia did not allocate particular housing damage to either its *jus in bello* or *jus ad bellum* claims. However, Ethiopia's *jus ad bellum* housing claims, discussed *infra,*[41] indicated that shelling caused by far the largest amount of damage to housing. Given this, damage to or destruction of housing by Eritrean forces in areas where the Commission found liability would have to be less—indeed, substantially less—than half of the total number of houses damaged or destroyed.

134. Moreover, not all damage to housing resulted from actions for which Eritrea is liable. Some houses decayed from lack of maintenance during their owners' absences; traditional houses were particularly at risk of this. Some houses lost components such as structural supports, roofs and doors, to civilian looters, or to Ethiopian soldiers seeking building materials for trenches or fortifications. In addition, in its *jus in bello* claim for the destruction of Zalambessa (considered below), Ethiopia claimed for the destruction of 1,220 houses. Absent any contrary indication in the record, the Commission must assume that those houses, or some significant proportion of them, were included in UN and other estimates of the extent of housing damage in Tigray.

135. The extensive gaps and ambiguities in the record, and the limited geographic scope of the Commission's liability findings, compel the Commis-

[41] *See* Section XI.E.1 *supra.*

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sion to estimate the extent of damage to housing for purposes of Ethiopia's *jus in bello* claim. In doing so, the Commission has given considerable weight to international agencies' estimates of the number of damaged or destroyed houses prepared during and after the war. It has also given weight to evidence indicating that shelling was a major cause of damage to housing. Such damage from shelling can only be considered in connection with Ethiopia's *jus ad bellum* housing claim. The Commission accordingly awards Ethiopia the sum of US$1,900,000 for the *jus in bello* component of its claims for damage to housing.

IX. Actual Amount *Jus in Bello* Damages Claims

136. This portion of Ethiopia's *jus in bello* claims included multiple elements. Ethiopia claimed an amount it converted to approximately US$120 million for damage to the town of Zalambessa, to churches and government facilities, and to numerous Ethiopian enterprises and government agencies. Ethiopia also claimed actual amounts of damages said to result from Eritrea's bombing at the Ayder School in Mekele. Ethiopia's Damages Group One Memorial presented these *jus in bello* claims alongside certain *jus ad bellum* claims for specific amounts of actual damages, including claims for deaths and injuries caused by landmines and for injury from the bombing of the Mekele airport. These claims will be treated separately below, together with Ethiopia's other *jus ad bellum* claims.

A. Destruction in Zalambessa

137. Zalambessa, an Ethiopian border town with a pre-war population of seven to ten thousand, lies on the main road between Asmara and Addis Ababa. It was a focal point of the war on the Central Front. The town was occupied for almost all of the war by Eritrean forces, and suffered massive physical damage and extensive looting. In its Central Front Partial Award, the Commission found that Eritrea was liable for 75% of the physical damage and for 100% of the looting. Ethiopia claimed an amount it converted to equal US$29,489,000 as material damages for the destruction and looting, reflecting the full amount of damage allegedly inflicted. In this regard, Ethiopia contended that Eritrea should be responsible both for the 75% of physical damage the Commission attributed to the *jus in bello* violation, and for the remaining 25% because of Eritrea's violation of the *jus ad bellum*.

138. Ethiopia alleged that 1,489 buildings were severely damaged or destroyed in Zalambessa. In all (including both the *jus in bello* and *jus ad bellum* elements of its claim), Ethiopia claimed an amount it converted to equal US$23,677,400 for the full amount of this physical damage, equaling about US$15,900 per building. The claim included a mosque and several churches and their associated structures, as well as 1,220 "residential houses;" average

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damage to houses was said to be US$10,266 each. This amount was considerably larger than the average amount claimed by Ethiopia for destruction of houses in rural Tigray. However, the evidence (including a number of declarations and signed statements by former Zalambessa residents filed with Eritrea's Counter-Memorial) indicated that many houses in Zalambessa were substantial, multi-roomed structures. An April 2002 study on the reconstruction of Zalambessa prepared by the Tigray Emergency Recovery Programme gave further credence to the amount claimed for houses. The 2002 study used a slightly higher per-house figure, 81,000 birr, or about US$11,740 at the exchange rate used in Ethiopia's pleadings.

139. The primary evidence for Ethiopia's claims for damage to structures in Zalambessa was an extensive and detailed engineering survey prepared for the Tigray Works and Urban Development Bureau. A team of engineers, assistant engineers, surveyors, local elders and others prepared this survey in October through December 2000, before this Commission was created. The survey was supplemented by evidence showing actual reconstruction costs of some public buildings. The engineering survey estimated total rebuilding costs at 149,441,206 birr. At birr 6.9:$1 (the favorable exchange rate Ethiopia used in its pleadings), this was approximately US$21.66 million, roughly US$2 million less than Ethiopia claimed. The difference was not clearly explained, although the evidence included a declaration by a senior Ethiopian public works official stating that, because of price increases, "the actual costs of rebuilding these structures would be substantially higher than our initial estimate."

140. The Commission finds the engineering study to be thorough, reasonable and credible. It involved a building-by-building assessment of damaged structures, often including drawings showing each building's type, location and size. The evidence included numerous individual building worksheets prepared to estimate rebuilding costs. There were careful estimates of the costs of repairing or replacing each, based upon the extent of damage, type of construction, and surface area. These cost estimates were developed soon after Ethiopia recovered Zalambessa, for governmental purposes unrelated to litigation. The estimates appear reasonable to the Commission in the circumstances. They were more detailed and professional than much of the other evidence adduced by either Party in other claims involving damage to structures. The specified costs were typically well within (or below) the range of per-square-meter repair or replacement costs cited in other claims for some similar structures.

141. Eritrea's principal defense to Ethiopia's claim for damages to structures was that the claim should be significantly reduced because more than three hundred persons said to be Eritrean nationals owned many of the destroyed structures. In Eritrea's view, Ethiopia could not assert a claim for damage to these structures in the exercise of diplomatic protection. Eritrea's Damages Group One Counter-Memorial evidence included numerous short preprinted forms completed and signed by persons living in Senafe who pre-

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viously lived in Zalambessa, or their relatives. These forms recited that the signer was an Eritrean, and had been "since Eritrea became independent." They then described in a few handwritten words properties the signer or the signer's relative allegedly owned in Zalambessa. This evidence also included lists of Eritreans said to have owned property in Zalambessa, including one listing 289 owners.

142. Ethiopia responded with the declaration of a senior Tigray security official alleging that family members or agents of many persons on Eritrea's lists remained in Ethiopia, and had received government housing reconstruction grants and rehabilitation funds. This was accompanied by the official's rebuttal list of the 289 properties, said to show that, for many, Ethiopian owners or agents had obtained Ethiopian government construction or rehabilitation funds. Ethiopia added that, in any case, any Eritrean owners would have been dual nationals, since Ethiopian law limits real property ownership to nationals. Ethiopia also argued that it was claiming in its own right for injury incurred on account of the destruction of an Ethiopian town, as well as for expenses incurred or to be incurred in rebuilding that town, not in the exercise of diplomatic protection.

143. The Commission has not reconciled the Parties' dueling lists of hundreds of properties in Zalambessa that were, or were not, owned by Eritreans. It agrees with Ethiopia's characterization of its claim as being based upon damage directly falling upon the State of Ethiopia, in the form of substantial public expenditure required to repair or replace damaged public structures and to assist private owners. The Commission also believes that the consideration of damages due must take account of the nature of the underlying violation, which involved massive and deliberate destruction of a town by Eritrean forces without military justification.

144. The engineering survey documenting the extent of physical damage to Zalambessa estimated the costs of repair and reconstruction of churches, houses and various public buildings as of December 2000 to be 149,441,206 birr. As noted above, a senior Ethiopian public works official projected that the actual costs of reconstruction after December 2000 would be higher, because of post-war increases in construction costs. In determining compensation for Eritrea's claims for damage to or destruction of a large number of identified buildings, the Commission has taken account of documented post-war shifts in exchange rates and increases in construction costs in Eritrea. In order to treat the Parties equally, it should accord similar treatment to Ethiopia's claim. As the record did not clearly indicate the amount of post-war increases in construction costs in Ethiopia, the Commission estimates them to have been 20%. Increasing the December 2000 engineering study's estimate by 20% equals 179,329,400 birr. The Commission awards 75% of this amount, or US$16,815,000, as compensation for damage to and destruction of buildings in Zalambessa in violation of the *jus in bello*.

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145. Ethiopia's claim for the remaining 25% is treated in Section XI along with Ethiopia's other *jus ad bellum* claims.

B. Looting in Zalambessa

146. *Looting from Private Homes.* Pursuant to the Commission's finding that Eritrea was liable for 100% of the looting losses in Zalambessa, Ethiopia claimed US$3,056,771 for personal property allegedly looted from private homes in Zalambessa. This equals about US$2,500 per household for each of the 1,220 "residential houses" that allegedly suffered damage. The claimed amount was derived from a survey carried out in October through December 2001 for reconstruction purposes by the Regional State of Tigray. The survey utilized questionnaires administered to, and interviews with, persons displaced from Zalambessa. The dollar amount claimed appears to be a conversion of the estimated value of household property damage identified in the 2001 study (slightly over 21,000,000 birr, 10,268 birr per household), converted at birr 6.9: US$1. The report did not include the questionnaires, but it contained a reasonable explanation of the questionnaire and interview process used to gather and refine the data. The numbers stated are internally consistent, and appear reasonable to the Commission in the circumstances. While the amounts claimed for looting damage per household were appreciably higher than looting losses Ethiopia claimed in the war zones at large, the claims involved residents of a thriving border community who were typically more prosperous and more likely to own electrical appliances and other vulnerable property.

147. Because the Tigray survey was prepared for governmental purposes other than litigation, utilizing a reasonable methodology, the Commission accepts it as a measure of the losses of personal property suffered by the residents of Zalambessa. However, the report did not distinguish between losses attributable to looting and to other causes. Under the Commission's liability Awards, only 75% of losses of personal property not due to looting are compensable, and some limited adjustment is required to reflect this. Based on the record, the Commission believes that losses of personal property were predominately attributable to looting, and accordingly awards Ethiopia US$2,500,000 in respect of this damage.

148. *Other Looting Losses.* Ethiopia also claimed smaller amounts in respect of property allegedly looted from businesses, government agencies and other entities. (For clarity, the amounts of the claimed looting losses have been converted to U.S. dollars by the Commission at the birr 8:US$1 rate.) Ethiopia claimed:

- US$11,798 for safes and other property looted from the Commercial Bank office in Zalambessa;
- US$64,079 for property allegedly looted from two churches and a mosque in the town;
- US$12,945 for property looted from the Zalambessa customs

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house, including US$1,000 for a minivan and US$2,500 for contraband items stored at the customs warehouse;
- US$7,246 for property lost by the Tigray Regional Disaster Prevention and Preparedness Bureau (the narrative accompanying this claim stated that this amount included 300,000 quintals of grain, a large quantity that presumably reflected a typographical error); and
- US$3,269 for furniture and recreational equipment taken from the Tigray Youth Association office.

These amounts were appropriately documented and appear reasonable in the circumstances. The Commission awards US$99,000 as compensation for these looting claims.

149. Ethiopia claimed US$107,355 for a Rubb hall (a portable grain storehouse) looted from the Relief Society of Tigray. The evidence showed that the Rubb hall was originally donated by Catholic Relief Services in 1993, and was placed on the Society's books in that year at an initial value of 858,840 birr. Given that the property was several years old at the time of its loss, the Commission awards 80% of the amount claimed, or US$86,000.

150. Ethiopia claimed US$167,578 for property looted from the Tigray Regional Agriculture Bureau following the invasion of Zalambessa. The valuation was based on the declaration of a senior Agricultural and Natural Resources Development Office official and accompanying lists of property lost at several locations. The official stated that the lists were "compiled based on estimates of the value and inventory of these items as of the time of the war," but did not state a value of property allegedly looted in Zalambessa. The accompanying tables appeared to be based on the authorized levels of supplies, not on amounts actually on hand. They also listed some supplies lost from Badme (and perhaps also other locations) as well as from Zalambessa. The claimed losses do not appear unreasonable in the circumstances. However, as the evidence was based on estimates (albeit by a knowledgeable official), and was imprecise in other respects, the Commission awards 75% of the claimed amount, or US$126,000.

151. Ethiopia alleged that Eritrea looted construction machinery and material being used by the Tigray Regional Rural Roads Authority in the Zalambessa area at the outbreak of the war, to the value of US$1,132,694. More than half of this claim was for the original acquisition cost of three bulldozers and two dump trucks allegedly looted. There was no evidence showing that this machinery and material actually was taken by Eritrea; there was evidence showing that, prior to the war, much of it was stored in a facility several kilometers south of Zalambessa. Road building material and heavy construction equipment would have been equally valuable to both armies for building trenches and other military engineering works on the static Zalambessa front. In this regard, there was uncontested evidence that both armies were using bulldozers to dig trenches in the Zalambessa area in mid-May 1998, prior to

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Eritrea's attack. Given the ambiguities of the evidence, the Commission awards Ethiopia the dollar equivalent of 50% of the amount claimed, or US$566,000.

152. Finally, Ethiopia claimed US$3,269 for looting of tables, chairs, a tennis table and rackets, and a pool table from the office of the Tigray Youth Association. While the evidence for this claim was limited, the character and amount of the claim appear reasonable in the circumstances. The Commission accordingly awards US$3,000 in respect of this claim.

153. With respect to Ethiopia's claims for looting in Zalambessa as discussed in this subsection, the Commission awards the total of US$3,380,000.

C. Deaths, Injuries and Property Damage in Mekele

154. The Commission previously found that Eritrea violated the *jus in bello* in the conduct of its air operations in May 1998, in connection with two attacks that dropped cluster bombs near the Ayder School in Mekele. These events caused extensive deaths and injuries, as well as some property damage. Ethiopia claimed an amount it converted to equal US$882,539 for deaths, injuries and damage from the bombings. This amount was then increased by about US$4 million to reflect moral damage to the dead and injured and their families. Ethiopia also claimed damages for death, damage and injury from a strafing attack on the Mekele Airport earlier on the same day. While the Commission previously found the airport to be a legitimate military target, Ethiopia claimed compensation for this attack on *jus ad bellum* grounds. The Commission addresses this claim in Section XI of this Award, in connection with Ethiopia's other *jus ad bellum* claims.

155. Ethiopia claimed US$322,392 for the deaths of sixty persons in the bombing in the Ayder School vicinity and US$333,997 for injuries to 168 others. Ethiopia calculated these amounts in the manner used to compute its fixed-sum claims, with adjustments reflecting the ages of those killed and injured and a further adjustment to reflect variations in the extent of injuries received. Thus, Ethiopia sought 100% of projected lifetime earnings for those who were killed, and a percentage of a reduced level of lifetime earnings for those who were injured. As with Ethiopia's fixed amount claims, projected lifetime earnings were not discounted to present value.

156. Eritrea did not contest the numbers of persons killed and injured, but argued that Ethiopia could not recover more than US$1,500 per victim, the maximum amount indicated in the Commission's 2001 Decisions regarding elements of a possible mass claims system.[42] (As noted previously, that system was not completed or adopted, in light of the Parties' decisions to file

[42] Eritrea-Ethiopia Claims Commission Decision No. 2 ("Claims Categories, Forms and Procedures"); 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).

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their claims as State-to-State claims.) Eritrea also contended, *inter alia,* that Ethiopia's claims for medical care in Ethiopia (approximately US$43,000 for treating 168 injured persons) were excessive, and that its claims for damage to the Ayder School and surrounding buildings were excessive and unproven.

157. Ethiopia's evidence included death certificates, extensive hospital records, and other contemporaneous documents. These proved numerous deaths and the hospitalization and subsequent treatment of many persons wounded in the bombings. This evidence was not contested. Based on this substantial record, the Commission accepts Ethiopia's contention that sixty persons were killed and 168 injured in the bombings at the Ayder School.

158. However, the Commission does not accept Ethiopia's method of calculating the compensation due on account of the serious loss of life and injury involved here. Ethiopia's method of calculation resulted in a basic award of about US$5,400 for each death, reflecting the victims' estimated lifetime future earnings, undiscounted and converted at an exchange rate selected by Ethiopia. This amount then was roughly doubled by additional moral damages, calculated using Ethiopia's elaborate matrix of base impact values, family multipliers and severity factors. The Commission previously noted its reservations regarding the use of undiscounted projections of future earnings in computing damages. It also has rejected Ethiopia's mechanistic approach to calculating moral damages, although it believes that some violations of international law, taking account of their seriousness, character and consequences, require an additional measure of damages.

159. Ethiopia also claimed an amount it converted to equal US$96,326 for medical treatment to persons injured in the bombings including US$40,050 for costs of treatment provided at the Mekele Hospital and US$3,087 for treatment in Addis Ababa. The claim for treatment in Mekele and Addis Ababa was adequately documented and reasonable in the circumstances, subject to adjustment of the exchange rate. The balance of US$53,189 was for expenses incurred in dollars by a single individual who went to Israel for treatment. The Commission approves the claims reflecting this individual's medical expenses and airline tickets, in the amount of US$15,900. However, the evidence did not permit assessment of the reasonableness of the remaining elements of the claim, which were supported by a one-page letter mentioning the patient's eight annual visits of twenty days to Israel for "medical operation and check up." They are denied.

160. Ethiopia next claimed an amount it converted to US$42,882 for damage to the Ayder School and its contents (US$26,974 for repairs, and US$15,908 to replace books, school desks, other furniture, and various fixtures and educational materials), and US$86,942 for damage to homes and other buildings and property near the school, including a printing plant that was extensively damaged. Eritrea argued that the claim for damage to the school and its contents was excessive, but the Commission does not find the amount to be unreasonable in the circumstances. It also finds the amounts claimed in

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regard to damage to homes, businesses and other structures damaged by the bombing to be sufficiently documented and reasonable in the circumstances, all subject to adjustment of the exchange rate for conversion.

161. Taking account of the consequences following from the serious violation of international law involved here, the Commission awards Ethiopia US$2,500,000 in respect of deaths and injuries, medical expenses and property damage resulting from the dropping of cluster bombs in the vicinity of the Ayder School in Mekele.

D. Other Looting and Damage to Property

1. Government Buildings and Infrastructure

162. Ethiopia claimed US$13,963,982 in damages for the destruction and looting of "at least" 331 administration buildings, schools, clinics, veterinary clinics, water supply systems and agricultural training centers in Tigray on the Central and Western Fronts, including US$536,765 for moveable property allegedly looted from those locations. Ethiopia also sought US$2,566,002 for the destruction and looting of at least 35 schools, clinics, veterinary clinics and water supply systems in Afar on the Eastern Front, including US$93,891 for moveable property allegedly looted from those locations.

163. Ethiopia pleaded entitlement to compensation under either the Commission's *jus in bello* or *jus ad bellum* liability findings and, accordingly, did not specify the liability basis for its claims for specific property. However, the Commission has sought throughout these proceedings to assess compensation on the basis of liability for either breach of the *jus ad bellum* or the *jus in bello.* Ethiopia's failure to relate its claims to the Commission's specific liability findings has greatly complicated assessment of this claim, and has limited Ethiopia's recovery of *jus in bello* damages.

164. The *jus ad bellum* damages, which comprise a larger component of these claims, are addressed separately in Section XI of this Award. A more extensive review of evidence and argument related to these claims is reserved for that section. A shorter review of the evidence bearing on determining amounts awarded under the *jus in bello* follows here.

165. Eritrea's liability for looting and destruction of public buildings on the three fronts was not uniform. On the Central Front, the Commission found Eritrea liable for violating the *jus in bello* by permitting "widespread looting and property destruction in the areas that were occupied" by Eritrean forces in Ahferom, Irob and Mereb Lekhe Weredas. The Commission also found Eritrea liable for permitting "frequent" looting and destruction in Gulomakheda Wereda.

166. On the Western Front, the Commission did not find *jus in bello* liability for destruction of property. It found liability only for looting in areas occupied by Eritrean troops in Tahtay Adiabo, Laelay Adiabo and Kafta

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Humera Weredas (the findings in Laelay Adiabo and Kafta Humera Weredas emphasized looting of livestock). Given the limited scope of these findings, the Commission must exclude Ethiopia's *jus in bello* claims for damage to buildings on the Western Front, except insofar as the evidence shows that damage involved looting. As discussed below, the evidence rarely offered such detail.

167. On the Eastern Front, Eritrea was liable for permitting looting and destruction of property in Dalul and Elidar Weredas.

168. In the earlier proceedings, the Commission rejected as unproven both Parties' claims that the other engaged in shelling that was indiscriminate or otherwise contrary to the *jus in bello.* Accordingly, destruction of property due to shelling is not compensable under the *jus in bello.* The *jus ad bellum* liability component of these claims is considered separately in Section XI of this Award.

169. For its claim of damages to the 331 buildings on the Central and Western Fronts, Ethiopia produced in Annex 66 to its Damages Group One Memorial an itemized list of all the claimed government buildings and infrastructure. This list identified their location by wereda and listed values of alleged damage and loss to structures and moveable property. Each entry on the list referred to a separate annex. These annexes contained varying amounts of supporting evidence, such as purchase orders, invoices and construction contracts. For the Eastern Front, Ethiopia produced a similar list in Annex 242 to its Damages Group One Memorial, itemizing alleged losses relating to thirty-five buildings. Annex 242 also referenced separate annexes for each structure, containing payment vouchers and construction contracts for reconstruction work. Ethiopia also submitted declarations of local officials involved with emergency recovery programs attesting that the evidence related to war damage.

170. Eritrea argued that much of the damage for which Ethiopia sought recovery was caused by shelling for which Eritrea was not found liable. Eritrea also argued that it was not possible to determine from Ethiopia's evidence the locations of many structures, and that those that could be located often were far from the battlefronts. Eritrea noted in this context that under the Commission's liability Awards, it was only liable for property destruction in areas of those weredas that it occupied.

171. Eritrea also contended that much of the construction activity for which Ethiopia claimed compensation was not to repair or replace structures damaged during wartime, and instead was new construction relating to Ethiopia's internal development plans. With respect to water supply systems, Eritrea argued that many water points for which Ethiopia claimed were under development because of drought, not the war.

172. Ethiopia's evidence for *jus in bello* damage to public buildings and infrastructure is problematic in several regards. It generally did not show the alleged cause of particular property destruction, whether shelling or other-

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wise. It often did not identify locations of facilities with sufficient detail to allow Eritrea or the Commission to locate them in order to determine whether alleged damage or reconstruction was related to the war and fell within the scope of the Commission's *jus in bello* liability findings. In view of the impossibility in ascertaining the cause of much of the claimed damage, the Commission cannot assume that it was caused by actions for which Eritrea was liable under the *jus in bello*. In this regard, where the liability evidence did indicate a cause for particular damage, it generally referred to shelling damage. Given the lack of specificity in Ethiopia's evidence, and the absence of liability for property destruction on the Western Front, Ethiopia's claims for *jus in bello* property damage fail on all three fronts.

173. This leaves Ethiopia's claims for *jus in bello* damage resulting from looting. As explained in more detail in Section XI on *jus ad bellum* compensation, the evidentiary inconsistencies and lack of detail in the damages phase evidence for these claims required the Commission to rely on liability phase evidence to corroborate claims of damage to particular structures. Because the damages phase evidence of looting also included purchase orders for new items without further corroboration of actual looting, the Commission referred to the liability phase evidence to determine whether compensation was appropriate for losses claimed to result from looting.

174. During the liability phase proceedings, Ethiopia submitted extensive evidence related to looting of civilian property, churches, health institutions and educational institutions. With respect to the public buildings and infrastructure addressed here, however, the declarations submitted to show looting damage were generally not specific in identifying specific looted properties and/or their value. Although the Commission established liability for these claims in the earlier proceedings, it cannot derive figures for looting damage without evidence.

175. Some of the materials submitted at the liability phase, however, provided sufficient information upon which the Commission can base an award of compensation for looting to public buildings and infrastructure on the Central and Western Fronts.

176. On the Central Front, Ethiopia's liability phase filings included a December 2000 report of the Tigray Regional State Health Department of the Eastern Zone cataloguing looting to health institutions for which Eritrea was found to be liable in Irob Wereda. This report credibly itemized and provided amounts for properties looted in the amount of 1,148,160 birr. A June 1999 Damage Assessment Report of the Tigray Bureau of Regional Planning and Economic Development also noted that materials to be used for a water pump in Alitena, in the value of 132,000 birr, were looted during the war. A September 2000 Report of Damages Sustained by Educational Establishments of the Tigray Regional Bureau of Education separately identified 1,040 birr for looting at the Adi Fitaw School in this wereda (but that report did not otherwise provide a sufficient basis separately to identify any other looted properties).

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Consequently, the Commission finds adequate evidentiary support for the dollar equivalent of 1,281,200 birr in compensation for the looting of public buildings and infrastructure on the Central Front.

177. On the Western Front, the Tigray Regional Bureau of Planning and Economic Development noted in its June 1999 report that a water supply facility in Badme was looted of property in the value of 256,000 birr and another water supply facility in Sheraro Town was burned, causing losses of 125,000 birr. The Commission finds adequate evidentiary support for 381,000 birr in compensation for the looting of public buildings and infrastructure on the Western Front.

178. On the Eastern Front, Ethiopia provided credible witness testimony indicating that Eritrean soldiers set fire to a school, valued at 436,355 Birr, and a health clinic, valued at 413,340 birr, in Bada-Adi Murug. The Commission finds adequate evidentiary support for 849,695 birr in damage for these institutions.

179. The total amount awarded for Ethiopia's *jus in bello* actual amount claims to public buildings and infrastructure on all three fronts is US$315,000.

2. Religious Institutions

180. Ethiopia claimed US$9,238,669 in compensation for material damages resulting from Eritrea's looting, destruction and damage to "at least" 164 churches, monasteries, mosques, church-run clinics and parochial schools in the regions of Tigray and Afar. Ethiopia pleaded that it is entitled to compensation under either the Commission's *jus in bello* or *jus ad bellum* findings, but did not specify the liability basis for its claims in specific instances. Eritrea's *jus in bello* claim for compensation for damage to religious institutions was generally based on the Commission's findings of property destruction and/or looting on all three fronts. The *jus ad bellum* component of this claim is addressed in Section XI of this Award.

181. At the liability phase, Ethiopia submitted testimony regarding the looting and destruction of religious institutions on all three fronts, portraying a serious disregard of the sanctity of those institutions by Eritrean forces. Credible testimony indicated that many churches had been ransacked, desecrated, destroyed and used for various purposes other than worship. Evidence of such reprehensible conduct comprised a component of the Commission's findings on looting and property destruction at that stage of the proceedings. The Commission is mindful of the central role of religious institutions in the life of Ethiopians and recognizes the concern and distress many congregations experienced from the damage and desecration of their places of worship. The Commission has sought to account for the seriousness of this harm in its assessment of compensation for this claim.

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182. The evidence submitted at the damages phase to support this claim consisted generally of reports from Orthodox and Catholic diocesan authorities, as well as letters and claims forms submitted by priests or other officials of individual Orthodox and Catholic churches, charities and other religious institutions regarding damaged and looted properties.

183. The nature of the evidence varied widely from claim to claim. Some of the local reports were accompanied by oaths from church officials attesting to damage and amounts, some contained no supporting documentation, and some contained letters from church officials that provided invoices and payment vouchers showing the purchase of new items or construction. In some instances, Ethiopia cited to the declarations of local religious figures submitted at the liability phase to corroborate reports of local officials that contained no supporting documents. Ethiopia indicated at the damages hearings that it had submitted all claims for damage to religious institutions that appeared to be reasonable, but had not otherwise sought to verify the extent or amount of the damages claimed.

184. Eritrea argued that shelling caused much of the claimed damage, so it was not compensable under the Commission's *jus in bello* findings. Eritrea further argued that large portions of the Ethiopian evidence concerned areas that were not occupied by Eritrea during the war and therefore provided no basis for liability. Eritrea alleged that Ethiopia's evidence did not provide enough information and/or corroboration to determine that damage actually occurred, particularly where new construction contracts and purchase invoices were used as evidence. Eritrea noted in this regard that Ethiopia undertook no efforts independently to verify the amounts cited in the reports of local officials.

185. On the Central Front, the Commission found Eritrea liable for widespread looting and property destruction in occupied areas of the Irob, Ahferom and Mereb Lekhe Weredas, and for frequent looting and property destruction in Gulomakheda Wereda. During the liability phase, Ethiopia provided extensive witness testimony of looting and destruction of religious institutions in Irob, Ahferom and Gulomakheda Weredas, indicating a significant loss of valuable religious articles, damage to churches used by Eritrean forces for various activities, and destruction of many of these institutions. In Mereb Lekhe, in comparison, Ethiopia did not provide specific evidence of damage to and looting of religious institutions at the liability phase.

186. On the Western Front, the Commission found Eritrea liable for permitting the looting of property in the Tahtay Adiabo, Laelay Adiabo and Kafta Humera Weredas. The evidence Ethiopia presented at the liability phase regarding Laelay Adiabo and Kafta Humera Weredas emphasized looting of livestock, while, in the Tahtay Adiabo Wereda, Ethiopia presented limited evidence of looting and damage to religious institutions.

187. On the Eastern Front, Eritrea was found liable for permitting the looting and destruction of property in occupied areas of Dalul and Elidar

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Weredas. The liability phase evidence in those weredas also emphasized looting of livestock. No evidence was put forward for the looting of religious institutions on the Eastern Front at the liability phase.

188. With regard to the assessment of the values of religious items destroyed or looted that may have unique cultural value, the Commission generally accepts that the religious officials who attested to the values of these items would be best positioned to make those valuations.

189. On the Central Front, Ethiopia claimed US$5,229,389 in compensation for looting, destruction and damage to religious institutions. The liability phase testimony presented for the Central Front, in particular in the Irob, Ahferom and Gulomakheda Weredas, conveyed a serious disregard for the sanctity of religious institutions, many of which were used by Eritrean soldiers during the war for various purposes or otherwise damaged, looted or desecrated.

190. The evidence presented in support of Ethiopia's damages claims for these three weredas included liability phase declarations, a collection of reports from the Ethiopian Orthodox Church in Ahferom containing individually sworn accounts of damage to particular churches, and a report of the Eastern Tigray Diocese for damage in Irob. Additional reports submitted at the damages phase for these weredas were generally supported by the liability phase testimony; sworn statements from local religious officials attached to the reports provided further corroborative support.

191. The Commission found Eritrea liable for frequent (as opposed to widespread) looting and destruction of property in Gulomakheda Wereda. The damages evidence presented for that wereda duplicated that produced at the liability phase, which the Commission found to be credible evidence of frequent looting and property destruction at that phase of the proceedings. Ethiopia submitted thoroughly documented reports of extensive damage to Catholic churches in Gulomakheda and Irob Weredas prepared by the Adigrat Diocese Catholic Secretariat, including statements from local officials as to the cause of damage and documentation of loss associated with moveable and immoveable property. The Commission finds these materials to be credible and awards such damages that are compensable under violations of the *jus in bello.*

192. In Mareb Lekhe Wereda, Ethiopia relied on a collection of reports submitted at the damages phase from the Ethiopian Orthodox Church, which were sworn by local church officials attesting to damage and looting caused to two churches. The Commission finds the sworn reports of those local officials to be generally credible.

193. Some of the evidence on which the Commission relies for assessing compensation on the Central Front indicated that claimed damage was caused by shelling or provided no basis to determine the cause of damage. Considering that shelling is not compensable under the Commission's *jus in bello* find-

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ings, the Commission has segregated those instances for separate treatment under the *jus ad bellum* in Section XI of this Award. In consideration of all of the available evidence and the seriousness of the violations involved, the Commission awards Ethiopia US$4,000,000 in compensation for damage caused to religious institutions on the Central Front.

194. On the Western Front, Ethiopia claimed US$3,956,528 in compensation for looting, destruction and damage to religious institutions in Tahtay Adiabo and Kafta Humera Weredas.

195. In Kafta Humera, Ethiopia offered a report of the Humera Diocese itemizing losses associated with the looting of various churches and other damage for which the cause was unclear. The Commission accepts the evidence of looting for the purpose of assessing *jus in bello* compensation in this claim, yet notes that Eritrea was not found liable under the *jus in bello* for property damage on the Western Front and will therefore treat evidence of such damage separately under the *jus ad bellum*. Ethiopia submitted further evidence of damage to the Humera Mosque, which will also be reviewed separately under the *jus ad bellum* component of this claim.

196. In Tahtay Adiabo, Ethiopia relied on a letter of the Manager of the Northwestern Zone of Tigray Diocese of the Orthodox Church listing destroyed and damaged church properties. This letter was not accompanied by sworn reports of local officials, however. In some instances, the claimed damage was corroborated by liability phase declarations. The cause of the damage in those instances was unclear, however, and will therefore be treated in the *jus ad bellum* component of this claim. In consideration of all of the available evidence and the seriousness of the violations involved, the Commission awards Ethiopia US$475,000 in compensation for damage caused to religious institutions on the Western Front.

197. On the Eastern Front, Ethiopia claimed US$52,752 in compensation for looting, destruction and damage to religious institutions in the wereda of Elidar. Ethiopia's evidence consisted of a report of the Afar Diocese Secretariat that summarized its investigation into war damage and provided detailed reports of damage and looting to churches in the region. Ethiopia's liability phase evidence also included witness declarations regarding the destruction of several mosques, although these institutions were not specifically identified in Ethiopia's damages calculations. The cause of damage to those mosques furthermore remained unclear. In consideration of the available evidence and the severity of the violations involved, the Commission awards Ethiopia US$25,000 in compensation for damage caused to religious institutions on the Eastern Front.

198. The Commission awards a total of US$4,500,000 in compensation for material damages to religious institutions on all three fronts under *jus in bello* liability.

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3. Saba Marbles Quarry

199. Ethiopia sought US$3,252,961 for looted equipment and two years' lost profits on account of Saba Dimensional Stones Share Company ("Saba Marbles"), which had a large marble quarry and associated camp located in the vicinity of Dichinama in Tahtay Adiabo Wereda. The claim is based on allegations of looting in Tahtay Adiabo Wereda, an area where the Commission found Eritrea liable for permitting looting. As the claim falls within the scope of a finding of *jus in bello* liability, the Commission will consider it here.

200. The quarry and camp were in an area entered and occupied by Eritrean forces soon after their attack on Badme in May 2008. Eritrea's evidence recognized that Eritrean forces took the quarry; the statement of an Eritrean officer in Eritrea's Damages Group One Counter-Memorial evidence referred to a "[m]arble factory taken by our side" in the relevant area. The bulk of the claim, US$3,005,264, was for looted machinery and equipment. Ethiopia also sought approximately 3.5 million birr for lost profits between 1998 and 2000, and 1.7 million birr for salary payments made to retain skilled workers from May 1998 to September 1999.

201. The claim identified the machinery and equipment allegedly looted, and was supported by a witness declaration from the Saba Marbles General Manager and substantial documentation as to the existence and value of the lost machinery and equipment. The evidence also included declarations by four company employees describing how in May 1998 they witnessed Eritrean forces arriving at the quarry and its associated camp, and later looting heavy machinery, equipment, parts and personal property. These witnesses described Eritrean troops removing bulldozers, excavators, trucks, generators, compressors, drills and other types of equipment used in quarrying. Their statements were consistent with each other and with the documentary evidence regarding the equipment at the quarry.

202. In its Statement of Defense at the liability phase, Eritrea asserted that the quarry was located on the front lines, and that any damage there was "incidental war damage" and not compensable. Eritrea further alleged that "the Dichinama marble quarry is in Eritrea, not in Ethiopia," and that "[d]amage suffered at Dichinama is damage to the Eritrean economy, not to the Ethiopian economy." Eritrea submitted no evidence to support these contentions. The Commission sought to clarify the exact location of the quarry during the hearings, but the issue was not resolved. In any event, the claim at issue was for looting of equipment and losses stemming from the interruption of the quarrying business in an area previously under peaceful administration by Ethiopia. For these purposes, regardless of whether the quarry was in Eritrea or Ethiopia, it was not lawful for Eritrean troops to seize the company's equipment and other property and remove it by force in the manner described by the witnesses.

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203. The Commission concludes that the evidence supports Ethiopia's claim for twelve categories of looted machinery and equipment in the total amount of US$2,882,285 (applying the May 12, 1998 U.S. dollar exchange rates provided by Ethiopia for the invoiced Italian, Belgian and Swedish currencies). The Commission disallows the claim for nine allegedly looted tankers and related spare parts worth 844,435 birr as unsupported by the evidence.

204. Turning next to Ethiopia's lost profits claim, the Commission is satisfied from the record in the liability phase and the declaration of the General Manager that Saba Marbles did lose profits from May 1998 until some point in 2000. It is reasonable that, as recounted by the General Manager, the company had to clear landmines after Operation Sunset in February 1999 and so could not resume quarrying operations until September 1999, after which production was limited because of the lack of equipment caused by the looting. However, the evidence offered to support the quantum of those lost profits was sparse. In addition to the General Manager's declaration, it consisted of a one-page Production Plan for 1989–1992 E.C. and invoices showing a sale price for marble of 3,322 birr per cubic meter. Although the Production Plan indicated an anticipated 10% growth in production each year, and the General Manager stated that Saba Marbles had enjoyed a 25% profit rate prior to the war, there was no documentary support for these figures. On balance, the Commission has determined to measure lost profits against the actual pre-war annual production, which was 1,684 cubic meters of marble in 1989 E.C., and to accept the 25% profit rate in light of an active post-war construction market. Applying these criteria, the Commission calculates Ethiopia's lost profits related to Saba Marbles to equal US$333,446.

205. The Commission denies Ethiopia's claim for salary payments made from May 1998 to September 1999 to retain skilled workers, not for lack of merit but for failure of proof. The General Manager attached to his declaration two undated charts listing the total salary payments allegedly made per month, with references to "Journal voucher No." and "Payment order Letters No.," but without any supporting documentation. This leaves the Commission with no way of assessing how many workers may have been involved or the reasonableness of salary amounts.

206. The Commission awards Ethiopia a total amount of US$3,216,000 for Eritrea's illegal seizure and looting of Saba Marbles.

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X. Ethiopia's Other *Jus in Bello* Compensation Claims

A. Prisoners of War

1. The Commission's Liability Findings

207. Eritrea was found liable for the following violations of international law committed by its military personnel and other officials of the State of Eritrea:

1. For refusing permission, from May 1998 until August 2000, for the ICRC to send delegates to visit all places where Ethiopian POWs were detained, to register those POWs, to interview them without witnesses, and to provide them with relief and services customarily provided;

2. For failing to protect Ethiopian POWs from being killed at capture or its immediate aftermath;

3. For permitting beatings or other physical abuse of Ethiopian POWs, which occurred frequently at capture or its immediate aftermath;

4. For depriving all Ethiopian POWs of footwear during long walks from the place of capture to the first place of detention;

5. For permitting its personnel to threaten and beat Ethiopian POWs during interrogations, which occurred frequently at capture or its immediate aftermath;

6. For the general confiscation of the personal property of Ethiopian POWs;

7. For permitting pervasive and continuous physical and mental abuse of Ethiopian POWs in its camps from May 1998 until August 2002;

8. For seriously endangering the health of Ethiopian POWs at the Embakala, Digdigta, Afabet and Nakfa camps by failing to provide adequate housing, sanitation, drinking water, bathing opportunities and food;

9. For failing to provide the standard of medical care required for Ethiopian POWs, and for failing to provide required preventive care by segregating prisoners with infectious diseases and conducting regular physical examinations, from May 1998 until August 2002;

10. For subjecting Ethiopian POWs to unlawful conditions of labor;

11. For permitting unnecessary suffering of POWs during transfer between camps; and

12. For failing to allow the Ethiopian POWs in its camps to complain about their conditions and to seek redress, and frequently punishing POWs who attempted to complain.[43]

[43] Partial Award, Prisoners of War, Ethiopia's Claim 4 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (July 1, 2003) [hereinafter Partial Award in Ethiopia's POW Claims], *dispositif,* Section V.D.

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2. The Commission's Conclusions

208. 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.

209. 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 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.

210. Seriousness of the Violations. While damages must be awarded for all POW violations, the Commission finds that violations 1, 2, 3, 5, 7 and 8 (as quoted above from the *dispositif* in the Partial Award on liability) were the most serious, and require the heaviest damages. The seriousness of the first violation flows from the experience of many wars, which has shown that proper access to POW camps by ICRC officials and by representatives of Protecting Powers is the most effective means of restraining abuses of POWs. The absence of any such external observers makes such abuses more likely. The seriousness of killing POWs needs no explanation, nor does permitting frequent beatings of POWs. Such violations of law, as well as pervasive and continuous physical and mental abuse, seriously and adversely affect all POWs, including those who may have had the good fortune not themselves to be victims. As noted in the Commission's Partial Award on liability, the Commission was also troubled by evidence that Eritrea unlawfully treated some POWs from Tigray worse than others, and unlawfully treated certain other POWs

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as deserters to whom it gave favored treatment.[44] Failure to provide adequate housing, sanitation, drinking water, bathing opportunities and food at four of the five POW camps, thereby seriously endangering the health of the POWs held in those camps, was a serious violation that adversely affected virtually all Ethiopian POWs.

211. Numbers of Victims. The total number of Ethiopians detained as POWs during the armed conflict approached 1,100. Between May 2000 and the final repatriation in August 2002, 1,017 were held in Eritrea's Nakfa Camp, but the evidence indicates that 628 were released and repatriated between December 2000 and March 2001. The others were not released and repatriated until August, 2002.

212. Seriousness of Injuries. The nature of the most serious violations was such that serious and lingering physical and mental injuries were inevitable. The Commission also noted in its Partial Award on liability that it was "sadly impressed" by the high number (said to be approximately fifty) of the Ethiopian POWs who died in the Eritrean POW camps.[45]

213. Award. On the basis of the above considerations, the Commission awards Ethiopia US$7,500,000 for the unlawful treatment of Ethiopian POWs.

B. Treatment of Ethiopian Civilians in Eritrea

1. The Commission's Liability Findings

214. In its Group Number Two damages claims, Ethiopia claimed US$2,055,188,660 in respect of injuries, including moral injuries, allegedly inflicted upon more than 120,000 Ethiopian civilians present in Eritrea at some time during the war. As with some of its other claims, Ethiopia blended together claims based on violations of the *jus in bello* and the *jus ad bellum*. The following discussion treats the portions of this claim involving the Commission's *jus in bello* liability findings. The *jus ad bellum* elements are discussed below, together with Ethiopia's other *jus ad bellum* claims. Earlier in this Award, the Commission has discussed and rejected Ethiopia's claims for large separate awards of moral damages. Ethiopia's Group Number Two claims for additional moral damages will not be further considered here.

215. Ethiopia's Claim 5 involved Eritrea's treatment of Ethiopian civilians present in Eritrea during the war. The Commission found Eritrea liable:

> For the following violations of international law involving acts or omissions by its civilian officials, military personnel or others for whose conduct it is responsible:

[44] *Id.*, para 83.

[45] *Id.*, para. 110.

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

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

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

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

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

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

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

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

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

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

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

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12. For allowing the seizure of property belonging to Ethiopians departing other than from detention camps, prisons and jails, and otherwise interfering with the efforts of such Ethiopians to secure or dispose of their property.[46]

2. Ethiopia's Claims

216. Ethiopia's Group Number Two compensation claims did not specifically address the Commission's liability findings. Ethiopia instead contended that the Commission's liability findings showed Eritrean violations of international law to have been so serious and pervasive as to establish that every one of the 120,000 Ethiopians in Eritrea experienced some violation. Hence, Ethiopia asserted, it should be awarded additional compensation in respect of every one of the 120,000. Ethiopia did not present new evidence regarding the frequency or extent of violations, but it did submit lists of witness declarations previously in the liability record said to show the severity and extent of violations.

217. Ethiopia calculated its claims using a variant of the approach used in its Group Number One claims. It first divided all of the estimated 120,000 Ethiopians located in Eritrea when the war began into three categories, contending that persons in each category suffered broadly similar levels of mistreatment warranting similar compensation. In devising its three categories, Ethiopia noted that the Commission's liability Award indicated that the nature and extent of Eritrea's violations varied over time, with a significant deterioration of Ethiopians' treatment during and after Ethiopia's invasion of Eritrea in May 2000.

218. Ethiopia's first category ("Category I"), said to contain 35,000 persons, included Ethiopians who left Eritrea before May 2000, including some detained under abusive conditions at the Hawshaite camp beginning in February 1999. (The Parties dispute the number detained at Hawshaite.) The second category ("Category II"), with 69,700 persons, included all Ethiopians remaining in Eritrea as of May 2000, but who were not detained in Eritrean detention camps. The third category ("Category III"), of 15,300 persons, included Ethiopians remaining in Eritrea as of May 2000 who were detained in such camps. These groups were then further divided in calculating Ethiopia's damages claims, reflecting different departure dates and other variable factors.

219. For all three categories, Ethiopia claimed damages based on an estimate of the lifetime earnings of Ethiopian nationals working in Eritrea, had they worked there all their lives undisturbed by political change, aging or other events. Lifetime earnings were estimated through a complex process. Ethiopia first estimated the occupations of Ethiopians working in Eritrea, based on a statistical sample of 384 persons drawn from 30,073 persons listed in a "Compilation of Ethiopian Nationals Who Suffered Loss, Damage, or

[46] Partial Award, Civilians Claims, Ethiopia's Claim 5 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (December 17, 2004) [hereinafter Partial Award in Ethiopia's Civilians Claims], *dispositif,* Section VIII.D.

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Injury Under Statement of Claim No. 5" prepared by Ethiopia's Disaster Prevention and Preparedness Commission (the "DPPC Compilation"). The 384 individuals in the sample then were grouped into nine occupational groups. Salaries for each group were obtained from "a regional government official familiar with the economic conditions of Ethiopians living in Eritrea during the war," and from Ethiopians living in Eritrea when war began.

220. The ensuing calculations produced an estimated weighted average annual income of Ethiopians in Eritrea of US$1,684, several times the corresponding figure for Ethiopia and the amount of various estimates of per capita gross domestic product in Eritrea. Life expectancies were calculated by determining the average age of a sample of returning Ethiopians (28.9 years), and subtracting this from the average life expectancy of persons of that age (44.3 years), giving a remaining life expectancy of 15.4 years. Average annual income was multiplied by that remaining life expectancy, giving projected lifetime income of Ethiopians in Eritrea of US$25,934. This amount was not reduced to present value, or otherwise adjusted to reflect factors such as the effect of aging on earning capacity. As with its Group Number One damages claims, Ethiopia contended that various percentages of lost future income reflected the gravity and frequency of particular types of violations.

221. *Ethiopia's Category I Claims*. Ethiopia claimed US$509,932,000 with respect to 35,000 persons said to fall in Category I. This included US$9,012,000 in respect of 3,000 persons held for a period at Hawshaite camp after Ethiopia's success in Operation Sunset, plus claims for material and moral damages and for lost property for the 35,000. These equaled US$14,312 per individual, including US$9,077 in material damages (lost income), US$4,114 in moral damages, and US$1,121 for lost property. For this category, Ethiopia submitted that 35% of future earnings (US$9,077 per person) was "an appropriate differential." Ethiopia offered no new evidence or statistical or other analysis to support the estimate of 35%.

222. As indicated above, Ethiopia's claims for moral damages as a separate and additional element of the Commission's damages Awards have been dismissed and will not be considered further. The claim for US$1,121 per capita for property loss was derived from another statistical sample of property losses claimed by persons listed in the DPPC Compilation.

223. *Ethiopia's Category II Claims*. Ethiopia claimed US$1,213,362,700 for its Category II. This group included an estimated 69,700 persons remaining in Eritrea as of May 2000, but who were not detained in Eritrean detention camps. Ethiopia divided this category into subgroups, because some of the Commission's liability findings applied only to limited groups of persons or only during May through December 2000 (which Ethiopia regarded as the end of the Commission's jurisdictional period). Ethiopia contended that every person in Category II experienced one or more of the violations affecting persons in Category I, and was also at risk of additional violations found by the Commission after May 2000.

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224. Ethiopia argued that persons in Category II were exposed to more egregious forms of Eritrean behavior and were at risk for a longer period of time, and hence that per capita compensation levels should be increased accordingly. Ethiopia claimed 45% of projected lifetime earnings as material damages in respect of each of 36,700 people in one subgroup (US$11,670 per person). It claimed 50% (US$12,967) with respect to each of 33,000 people said to be covered by the Commission's liability finding regarding departure from Eritrea under unsafe and inhumane conditions.

225. Ethiopia again sought large moral damages; these claims have been dismissed. Ethiopia also claimed US$1,121 per capita for property loss for each of 31,200 persons; the lower number reflects the fact that many departures (and associated property losses) occurred after December 2000.

226. *Ethiopia's Category III Claims*. Finally, Ethiopia claimed US$331,893,960 for Category III, involving persons detained under harsh conditions in Eritrean detention camps after May 2000. Ethiopia previously contended that there were 7,000 such detainees; it maintained at this stage that further analysis showed the correct number to be 15,300. Ethiopia claimed different amounts for sub-groups within this category, believing that for jurisdictional reasons it could not claim for property losses and poor conditions of departure for persons who left after December 2000.

227. Ethiopia contended that persons in Category III experienced particularly severe suffering and abuse, and it accordingly sought higher percentages of projected lifetime earnings and larger damages for moral injury for them. By way of illustration, Ethiopia sought US$21,824 in respect of the losses of each of 13,800 people (the largest single group in Category III). It also sought additional damages for persons killed or injured by the July shootings at Wi'a camp, and for property losses. It also sought substantial moral damages, claims that have been dismissed.

3. Eritrea's Response

228. Eritrea vigorously contested the size of Ethiopia's damages claim and much of its analysis. Among other things, Eritrea contended that Ethiopia misconstrued or disregarded the Commission's liability findings, and sought compensation for thousands of people who left Eritrea for reasons for which Eritrea is not legally responsible. It maintained that Ethiopia's percentages of assumed lost future earnings were wholly arbitrary and unproven, and criticized basing the claim on inflated hypothetical annual earnings in Eritrea. It maintained that Ethiopia's evidence did not prove losses of salary income of the magnitude asserted, and that claims forms and other evidence previously filed by Ethiopia showed that the salary levels of Ethiopians in Eritrea were far lower than Ethiopia claimed. Eritrea also urged that evidence previously filed by Ethiopia did not bear out its present claims of widespread unemployment or disability among Ethiopians who left Eritrea.

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229. Eritrea disputed information in the sample Ethiopia used to determine average salary levels, introducing Eritrean government records showing incomes for many persons in the sample that were much lower than Ethiopia claimed. Eritrea also criticized Ethiopia's lists of previous witness declarations said to show the frequency of Eritrea's violations. It contended that Ethiopia mischaracterized many of these declarations, and that it continued to rely upon witnesses who had been impeached during the earlier proceedings. Eritrea also accused Ethiopia of extensive double counting, both in these lists and in calculating its damages claims.

230. Eritrea questioned Ethiopia's doubling of the number of civilians allegedly held in Eritrean detention camps, and responded in considerable detail to Ethiopia's claims for damages for persons who left Eritrea after May 2000 in government transports. Eritrea maintained that the evidence showed that the ICRC played a significant role in most departures, and that only a few people left without ICRC involvement.

4. The Commission's Conclusions: Introductory Comments

231. The Commission understands the logic of the manner in which Ethiopia organized its Group Number Two damages claims. Nevertheless, this approach has created difficulties for the Commission. The claims were not directly related to the Commission's actual *jus in bello* liability findings. Key estimates regarding the frequency of violations and the numbers of victims were not connected to the evidence. *Jus in bello* and *jus ad bellum* elements were woven together. Damages were calculated using techniques that did not appear appropriate in the circumstances.

232. As with some of Ethiopia's Group Number One damages claims, the Commission does not accept the use of percentages of projected lifetime earnings in Eritrea as the basis for determining compensation. It does not believe these provide an appropriate reference, absent evidence of permanent or long-lasting loss or impairment of individuals' physical or psychological abilities. Moreover, if projected earnings were to be used, the benchmark would have to be potential earnings in Ethiopia, not in Eritrea. Individual Ethiopians working in Eritrea did not have the assured legal right to remain there permanently, and there was insufficient basis for Ethiopia's seeming premise that "but for" the war, they would have done so. The Commission also doubts the huge differential Ethiopia portrayed between Ethiopians' earnings in Eritrea and their earnings in Ethiopia. The Commission found in its Partial Award in Ethiopia's Civilians Claims that many Ethiopians in Eritrea "had limited financial resources and held low paying jobs."[47] Ethiopia's evidence at the liability phase also suggested a different picture. A 2002 UN report in the record indicated that most returnees from Eritrea were persons with relatively

[47] *Id*., para. 11.

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low levels of education and skills. Further, the claimed amounts were not discounted to present value, or otherwise adjusted to reflect factors such as aging that may affect earnings.

233. Given the lack of clear correlation between several of Ethiopia's damages claims and the Commission's specific liability findings, and the lack of persuasive evidence regarding the claimed frequency of violations, the Commission's analysis does not mirror Ethiopia's presentation of its claims. The Commission has instead sought to assess damages due within the framework of its actual liability findings and on the basis of the evidence previously in the record.

234. This assessment must take account of the number of Ethiopians in Eritrea potentially affected by Eritrean violations. In its Partial Award in Ethiopia's Civilians Claims, the Commission estimated a pre-war Ethiopian population in Eritrea in the order of 110,000–120,000.[48] The Commission estimated that between 20,000 and 25,000 Ethiopians left Eritrea in the summer and fall of 1998, soon after the war began.[49] Indeed, the record included multiple reports suggesting that the number leaving during this early period may have been closer to 30,000.

235. Some Ethiopians leaving Eritrea during the early months of the war doubtless suffered difficulty and discomfort, but the evidence did not indicate frequent abuse of the kinds identified in the Commission's liability findings during this period. Thus, approximately 25,000 persons who left early in the war should be subtracted from the relevant population. The Commission also found that "perhaps 5,000 Ethiopians left Eritrea during 1999,"[50] further reducing the number potentially exposed to the significant violations the Commission identified in the final stages of the war and its aftermath.

5. The Commission's Conclusions

236. The Commission found Eritrea liable for a number of violations of the *jus in bello,* of varying gravity and extent. In some cases, it was possible from the record to determine with reasonable certainty the probable number of victims, providing an important reference point in assessing the compensation due. In other cases, the evidence did not support such quantification.

237. Failure to Protect From Threats and Violence. The Commission first found Eritrea liable "for failing to ensure that Ethiopians in Eritrea who were not in detention were protected against acts or threats of violence by civilian and military police and the civilian population as required by Article 27 of Geneva Convention IV." As indicated in the Commission's Partial Award, the liability phase evidence included numerous accounts describing

[48] *Id.*, para. 6.

[49] *Id.*, para. 7.

[50] *Id.*

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such acts.[51] Indeed, a few declarations alleged murders and other extreme violence against Ethiopian civilians, although these were uncorroborated and phrased in ways that led the Commission not to give them much weight. Eritrea presented rebuttal evidence showing that some of these accounts involved barroom brawls or legitimate law enforcement actions, but this was not sufficient to alter the cumulative picture.

238. It is apparent from the record that many threats were directed against Ethiopians, and that threats sometimes turned to official or private violence. Conditions worsened as the war progressed, leading to a widespread climate of anxiety and fear among Ethiopians in Eritrea. This was a serious matter, but it was not possible to determine accurately the number of incidents or the number of Ethiopians affected. The size of the Ethiopian population in Eritrea offered one reference point, particularly the male population who appeared to have been the principal targets of serious abuse on the streets. Taking account of factors such as the size of the vulnerable population and the number of accounts alleging threats or violence, the Commission awards Ethiopia US$2,000,000 for failure to protect Ethiopian civilians in Eritrea from threats and violence.

239. Failure to Ensure Access to Employment. The Commission found Eritrea liable "[f]or failing to ensure Ethiopians the right to find paid employment on the same basis as nationals after the June 2000 Cease-Fire Agreement, contrary to Article 39 of Geneva Convention IV." This finding was based upon the Commission's assessment of the totality of the circumstances after the ceasefire, "including the widespread discharge of Ethiopians by public and private employers, their ejection from public housing and the widespread if not total termination of Ethiopians' business licenses."[52]

240. The evidence did not clearly show how many persons lost or could not obtain employment on account of conduct attributable to the Government of Eritrea, although many people apparently were affected. Analysis was further complicated because the period covered by this finding was a time of economic and social turmoil in Eritrea after Ethiopia's invasion in May and June 2000, affecting both Eritreans and Ethiopians. And, while many Ethiopians may have joined the post-war exodus from Eritrea because they were unemployed, others left for other reasons.

241. In assessing the extent of damages, the Commission has taken as one reference point the earnings that individuals might have lost in Ethiopia on account of becoming unemployed in Eritrea and having to return to Ethiopia. It has also taken into account that many Ethiopians in Eritrea were employed in casual or agricultural labor, as domestics, or in other low paying jobs. Taking account of these and other circumstances, the Commission

[51] *Id.*, paras. 40–43.

[52] *Id.*, para. 52.

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awards Ethiopia US$1,500,000 for failure to ensure Ethiopian civilians in Eritrea access to employment.

242. Access to Medical Care. The Commission found Eritrea liable "for failing to ensure that Ethiopians were able to receive medical treatment to the same extent as Eritrean nationals as required by Article 38 of Geneva Convention IV." This finding was based on a limited amount of evidence indicating that public hospitals, particularly in Asmara where most Ethiopians lived, "often" or "by and large" refused to treat Ethiopians. Several witness declarations indicated that medical care was available to Ethiopians through private clinics and physicians, but that it had to be paid for. Some declarants did not claim to have been denied care in public hospitals, instead indicating they did not seek care in the belief it would be refused. Other declarations complained about the poor quality of care, not that it was unavailable. There was rebuttal evidence showing that some Eritrean hospitals did care for some Ethiopians.

243. The evidence did not show that this violation by Eritrea affected large numbers of people or caused widespread or significant injury, and Eritrea's rebuttal evidence suggested that there was not a uniform government policy of refusing access to care. Accordingly, the Commission awards Ethiopia US$50,000 for failure to ensure that Ethiopian civilians in Eritrea had equal access to medical care.

244. Wrongful Detention and Abusive Treatment While in Custody. The Commission found Eritrea liable for "detaining Ethiopians in police stations, prisons and jails without clear legal basis, without charge or trial or minimum procedural rights," "for concealing some of these Ethiopians from the ICRC," and for permitting those detained "to be subjected to physical and psychological abuse and substandard living, sanitary and health conditions."

245. The Commission found that "an unknown but appreciable number of Ethiopians was detained in Eritrean prisons and jails prior to May 2000" in circumstances covered by these liability findings.[53] These were serious violations of humanitarian law. The Commission was particularly concerned by the credible indications in the record that Ethiopian authorities sometimes moved or hid detainees to prevent access by the ICRC.[54] However, the number of these violations again was unclear, and the record contained conflicting indications. As the Commission noted in its Partial Award, approximately 15% of Ethiopia's 402 declarants claimed that they were detained. Several claimed they were held for long periods on suspicions related to security. Former "Fighters" or members of the Tigrayan People's Liberation Front or Tigrayan Development Authority appeared to have been particularly at risk of protracted and harsh detention on security grounds.[55]

[53] *Id.*, para. 75.

[54] *Id.*, paras. 74 & 75. *See also* Partial Award in Ethiopia's POW Claims, paras. 55–62.

[55] Partial Award in Ethiopia's Civilians Claims, para. 74.

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246. However, the U.S. Department of State's 2001 Human Rights Report (covering the sensitive period in 2000) took a cautious position regarding the frequency of improper or abusive detentions. It concluded that "[a]n unknown *but believed to be small number* of Ethiopians, particularly men, are believed to be held in police stations, prisons, and jails in Asmara and possibly in other areas. . . . International monitors have access to the majority of detainees in police stations and jails."[56] For its part, Eritrea contended that detentions were for ordinary criminal offenses or immigration violations. Eritrea presented evidence that there were 3,000 to 4,000 arrests for immigration law violations, which the Commission found did not violate international law.[57]

247. Taking account of the seriousness of the violations involved, but also of the uncertainties regarding their frequency and extent, the Commission awards Ethiopia the sum of US$2,000,000 for wrongful detention and abusive treatment of Ethiopians in Eritrean custody.

248. Hawshaite Camp. The Commission found Eritrea liable "for detaining Ethiopians at Hawshaite camp in western Eritrea during and after February 1999 without legal justification, and for permitting the Ethiopians so detained to be subjected to inhumane treatment and to inadequate food, sanitary and health conditions." The Commission noted that the evidence regarding detentions at Hawshaite, while "not extensive," established an unrebutted *prima facie* case that "a significant number of Ethiopians" was detained there for several months during 1999.[58] In the case of Hawshaite, Ethiopia framed its damages claim on the basis of the Commission's liability finding, claiming US$3,004 per victim, consisting of US$2,593 for material damages calculated on the basis of purported lost earnings and US$411 for a moral damages component. Ethiopia claimed a total of US$9,012,000 for the 3,000 detainees it alleges were at Hawshaite.

249. In the damages proceedings, the Parties sharply disagreed regarding the number of persons detained at Hawshaite. Eritrea contended that there were far fewer than the 3,000 Ethiopia alleged to be held there. The record regarding Hawshaite, while sparse, was sufficient to show that a considerable number of people were held there, some for substantial periods, under very poor and abusive conditions. Taking account of the available evidence, the Commission awards compensation in the amount of US$1,500,000 in respect of the harsh treatment of detainees at Hawshaite.

250. Detentions After May 2000. The Commission made several related liability findings involving the detention of large numbers of Ethiopian civilians in Eritrea under harsh conditions during and after May 2000. It found

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[56] Country Reports on Human Rights Practices for 2001, Eritrea (U.S. Department of State, Mar. 4, 2002), *available at* http://www.state.gov/g/drl/rls/hrrpt/2001/af/8370.htm (visited Aug. 14, 2009). (Emphasis added.)

[57] Partial Award in Ethiopia's Civilians Claims, para. 71.

[58] *Id.*, para. 78.

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Eritrea liable "for detaining several thousand Ethiopian civilians during and after May 2000 without sufficient justification," and for "failing to provide these detainees humane treatment and the minimum standards of food and accommodation." It also found Eritrea liable "for permitting these detainees to be subjected to acts of violence and physical abuse by camp guards, and in particular, for permitting untrained and undisciplined camp guards to use indiscriminate and excessive lethal force against detainees at Wi'a detention camp in July 2000, causing numerous deaths and serious injuries." The Commission addresses its findings relating to the use of force at Wi'a camp separately below.

251. In the current proceedings, the principal disagreement between the Parties involved the numbers of Ethiopians who were detained by Eritrea during this period. At the liability phase, Ethiopia contended that approximately 7,000 Ethiopians were detained, and this claim was noted in the Commission's Partial Award.[59] However, the Partial Award also cited ICRC reports referring to smaller numbers of Ethiopian civilians held in camps (although it was not clear if the ICRC visited all of the locations where detainees were held), as well as a U.S. State Department report citing a range of 10,000 to 20,000 persons in varying forms of confinement or restraint.[60]

252. At the damages phase, Ethiopia contended that further study showed that there were approximately 15,000 detainees, more than twice the number previously claimed. Eritrea disputed this claim.

253. The Commission's review of the conflicting evidence suggests that the number of detainees probably was larger than the 7,000 cited by Ethiopia at the liability phase, but was not as large as now claimed. (While the Commission's Partial Award noted Ethiopia's claim that there were 7,000 detainees, it did not make a finding that this was the number, and indeed cited other evidence seemingly inconsistent with that claim. Accordingly, questions of *res judicata* do not arise.) The evidence did show that detainees were held under harsh, improvised conditions, and often experienced brutal treatment.

254. Taking account of the available evidence, and of the harsh conditions under which significant numbers of Ethiopians were detained without sufficient justification, the Commission awards compensation of US$10,000,000 for these detentions.

255. Deaths and Injuries at Wi'a Camp. The Commission found Eritrea liable for permitting detainees "to be subjected to acts of violence and physical abuse by camp guards, and in particular, for permitting untrained and undisciplined camp guards to use indiscriminate and excessive lethal force against detainees at Wi'a detention camp in July 2000, causing numerous deaths and serious injuries." The award of compensation immediately above takes into account the violence and abuse directed against detainees by some

[59] *Id.*, para. 100.

[60] *Id.*

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camp guards. However, the Commission was particularly concerned in its liability finding about a serious shooting incident at the Wi'a Camp on July 11, 2000, in which guards killed at least fifteen detainees and injured at least another sixteen. An additional award is required in relation to this incident. In consideration of that incident and other conditions at the camp, the Commission awards compensation in the amount of US$500,000 for deaths and injuries at Wi'a Camp.

256. Expelled Detainees' Property. The Commission found Eritrea liable "for expelling several thousand Ethiopians from Eritrea directly from detention camps, prisons and jails during the summer of 2000 under conditions that did not allow them to protect their property or interests in Eritrea." The record indicated that most, if not virtually all, of the Ethiopians detained during and after May 2000 were directly expelled to Ethiopia from the places where they were held. Ethiopia contended that these detainees on average suffered property losses it converted to equal US$1,121 per person, based on a statistical sample of property losses claimed by persons returning to Ethiopia listed in the DPPC Compilation.

257. The Commission questions whether this survey offered a reliable guide to the true amount of property losses experienced by expelled detainees. The claimed amount appears excessive, given the economic position of most Ethiopians in Eritrea, and is inconsistent with other indications in the record. For example, a June 1999 damage assessment report by the Government of Tigray submitted by Ethiopia in the earlier proceedings indicated that 14,600 persons who had left Eritrea and resettled in Tigray as of May 1999 claimed to have lost property estimated at 34,000,000 birr. This self-appraisal of losses equaled about 2,330 birr per capita, roughly US$290 at an exchange rate of birr 8:US$1. This figure (while perhaps high, as self-appraisals of losses often are) seemed a more reliable point of reference.

258. Based on its review of a limited record, the Commission awards Ethiopia the sum of US$2,000,000 for not protecting expelled detainees' property.

259. Other Departing Ethiopians' Property. The Commission found Eritrea liable for "allowing the seizure of property belonging to Ethiopians departing other than from detention camps, prisons and jails, and otherwise interfering with the efforts of such Ethiopians to secure or dispose of their property." Ethiopia again calculated its claim based on an assumed loss of US$1,121 worth of property per capita, as derived from the DPPC Compilation. Ethiopia claimed this amount in respect of every Ethiopian adult and child who left Eritrea at any time during the Commission's jurisdictional period, including those leaving before May 2000, contending that the Commission's liability finding regarding loss of departees' property applied throughout this period. This is not correct. The Commission's finding related only to Ethiopians who departed between May 2000 and the end of December 2000. The finding was set out in a separate section of the Partial Award captioned "Claims

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After May 2000," and the related discussion in the text of the Partial Award clearly concerned only events during and after May 2000.[61]

260. Ethiopia provided no additional evidence to support its claim that Ethiopians who left Eritrea during the relevant period possessed and lost significant amounts of property (although there was evidence that many Ethiopians returning to Ethiopia were largely destitute and required assistance from relief agencies). Ethiopia's claim that there were extensive losses of property from actions attributable to Eritrea was at odds with the observation in the Commission's Partial Award that departing Ethiopians who were not expelled had reasonable opportunity to arrange their affairs prior to departure.[62] Ethiopia's contentions regarding the numbers affected were also unsustainable. To assess the number of persons who potentially lost property, it is necessary to exclude those who left in 1998, 1999 and 2001. Those who were expelled directly from Eritrean detention camps also must be excluded, as their property losses are covered above. The Commission also must take account of the economic situation of Ethiopians in Eritrea, many of whom had low-paying jobs and little opportunity to acquire property. Based on the totality of the record, the Commission awards Ethiopia US$1,000,000 for not protecting the property of other departing Ethiopians.

261. Failure to Ensure Safe and Humane Repatriation. Finally, the Commission found Eritrea liable "for failing to ensure the safe and humane repatriation of departing Ethiopians in transports that were not conducted or supervised by the ICRC." Ethiopia claimed that this finding covered more than 33,000 people. Eritrea contended that the numbers were much lower, referring, *inter alia,* to evidence previously submitted by Ethiopia suggesting that ICRC personnel frequently organized and assisted Ethiopians returning to their country.

262. The evidence cited by Eritrea did refer to substantial ICRC involvement, but was ambiguous as to time, referring to repatriations occurring through June 2002. Other documents in the record, including the ICRC's own reports and information originating from both governments, indicated that many Ethiopians made the return journey during the period at issue without ICRC involvement. Indeed, the ICRC's Annual Report for 2000 referred to having repatriated only 12,000 Ethiopians from Eritrea during 2000, the year in which the largest number of repatriations occurred. Based on its review of the evidence, the Commission concludes that many thousands of Ethiopians were returned to their country in transports that were not arranged or supervised by the ICRC. Their experiences could be harsh and sometimes dangerous, as illustrated by a video in Ethiopia's evidence showing aged and infirm deportees and small children crossing the Mareb River from Eritrea, some on the backs of Ethiopian soldiers. Nevertheless, the discomforts and distress

[61] *Id.*, paras. 132–135.

[62] *Id.*, para. 134.

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of the trip were limited in duration, and the evidence did not establish any significant loss of life or physical injury connected with these thousands of repatriations. Accordingly, the Commission awards Ethiopia US$1,100,000 in respect of these injuries.

C. Treatment of Diplomatic Property and Personnel

1. The Commission's Liability Findings

263. Ethiopia and Eritrea each filed extensive claims for alleged damage suffered from 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.

264. 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."

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

> a. for violating Article 29 of the Vienna Convention on Diplomatic Relations by arresting and briefly detaining the Ethiopian Chargé d'Affaires in September 1998 and October 1999 without regard to his diplomatic immunity; and
>
> b. having retained a box containing Ethiopian Embassy correspondence including blank passports for five years, for violating official Ethiopian diplomatic correspondence and interfering with the functioning of the mission in breach of Articles 24 and 29 of the Vienna Convention on Diplomatic Relations.

2. Ethiopia's Claim

266. At the damages phase, Ethiopia took the position that the Commission's liability findings for the diplomatic claims, for both Parties, "should be regarded as sufficient reparation in the form of satisfaction." Ethiopia noted that the relevant harm was suffered directly by the State or its diplomatic employees and, compared to the harm caused to civilians in other claims, was relatively minor. In the alternative, Ethiopia requested a

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monetary award commensurate with those awarded for personal injury and property loss. Ethiopia, which presented no new evidence at the damages phase, explicitly withdrew its *jus ad bellum* claim as it related to damages to diplomatic personnel and property.

3. Eritrea's Response

267. In response, Eritrea rejected any notion of reciprocal findings of satisfaction without monetary awards. Eritrea argued that Ethiopia could refrain from seeking such damages if it so chose, but Eritrea was entitled to full monetary damages for the comparatively "far greater" diplomatic liabilities assessed by the Commission against Ethiopia.

4. The Commission's Conclusions

268. Having reviewed the Parties' submissions and evidence submitted at the liability phase, the Commission agrees with Ethiopia that the harm it suffered was indeed nonmaterial and comparatively minor. Ethiopia failed to prove an economically measurable interference with diplomatic function in either of its successful claims. The arrest and detention of the Chargé, while a serious violation of his immunity, kept him from his official duties only for two short periods. As to the official correspondence retained by Eritrea, there was no suggestion that the Embassy or Ethiopian nationals suffered economic harm; Ethiopia did not claim for the value of the lost blank passports or other documents.

269. 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.[63] In the instant case, given Eritrea's serious but non-material interference with Ethiopia's Chargé and official correspondence, the appropriate relief is satisfaction in the form of a declaration of wrongfulness.

270. Accordingly, as appropriate reparation, the Commission reiterates its liability findings and declares that Eritrea violated the Vienna Convention on Diplomatic Relations by arresting and detaining the Ethiopian Chargé d'Affaires in September 1998 and October 1999 without regard to his diplomatic immunity, and by violating official Ethiopian diplomatic correspondence and interfering with the functioning of the Ethiopian diplomatic mission.

[63] Corfu Channel Case (U.K. v. Alb.), Judgment, 1949 I.C.J. REP. p. 244 (Dec. 15).

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XI. Ethiopia's Claims for Compensation for Eritrea's Violation of the *Jus ad Bellum*

A. Introduction

271. The Commission's Liability Findings. In response to Ethiopia's Claims 1–8, involving the *Jus Ad Bellum,* the Commission made the following findings of liability for violation of international law by Eritrea:

> 1. The Respondent violated Article 2, paragraph 4, of the Charter of the United Nations by resorting to armed force on May 12, 1998 and the immediately following days to attack and occupy the town of Badme, then under peaceful administration by the Claimant, as well as other territory in the Claimant's Tahtay Adiabo and Laelay Adiabo Weredas.
>
> 2. The Claimant's contention that subsequent attacks by the Respondent along other parts of their common border were pre-planned and coordinated unlawful uses of force fails for lack of proof.
>
> 3. The scope of damages for which the Respondent is liable because of its violation of the *jus ad bellum* will be determined in the damages phase of these proceedings.[64]

272. The question of the scope or extent of Eritrea's responsibility for breach of the *jus ad bellum* pervaded Ethiopia's Group Number One and Group Number Two damages claims. Many very large claims rested upon the contention that Eritrea is legally responsible for particular damage as the consequence of the Commission's December 2005 finding that Eritrea violated the *jus ad bellum,* the international law rules regulating the resort to armed force, in relation to its May 1998 armed attack in the Badme area.[65]

273. Ethiopia sought very large fixed-sum and actual amount damages for these *jus ad bellum* claims, frequently making separate claims for similar damage on account of violations of both the *jus ad bellum* and the *jus in bello.* Ethiopia initially advanced claims for *jus ad bellum* damages for twenty-three separate types of damage:

1. internally displaced persons;
2. civilian deaths on the war fronts;
3. civilian injuries on the war fronts;
4. civilian property damage, including religious institutions, primarily from shelling;
5. deaths and injuries caused by landmines;
6. property destruction and losses by businesses;

[64] Partial Award, *Jus Ad Bellum,* Ethiopia's Claims 1–8 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (December 19, 2005) [hereinafter Partial Award in Ethiopia's *Jus Ad Bellum* Claims], dispositif, Section IV.7.

[65] Partial Award in Ethiopia's *Jus Ad Bellum* Claims; Decision No. 7, *supra* note 10.

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7. harm to natural resources and the environment;
8. strafing and bombing of the Mekele airport in 1998;
9. deaths of Ethiopian prisoners of war while in Eritrean camps;
10. costs of operating Ethiopian POW camps;
11. departures of Ethiopians from Eritrea;
12. losses of property at Eritrean ports by Ethiopian government entities, businesses, NGOs and persons;
13. loss of tax revenues, including loss of customs revenue related to property lost at Eritrean ports;
14. damage suffered by Ethiopian Airlines;
15. damage associated with loss of tourism;
16. declines in international development assistance (loss of foreign loans, grants and assistance);
17. loss of foreign and domestic investment;
18. costs of reconstructing and rehabilitating areas in Ethiopia damaged by the war;
19. costs of assisting internally displaced persons;
20. costs of assisting persons expelled or displaced from Eritrea;
21. loss, damage and injury suffered by Ethiopia's Road Authority;
22. loss of revenues from imports and exports due to disruption of trade through Ethiopia ports; and
23. losses due to harassment and intimidation of Ethiopian Embassy staff in Eritrea and visitors to the Embassy.

274. Prior to the May 2008 hearing on Ethiopia's Group Number Two damages claims, Ethiopia withdrew a claim for migration or loss of wild animals previously included as part of its Claim 7 for environmental damage. It also withdrew Claims 10 (costs of administering prisoner of war camps), 13 (loss of tax revenues), 21 (loss by Ethiopia's Road Authority) and 22 (losses from disruption of international trade).

275. The Commission considers each of Ethiopia's separate categories of claims below. Before doing so, it must address two preliminary issues: (a) the geographical and temporal scope of liability following from the violation of the *jus ad bellum* identified by the Commission, and (b) the principles applicable to determining compensation for such a violation.

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B. Ethiopia's *Jus Ad Bellum* Claims—The Scope of Liability

1. The Parties' Positions

276. The Parties portrayed the potential extent of *jus ad bellum* liability in dramatically different terms. Ethiopia maintained that all of the types of injury listed above were proximately caused by Eritrea's May 1998 armed attack and Ethiopia's defensive responses. All were said to bear a reasonable connection to conduct that the Commission found to be unlawful, such that Eritrea should bear their full costs. In Ethiopia's view, the consequences of the Commission's *jus ad bellum* Partial Award could not be limited either temporally or spatially. Instead, "the *jus ad bellum* violation inescapably resulted in this wider condition [of wide scale hostilities] and, to the extent that there is loss, damage or injury associated with it, then that is compensable."

277. In a letter to the Commission dated December 26, 2005, Eritrea's President wrote that "despite strong reservations about the manner in which the facts and events of May 1998 were appraised and the subsequent judgment rendered," his Government would respect the Commission's adverse *jus ad bellum* ruling "in view of its prior commitments and treaty obligations to abide by all the rulings of the Commission established in accordance with the Algiers Peace Agreement," and Eritrea's counsel acknowledged Eritrea's responsibility to provide reparation for injuries proven to result from the specific violation the Commission identified. However, Eritrea contended that Ethiopia's claims far exceeded the scope of damages proximately caused by that violation, and that Ethiopia failed to prove many of the claimed injuries. Eritrea urged that, given these shortcomings, relief should be limited to satisfaction, perhaps in the form of a further declaration by the Commission that Eritrea had violated international law.

278. The Commission addressed the Parties' conflicting positions in informal guidance provided at a meeting following the April 2007 hearing, and in greater detail in Decision Number 7 of July 27, 2007.[66] It did not accept either Party's initial positions regarding the scope of compensation for the *jus ad bellum* violation. On the one hand, it did not accept Ethiopia's contention that Eritrea launched an aggressive war triggering financial responsibility for extensive liability for events throughout the two-year duration and wide geographic extent of the conflict (and after, in the case of Ethiopia's claims for the costs of operating its prisoner of war camps). On the other hand, it did not accept Eritrea's contention that Ethiopia's claims for monetary compensation for the *jus ad bellum* violation should be dismissed.

279. In Decision Number 7, the Commission reviewed the tests proposed by the Parties and the views of tribunals and commentators regarding the legal connection between an international delict and the scope of compensable injury. It concluded that, notwithstanding the concept's limitations,

[66] *Id.*

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this connection was best understood through the concept of proximate cause, informed by judgments on whether particular types of damage were foreseeable consequences of a delict. The Commission also reviewed past precedents involving compensation for uses of force, concluding that the historical record counseled caution. Because of the importance of the issue, and to allow further reflection by both Parties, the Commission reserved decision on most elements of Ethiopia's *jus ad bellum* compensation claims, resuming consideration of the issue in connection with Ethiopia's Group Number Two damages claims.

280. In its Damages Group Two Memorial and at the May 2008 hearing, Ethiopia again argued for broad *jus ad bellum* liability. In Ethiopia's view, the necessary import of the Commission's liability holding was that the entirety of the armed conflict between Eritrea and Ethiopia resulted from the May 1998 *jus ad bellum* violation. Ethiopia argued in this regard that there should be liability for the full range of a delict's potentially foreseeable consequences, not just those that appear most likely. In Ethiopia's view, the potentially foreseeable consequences of Eritrea's May 1998 actions included that which occurred—a costly two-year war along a long frontier. Accordingly, Eritrea should pay compensation for multiple types of damages, on all three fronts for the war, for the entirety of the war, as well as for various kinds of public expenditures related to the war, extensive economic damage to civilians, and other types of damage.

281. Eritrea responded by reaffirming arguments it made at the April 2007 hearing. In Eritrea's view, the scope of its liability should be confined to the specific areas and times identified in the Commission's *Jus Ad Bellum* Partial Award. Eritrea also contested the causal connection of several of the claimed types of damage to the Commission's liability finding, and maintained that Ethiopia frequently failed to prove the extensive injuries for which it sought compensation.

2. The Commission's Conclusions

282. The Commission's December 19, 2005 liability finding on Ethiopia's *jus ad bellum* claim was carefully drawn, and its meaning is illuminated by the explanations in the Partial Award and in Decision Number 7. Notwithstanding Ethiopia's characterization of the Partial Award, the Commission did not find that Eritrea bore sole legal responsibility for all that happened throughout the two years of the conflict. The Commission identified a breach of the *jus ad bellum* limited as to place and time.

> The Respondent violated Article 2, paragraph 4, of the Charter of the United Nations by resorting to armed force on May 12, 1998 and the immediately following days to attack and occupy the town of Badme, then under peaceful

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administration by the Claimant, as well as other territory in the Claimant's Tahtay Adiabo and Laelay Adiabo Weredas.[67]

283. In making this finding, the Commission dismissed as unproven Ethiopia's claim that the attack at Badme was part of a wider, pre-planned assault.

The Claimant's contention that subsequent attacks by the Respondent along other parts of their common border were pre-planned and coordinated unlawful uses of force fails for lack of proof.[68]

284. The Commission now must determine the extent of compensable damages following from the specific delict it identified. It is not the case (as Eritrea urges) that the Commission's finding limited the extent of damages to the specific places and periods it cited. Instead, the Commission must determine what injury was proximately caused by Eritrea's delict, informed by judgments regarding the consequences that should have been reasonably foreseeable to Eritrea's military and civilian leaders at the time of its unlawful action. This involves both legal and factual considerations.

285. *Legal Considerations*. The International Court of Justice has employed broad language to describe the reparation that should follow from a breach of the *jus ad bellum,* but its judgments have not addressed concretely the types or extent of damage to be regarded as proximately caused by a delict. Most recently, the Court in *Congo v. Uganda* affirmed in broad terms "that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act," but it left it to the parties to determine in the first instance what this meant through negotiations.[69] This process has not yet borne fruit. In *Cameroon v. Nigeria,* the Court found that Nigerian armed forces and police were present in large areas found to belong to Cameroon, but it denied further relief, concluding that "by the very fact of the present judgment and of the evacuation of the Cameroonian territory occupied by Nigeria, the injury suffered by Cameroon by reason of the occupation of its territory will in all events have been sufficiently addressed."[70] *Nicaragua v. United States* affirmed the United States' responsibility for unlawful uses of force, but the case was withdrawn by Nicaragua while the damages phase was underway.[71]

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[67] Partial Award in Ethiopia's *Jus Ad Bellum* Claims, *dispositif,* Section IV.B.1.

[68] *Id.*, Section IV.B.2.

[69] Armed Activities on the Territory of the Congo (Congo v. Uganda), Judgment, 2005 I.C.J. REP. p. 82, paras. 259–260 (Dec. 19).

[70] Case Concerning The Land and Maritime Boundary Between Cameroon And Nigeria (Cameroon v. Nig.: Eq. Guinea Intervening), Judgment, 2002 I.C.J. REP. p. 153, para. 319 (10 Oct.).

[71] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Order of 26 Sept. 1991, 1991 I.C.J. REP. p. 47.

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286. Some other international courts, tribunals and commissions have wrestled with whether particular types of damage have the requisite causal connection to a delict. Their decisions offer some guidance, at two levels. First, some decisions suggest the outer boundaries of compensable damage. Since at least the *Alabama* arbitration, panels have rejected claims for damages to generalized economic interests of the victorious State or its nationals, or to its expenses in waging war. The *Alabama* Commissioners thus concluded that the claims of the United States for the transfer of American merchant vessels to British registry, increased insurance costs, and the prolongation of the war and associated costs "do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation."[72] The United States-German Mixed Claims Commission, cited with approval by both Parties, emphasized the need for a direct causal connection between a loss and the actions of the defendant State, and rejected claims for "all damage or loss in consequence of the war."[73] More recently, in creating the United Nations Compensation Commission, the Security Council sought to limit the extent of compensable damage by confining jurisdiction to "direct" claims against Iraq.[74]

287. Most of Ethiopia's *jus ad bellum* damages claims respected the principles reflected in these past decisions, and Ethiopia has withdrawn some that arguably do not. Nevertheless, as discussed below, some of Ethiopia's claims involved types of damage to broader economic interests that were substantially removed from Eritrea's delict.

288. On a second level, past decisions offer informative precedents for some specific types of damage now claimed. Thus, in the case of post-conflict injuries from mines of unknown origin, the Commission found persuasive Umpire Parker's analysis in a claim before the U.S.-German Mixed Claims Commission.[75] The UNCC also addressed some questions and types of injury akin to those here; the Commission found persuasive the UNCC's practice of including damage resulting from actions by the forces of both parties

[72] Record of the Proceedings of the Tribunal of Arbitration, June 19, 1872, *reprinted in* III Marjorie M. Whiteman, Damages in International Law p. 1773 (1943).

[73] *Id*., pp. 1793–94.

[74] See N. Wühler, Causation and Directness of Loss as Elements of Compensability Before the United Nations Compensation Commission, in The United Nations Compensation Commission p. 205 (R. Lillich ed., 1995).

[75] Eisenbach Brothers & Company (U.S. v. Germ.), Administrative Decisions and Opinions of a General Nature and Opinions and Decisions in Certain Individual Claims pp. 857–858 (Parker, Umpire, 1933), *quoted in* WHITEMAN, *supra* note 72, at pp. 1796–97 (the loss when a cargo vessel struck a mine in 1919 was directly attributable to the hostile act of planting the mine, even if the loss occurred after hostilities ended, and the mine could have been placed either by Germany or by an opposing belligerent).

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to a conflict.[76] However, for several types of injuries claimed by Ethiopia, Whiteman's observation remains apt: "While there has been more or less agreement that certain types of damage are unreasonable, there has been no such agreement as to the reasonableness or unreasonableness of a wide variety of types of damage."[77]

289. *Factual Considerations, Proximate Cause and Foreseeability.* Past decisions and practice suggest elements of a legal framework for analyzing compensation claims for violation of the *jus ad bellum,* but they do not answer other basic questions. Like the U.S.-German Mixed Claims Commission before it, the Commission does not believe that a State's international responsibility in a case such as this extends to all of the losses and disruptions accompanying an international conflict. A breach of the *jus ad bellum* by a State does not create liability for all that comes after. Instead, there must be a sufficient causal connection. The Commission concluded in Decision Number 7 that this was best expressed through the concept of proximate cause. The nature and extent of the causal connection between Eritrea's conduct in May 1998 and ensuing events involves assessments of facts regarding the character and course of the armed conflict. This task has been complicated and uncertain. As time passed, the conflict was driven or shaped by both Parties' actions, by the actions of outside parties, and by the element of chance that pervades battlefields. Not surprisingly, the record rarely illuminated either Party's motivations and intentions.

290. In assessing causation, the Commission has tried, *inter alia,* to weigh whether particular consequences were, or should have been, foreseen by Eritrea's leaders in the exercise of reasonable judgment at the time of Eritrea's delict in May 1998. In this regard, Ethiopia urged a broad notion of foreseeability, contending that Eritrea should have foreseen, and should be held to account for, a wide range of results of its May 1998 actions, including each of the types of injury for which Ethiopia claimed compensation. The Commission believes that a more nuanced view is required. It agrees that the test of foreseeability should extend to a broader range of outcomes than might need to be considered in a less momentous situation. A substantial resort to force is a serious and hazardous matter. A party considering this course is bound to consider matters carefully, weighing the costs and possible bad outcomes, as well as the outcome it seeks. This is particularly so given the uncertainties of

[76] *See, e.g.,* UNCC Decision 17, S/AC.26/1991/Rev/1 (March 17, 1992) (covered claims include "any loss suffered as a result of . . . [m]ilitary action or threat of military action by either side. . . .").

[77] WHITEMAN, *supra* note 72, at p. 1767.

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armed conflict.[78] At the same time, if a party is deemed to foresee too wide a range of possible results of its action, reaching too far into the future, or too far from the battlefield, foreseeability loses meaning as a tool to assess proximate cause. If all results are foreseeable, the test is meaningless.

3. The Temporal and Territorial Scope of Liability

291. Based on its assessment of the facts available, and as described more fully below, the Commission concludes that injuries involving Ethiopian civilians and civilian property connected with the conflict in the areas and during the periods described below were proximately caused by Eritrea's May 1998 delict.

292. *The Western Front.* The clearest case involves injury to civilians and damage to civilian property resulting from the conflict on the Western Front of the war, from May 1998 until Ethiopia's military success in its Operation Sunset, concluding in March 1999. During this period, Eritrean forces occupied areas on the Western Front that were claimed by Eritrea but previously peacefully administered by Ethiopia, as well as Ethiopian territory that was not in dispute. Given that the purpose of the operation at Badme was to gain control of territory Eritrea regarded as its own, it was, or clearly should have been, foreseeable to Eritrea's leaders that Eritrean forces would seize and occupy the areas involved in the initial attacks, as well as additional areas claimed by Eritrea or that were required to secure and hold territory occupied by Eritrean forces.

293. Moreover, it was, or should have been, readily foreseeable to Eritrea's leaders that Ethiopia would resist the invasion of Badme and associated areas. It was, or should have been, readily foreseeable that the result would be a substantial conflict on the Western Front for so long as Eritrean forces occupied Badme and other areas on that front either in Ethiopia or previously under Ethiopian administration. Indeed, the level of Eritrean forces initially deployed at Badme in May 1998—which the Commission found involved several brigades supported by tanks and artillery—suggests that Eritrea's commanders did anticipate the possibility of significant Ethiopian resistance and of a substantial conflict.

294. It was, or clearly should have been, foreseeable that these military operations would result in Ethiopian civilian casualties and damage to Ethiopian civilian property, both in the areas on the Western Front occupied by Eritrea's forces, and on the Ethiopian side of the opposing armies' lines.

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[78] The Commission thus does not share the view of the British and American Commissioners assessing the Samoan claims who believed that, in a pre-Charter case involving resort to force, damages should be limited only to those "which a reasonable man in the position of the wrong-doer at the time would have foreseen as *likely* to ensue from his action." WHITEMAN, *supra* note 72, at p. 1780 (emphasis added).

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295. Operation Sunset involved extensive military operations through which Ethiopian forces retook the Badme area and other disputed or Ethiopian territory occupied by Eritrea on the Western Front. Thereafter, the principal lines of engagement on that front moved into territory that was unquestionably Eritrean.[79] After that time, many displaced civilians were able to return to their localities, although some returns were delayed by the need to clear landmines. However, as discussed more fully below, some additional casualties were caused by landmines planted while the conflict was active.

296. Eritrea is liable to provide compensation for injuries involving Ethiopian civilians and civilian property resulting from the military conflict (a) in the area including Badme and its environs, and (b) throughout all other areas on the Western Front where Ethiopian forces faced Eritrean forces occupying, or engaging in hostilities within, territory in Ethiopia or peacefully under Ethiopian administration prior to May 1998. Except for certain types of damage not subject to temporal limitation (notably injuries caused by landmines, and continuing costs of care for internally displaced persons unable to return to their homes), the relevant period extended from May 1998 until Ethiopia's Operation Sunset offensive ended in March 1999, bringing about the removal of Eritrean forces as described above.

297. Assessments of proximate causation and foreseeability become more complex and less certain as to injuries occurring at greater remove in space and time from the initial fighting in Badme and on the Western Front. In making these assessments, the Commission has given significant weight to the seriousness of a decision by a State to resort to the large-scale use of force. Such a momentous decision places a heavy obligation on the acting State's leaders to analyze and weigh carefully the potential consequences of their intended action. In this regard, a State choosing to resort to force in violation of the *jus ad bellum* bears responsibility for the foreseeable results both that it desires, and those it does not.

298. *The Central Front*. The Commission rejected as unproven Ethiopia's contention that the large-scale clashes between Eritrean and Ethiopian forces as the conflict spread east in May and June 1998 reflected a pre-planned Eritrean campaign of attacks violating the *jus ad bellum*.[80] Nevertheless, following the attack on Badme, powerful new forces came into operation that should have been readily foreseen by Eritrea's leaders and military commanders at the time of the attack on Badme in May 1998: the imperatives of military strategy and geography. Zalambessa is located at a key strategic location

[79] On February 27, 1999, following significant reverses in the course of Operation Sunset, Eritrea sent letters accepting the Organization of African Unity ("OAU") Framework Agreement for settlement of the dispute. Ethiopia had previously accepted the agreement as well. That same day, the UN Security Council adopted a presidential statement welcoming Eritrea's action, and demanding that the parties cease hostilities. For reasons that are disputed between the Parties, hostilities continued.

[80] Partial Award in Ethiopia's *Jus Ad Bellum* Claims, para. 18.

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on what became known as the Central Front. The principal road connecting Addis Ababa and Asmara—one of the few all-weather roads connecting Ethiopia and Eritrea, and the principal and most direct route between the two capitals—crosses the frontier there. It was, or should have been, readily apparent to Eritrea's leaders that, once a conflict began, neither Party could leave the principal avenue connecting their capitals open for control by the other Party.

299. Given this, the Commission believes that the rapid spread of the conflict along the general line of the border eastward towards Zalambessa, and the serious fighting that ensued at Zalambessa and at other locations on the Central Front, was the proximate result of Eritrea's breach of the *jus ad bellum*. It was, or should have been, readily foreseeable to Eritrea's senior leaders that, following the seizure of Badme, fighting would quickly spread eastward toward the Zalambessa area and into Irob Wereda, and that Ethiopia would mount a stiff resistance throughout the Central Front area.

300. On the Central Front, the Parties settled into lines of engagement that remained largely stable throughout the war. In many areas, Eritrean forces held positions in Eritrea north of the Mareb River, or in other areas unquestionably located within Eritrea. However, Eritrean forces also occupied or conducted shelling or otherwise engaged in hostilities in other territory that was either in Ethiopia or was under peaceful administration by Ethiopia prior to May 1998. In these areas, Eritrea is liable for injury to Ethiopian civilians or civilian property throughout the period of Eritrean forces' presence or operations, which in some cases extended until June 2000. Further, as in the case of the Western Front, Eritrea is liable for certain types of damage not subject to temporal limitation, notably injuries caused by landmines, and proven costs of care for internally displaced persons unable to return to their homes.

301. *The Eastern Front*. The Eastern Front of the war was the most geographically distant from Eritrea's initial attack on Badme. It was located in the sparsely populated Afar Region, which includes some of the hottest and harshest terrain on Earth, with few roads and little water. The fighting was most intense in Elidar Wereda in the east of the Afar Region, particularly around the Ethiopian border town of Bure. There was also fighting elsewhere, particularly in Dalul Wereda, a sparsely populated border area adjoining Irob Wereda in the northwest of the Region.

302. Bure is located near the tri-point of Ethiopia, Eritrea and Djibouti, on the road connecting Ethiopia to the Eritrean port at Assab. Assab was Ethiopia's primary outlet to the sea before Eritrea's attack on Badme in May 1998, and much of Ethiopia's ocean-borne export and import cargo traveled this road. As discussed in the Commission's Award in Ethiopia's Ports Claim,[81]

[81] Final Award, Ports, Ethiopia's Claim 6 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (December 19, 2005) [hereinafter Final Award in Ethiopia's Ports Claim].

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those in Eritrea responsible for operating the port at Assab allowed significant amounts of valuable cargo to continue to move to Ethiopia for some time after the attack on Badme, perhaps hoping that the geographic scope of the conflict would somehow be contained.

303. Nevertheless, the Commission believes that it was, or should have been, readily foreseeable to Eritrea's leaders that the conflict could not be contained, and that it would spread to Elidar Wereda, particularly around Bure, with associated heavy costs to Ethiopian civilians and civilian infrastructure. Just as with Zalambessa, the imperatives of military strategy and geography gave rise to a situation that was likely to, and did, lead to intense fighting. In this harsh setting, the all-weather road connecting Assab in Eritrea with Ethiopia, and ultimately with Addis Ababa, had enormous strategic importance. A successful Ethiopian attack up the road into Eritrea toward the Red Sea might bring the capture of Assab, giving Ethiopia control of an ocean port and a great political and psychological victory. A successful Eritrean attack in the opposite direction might allow Eritrea to cut the road and rail links between Ethiopia and the port of Djibouti. This would deprive most of Ethiopia of access to a seaport for most of its imports and exports. Neither side could risk allowing the other such a victory, as Eritrea's leaders should have foreseen.

304. Accordingly, the Commission concludes that the causal connection between Eritrea's initial attack at Badme and the conflict that subsequently developed in Elidar Wereda is sufficiently clear and direct to hold Eritrea responsible for the ensuing injuries to Ethiopian civilians and civilian infrastructure in that wereda throughout the period of Eritrean forces' presence or operations, which sometimes extended until June 2000. Further, as in the case of the Western and Central Fronts, Eritrea is liable for certain types of damage not subject to temporal limitation, notably injuries caused by landmines, and documented costs of care for internally displaced persons unable to return to their homes.

305. Dalul Wereda is an area largely populated by nomadic Afar People in the area of the scorching and arid Danakil Desert and Depression. Its geographic and strategic situation differs from that of Elidar Wereda. Nevertheless, the Commission believes that, given the Parties' past military encounters in the area, it should have been reasonably foreseeable to Eritrea's leaders that the conflict would spread here too, with ensuing injury to civilians. Eritrea had alleged that Ethiopia unlawfully intruded upon its territory in this region in July-August 1997[82] when Ethiopia purportedly sent troops in to deal with internal armed opposition of the Afar people, establishing bases on what Eritrea considered to be its territory. Given this history and Eritrea's territorial claims, it should have been foreseeable to Eritrean leaders that, if Ethiopia refused to accept the Eritrean occupation of Badme, then the conflict would inevitably spread even to the Afar area, in which event Eritrea would occupy its claimed territories in

[82] *See* OAU Framework Agreement, *supra* note 79.

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that area. Accordingly, as in the case of Elidar Wereda, Eritrea is liable for the resulting injury to Ethiopian civilians or civilian property.

C. Determining the Amount of *Jus Ad Bellum* Compensation

306. The Commission faces difficult and unsettled questions regarding the principles to be applied in assessing the amount of compensation due on account of Eritrea's *jus ad bellum* violation.

307. Past judicial decisions and State practice offer limited guidance. While decisions provide some assistance in identifying types of damages that may be compensable in cases involving uses of force, they rarely examine questions relating to quantification. As noted earlier, a few International Court of Justice judgments have called for liability in broad terms in circumstances involving use of force, but the Court has only once determined compensation in a concrete situation. That case—*Corfu Channel*—involved damage claims much different from those here.[83]

308. Given the limited guidance available from past decisions, the Commission weighed several factors in assessing the amount of compensation that should follow from a breach of the *jus ad bellum.* A threshold question was whether any award of damages should be designed to serve the exceptional purpose of helping to deter future violations of Article 2, paragraph 4 of the Charter of the United Nations, or should, instead, serve the more conventional purpose of providing appropriate compensation within the framework of the law of State responsibility. As to this, the Commission understands the latter to be its responsibility, and it doubts that possible awards of monetary compensation would be likely to deter a State contemplating action in breach of the *jus ad bellum.* Under the Charter of the United Nations, the Security Council has primary responsibility for addressing (and deterring) violations of Article 2, paragraph 4 of the Charter, *inter alia,* by its authority to impose sanctions. Other deterrents are found in the rights of individual and collective self-defense, and in the risk of criminal punishment of government officials responsible for deciding upon the unlawful resort to force. The prospect of potential monetary liabilities seems of little comparative weight.

309. The Commission considered whether an award of compensation should reflect a precise quantification of the amounts of particular physical, economic or other varieties of damage caused by Eritrea, not otherwise compensable under the *jus in bello,* or a more general assessment of the character of the injury inflicted upon the State of Ethiopia in light of the Commission's decisions regarding Eritrea's *jus ad bellum* liability.

[83] *See* Corfu Channel, s*upra* note 63, at p. 244.

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310. The answer was dictated by the nature of the claims and of the underlying evidence. These claims often involved damage that was uncertain in extent and effect, and that occurred in remote locations. Clear proof of specific injury was often lacking, but requiring rigorous proof in the circumstances could both defeat the objective of providing compensation for injury and exceed the capacities of both the Parties and the Commission. Accordingly, as with other claims, the Commission made its best assessment, drawing upon a variety of indicators. The extent of compensable injury and damage, and the amount of appropriate compensation, frequently involved rough approximations.

311. In assessing compensation for violations of the *jus in bello,* the Commission sought to link the amount of compensation to the gravity of each type of violation. Such considerations have far less weight in assessing damages compensable solely on account of violation of the *jus ad bellum*. Ethiopia's *jus ad bellum* claims often alleged injury connected with military activities that the Commission earlier determined were not themselves unlawful. For example, Ethiopia claimed for damage to housing caused by artillery, civilian casualties from landmines, and damage and civilian casualties from Eritrea's 1998 bombing of the Mekele Airport. The Commission earlier determined that all of these actions did not violate the *jus in bello.* These underlying acts, by definition, were not themselves unlawful, and should not give rise to compensation on the same basis as violations of the *jus in bello.*

312. In a similar vein, the Commission believes that the law of State responsibility must maintain a measure of proportion between the character of a delict and the compensation due. Ethiopia strongly urged this principle in a different setting, in claiming huge moral damages, on the ground that Eritrea had committed egregious delicts meriting massive additional compensation. Eritrea's violation of the *jus ad bellum* in May 1998 as found by the Commission was serious, and had serious consequences. Nevertheless, that violation was different in magnitude and character from the aggressive uses of force marking the onset of the Second World War, the invasion of South Korea in 1950, or Iraq's 1990 invasion and occupation of Kuwait. The Commission believes that determination of compensation must take such factors into account.

313. The Commission also considered whether an award of compensation should be limited as necessary to ensure that the financial burden imposed on Eritrea would not be so excessive, given Eritrea's economic condition and its capacity to pay, as seriously to damage Eritrea's ability to meet its people's basic needs. As discussed previously, claims of compensation in claims of this magnitude may raise significant questions at the intersection of the law of State responsibility and fundamental human rights norms, notably those contained

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in common Article I(2) of the ICESCR and the International Covenant on Civil and Political Rights and in Article 2(1) of the ICESCR.[84]

314. In this regard, the Commission notes that, in situations involving unlawful use of force, States and the United Nations have created regimes or accepted outcomes involving compensation for far less than the damage caused by the unlawful use of force. Doubtless the experience of 1918 when the victors tried to extract substantial compensation from Germany was an important learning experience, as it contributed to dreadful consequences. Neither Germany nor Japan was made to bear financial responsibility for more than a fraction of the injury caused by their conduct in starting and waging the Second World War, although both suffered some mandated cession of territory. The experience of the UNCC, frequently cited by both Parties, is also instructive. Unlike the Parties in these proceedings, Iraq is a country with great natural wealth. Nevertheless, when the UNCC was created, the UN Secretary-General and the Security Council took pains to assure that any funds provided to the UNCC to pay claims were in excess of amounts required for Iraq's imports and debt service.[85]

315. The caution in setting levels of compensation reflected in these past experiences highlights another important concern. The process of moving from war to a stable and mutually beneficial peace often is difficult and uncertain, as the Parties' current relations show. Informed by the unhappy consequences of reparations under the Treaty of Versailles, most States have been concerned to ensure that programs for compensation or reparation do not themselves undermine efforts to accomplish a stable peace. The Commission would be greatly concerned if its efforts to carry out the mandate given it by the Parties led to a further deterioration of their relations, and impaired the prospects for a durable peace.[86]

316. Further considerations warrant caution. If compensation to a State for a violation of the *jus ad bellum* is to be calculated on the same basis as for the violation of the *jus in bello,* and if, as Ethiopia contends, a State initiating a conflict through a breach of the *jus ad bellum* is liable under international law for a wide range of ensuing consequences, the initiating State will bear exten-

[84] *See* para. 19 *et seq. supra.*

[85] Report of the Secretary-General pursuant to paragraph 10 of Security Council Resolution 687, S/22559 (May 2, 1991); Letter from the Secretary-General to the President of the Security Council, S/22661 (May 31, 1991). Over the years of its operation, the UNCC found liability against Iraq in a principal amount of about US$52 billion dollars, roughly 15% of the amount claimed. Less than half of that amount has been paid, and further substantial payments through the UNCC mechanism do not appear likely. *See* Status of Processing and Payment of Claims, *available at* www2.unog.ch/uncc/status.htm (visited March 31, 2009).

[86] *See* Carsten Stahn, *"Jus ad Bellum," "Jus in Bello" . . ."Jus post Bellum"?: Rethinking the Conception of the Law of Armed Force,* 17 EUR. J. INT'L L. pp. 921–943 (2006), *reprinted in* INTERNATIONAL LAW: CLASSIC CONTEMPORARY READING (Charlotte Ku & Paul F. Diehl eds., 3d ed. 2009).

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sive liability whether or not its actions respect the *jus in bello.* Indeed, much of the damage for which Ethiopia claims *jus ad bellum* compensation involves conduct that the Commission previously found to be consistent with the *jus in bello.* Imposing extensive liability for conduct that does not violate the *jus in bello* risks eroding the weight and authority of that law and the incentive to comply with it, to the injury of those it aims to protect. The Commission believes that, while appropriate compensation to a claiming State is required to reflect the severity of damage caused to that State by the violation of the *jus ad bellum,* it is not the same as that required for violations of the *jus in bello.*

317. As noted throughout this Award, determining compensation in cases such as these is often necessarily an imprecise and uncertain manner. This is particularly so in determining compensation for Eritrea's *jus ad bellum* violation. Guided by the principles described above, the Commission has used its best judgment in determining appropriate compensation for Eritrea's violation of the *jus ad bellum* in particular instances, which compensation is additional to that for the violations of the *jus in bello* dealt with in Sections VIII through X above.

D. Fixed Amount Compensation (Ethiopia's Categories 1–5)

1. Introduction

318. Ethiopia claimed large amounts as fixed-sum compensation for several of the types of injury listed above. These claims all involved injuries said to have been suffered by large groups of people as the result of military operations—by both Parties—that the Commission found did not violate the *jus in bello.* Ethiopia brought such claims for internally displaced persons (category 1), civilian deaths and injuries on the war fronts (categories 2 and 3), civilian property damage (category 4), deaths and injuries attributed to landmines (category 5), deaths of Ethiopian prisoners of war in Eritrean camps (category 9) and departures of Ethiopians from Eritrea (category 11). This section addresses the first five of these; the other two (prisoners of war and departures from Eritrea) are discussed separately below.

319. The Commission agrees that most of these types of injuries are the proximate and foreseeable results of Eritrea's delict, and warrant compensation to Ethiopia. The challenge lies in identifying compensable damages, given the limitations of the evidence and the manner in which the claims were presented. Many of Ethiopia's written pleadings took the form of multi-page recitals of individual witnesses' allegations. The underlying witnesses' statements, however, often did not indicate when events occurred, or where they occurred in relation to places identifiable on either Party's maps.

320. The liability phase evidence often provided little information regarding the frequency of particular types of violations, and Ethiopia did not

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offer additional evidence on this at the damages phase. Moreover, the amounts claimed as damages often appeared excessive and unsupported by the evidence. Given these limitations, the Commission has had to make approximate judgments regarding the frequency of injury and the level of compensation.

2. Internally Displaced Persons (Category 1)

321. Military operations frequently result in civilians being internally displaced, often with great human and economic costs. At the liability phase, the Commission found that internal displacement was not itself a violation of the *jus in bello.* However, large-scale internal displacement in the areas and times indicated above was the direct and foreseeable result of Eritrea's breach of the *jus ad bellum.* Accordingly, Eritrea is liable for injury to Ethiopians who were internally displaced from those areas and during those times on account of the war.

322. The displacement of many thousands of persons on account of Eritrea's violation of the *jus ad bellum* was a most serious consequence of the conflict. Many displaced persons suffered the loss of shelter, animals and essential household and farming implements. Those losses produced destitution and dependency on the relief provided by their government and by international agencies. The food and health conditions in many relief camps were often inadequate to meet the basic needs of many families, particularly young children. The Commission believes it is peculiarly the office of the *jus ad bellum* to provide a basis for compensation in the case of IDPs whose displacement was proximately caused by a violation of the *jus ad bellum.*

323. Most of those displaced were women and children. IDPs included both persons who fled their homes to escape ongoing military operations nearby, and others who left areas near the border as a precaution. The record shows that Tigray officials encouraged extensive evacuations from border areas in late 1998, when hostilities were at a comparatively low level, significantly increasing the number of IDPs. The record did not explain the circumstances leading to these evacuations, although Eritrea's October 1998 shelling of the town of Sheraro apparently was a factor.[87] The Commission views the evacuation of civilians from areas potentially affected by conflict at the urging of government authorities as a reasonable and foreseeable consequence of a breach of the *jus ad bellum.* Thus, the relevant population included both persons who fled their homes to escape nearby fighting, and others who left at the urging of government officials.

324. Ethiopia alleged that Eritrea's *jus ad bellum* violation caused the displacement of 349,837 Ethiopians, and claimed over US$1.5 billion as compensation. The claimed amount included US$209,913,910 in material damages (approximately US$600 per individual) and over US$1.3 billion in moral damages. Ethiopia calculated its material damages claim by multiplying the

[87] *See* para. 340 *infra.*

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average annual income of persons in regions affected by the war by an elaborate calculation of the total number of "displaced persons years." Ethiopia also made separate claims that included (although they were not limited to) IDPs' property losses from looting and damage to their houses and real estate, as well as claims for expenditures in receiving and caring for IDPs. These additional claims are addressed below.

325. Eritrea did not directly join issue with the accuracy of Ethiopia's numbers of displaced persons. Rather, Eritrea used those figures to argue that the high proportions of people displaced from war-affected regions undermined the credibility of the figures Ethiopia provided for fixed amount damages incurred by the remaining population on the basis of *jus in bello* violations. In addition to disputing its *jus ad bellum* liability for internally displaced persons, Eritrea argued that Ethiopia sought to recover damages for harms caused by its own actions, contending that it was the presence of landmines and Ethiopia's military operations that prevented displaced persons from returning to their homes.

326. As noted previously, the Commission has rejected Ethiopia's claims for large additional increments of moral damages, and the claim for over US$1.3 billion in additional moral damages will not be considered further here. However, it has taken into account the evidence of the nature of IDPs' injuries and experiences in considering the level of compensation.

327. The starting point for assessing this claim is the number of internally displaced persons falling within the scope of the Commission's *jus ad bellum* liability finding. The record included numerous documents, reports and briefings emanating from the Ethiopian government, the authorities in Tigray, and various UN and relief organizations regarding the numbers displaced on account of the war. These frequently cited a total proffered by the Government of Ethiopia of 349,837 displaced persons, 315,836 of whom were displaced in Tigray and 33,901 in Afar. These figures appeared to be the basis for Ethiopia's calculation of this claim.

328. The repetition by multiple sources of Ethiopia's estimated numbers of displaced persons did not necessarily make those numbers more reliable, and the evidence regarding internally displaced persons was not wholly consistent. Some reports by local officials suggested that the numbers of internally displaced persons in their areas of responsibility were significantly smaller than estimated by the national authorities. Ethiopia's numbers appeared to be an aggregate of estimated peak numbers of displaced persons recorded at specific points in time, although the numbers of displaced persons and the length of their displacement varied over the period of the conflict, casting further uncertainty as to the accuracy of those numbers.

329. Documents in the record also indicated that the estimate of nearly 350,000 internally displaced persons included many thousands of Ethiopians who returned to Ethiopia from Eritrea. These people, said by Ethiopia ultimately to number about 120,000, were addressed in other substantial *jus ad*

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bellum and *jus in bello* claims by Ethiopia.[88] Including them for purposes of this claim would result in double counting. Consequently, the estimated numbers of IDPs must be reduced significantly to take account of persons leaving Eritrea for whom Ethiopia also claimed elsewhere.

330. A further complication is that some areas in Tigray were plagued at relevant times both by war and by drought, and both afflictions caused displacement. The evidence did not distinguish between persons who left their homes on account of the war, and those who left for other reasons. However, it was clear that the war was by far the most significant cause of internal displacement, and the Commission has not taken drought into account in seeking to assess the numbers of persons displaced on account of the *jus ad bellum* violation.

331. The Commission concludes that the number of persons whose displacement was proximately caused by Eritrea's May 1998 violation of the *jus ad bellum* is substantially less than the total claimed by Ethiopia, perhaps two thirds of that number, perhaps somewhat less. Periods of displacement varied. Some persons displaced on the Western Front were able to return to their homes following the success of Operation Sunset in early 1999, although some returns there were delayed by the need to remove landmines or other impediments to return. Other IDPs, such as those from the Zalambessa area, were displaced for much longer periods. These people could return to their homes only beginning in June 2000, or even later in areas affected by landmines or other impediments.

332. Ethiopia's claim for internally displaced persons sought redress for the human suffering and income loss associated with their displacement. (As noted, IDPs' property losses from looting, damage to their houses and real estate, and Ethiopia's expenditures in receiving and caring for IDPs, were all subject to separate claims by Ethiopia addressed elsewhere in this Award.) Taking account of, *inter alia,* the number of internally displaced persons falling within the scope of Eritrea's *jus ad bellum* liability, the varying durations of their displacement, the personal and economic consequences of displacement, and Ethiopia's other relevant claims, the Commission awards US$45,000,000 to Ethiopia on account of this claim.

3. Civilian Deaths and Injuries (Categories 2 and 3)

333. *Ethiopia's Claim.* Ethiopia claimed US$205,167,028 as *jus ad bellum* material damages with respect to 39,881 civilians whose deaths were said to result from the war on all three fronts, but who were not covered by Ethiopia's other claims. Ethiopia alleged these deaths included deaths from intentional and indiscriminate shootings on the Western Front and deaths throughout all three fronts from shelling and aerial bombardments. Ethiopia's claim reflects

[88] *See* Sections X.B *supra* and XI.K *infra.*

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fixed amounts of more than US$5,000 per capita for the alleged victims. It claimed an additional US$102,583,514 on account of an equivalent number of injuries, with a per capita amount for each injury equal to half the amount claimed for deaths.

334. At the liability phase, the Commission rejected as unproven both Parties' claims that the other engaged in shelling that was indiscriminate or otherwise contrary to the *jus in bello*. The Commission finds, however, that Eritrea is liable for deaths and injuries caused by shelling and gunfire in the regions for which there is *jus ad bellum* liability. Death and injury are particularly severe consequences of armed conflict; deaths and injuries caused by weaponry are the direct result of such conflict. While the Commission takes into consideration the seriousness of such harm in assessing compensation, the extent of such injury must be demonstrated by Ethiopia on the basis of credible evidence.

335. The evidence supporting this large claim for civilian deaths and injuries attributable to Eritrea's *jus ad bellum* violation was modest. Ethiopia calculated the number of additional deaths entirely on the basis of an Ethiopian government estimate reflected in a December 2000 World Bank loan document. This estimate indicated that 36,000 primary breadwinners, including both civilians and militia (but not including regular military), lost their lives during the war. Ethiopia increased this figure by 50%, contending that at least that many additional family members were killed. The resulting total—an estimated 54,000 deaths—then was reduced to reflect civilian deaths covered by Ethiopia's other claims. This gave the 39,881 deaths for which Ethiopia claimed *jus ad bellum* damages; the same figure was used for its claim for injuries. While the World Bank figures did not distinguish the geographic location of civilian deaths, Ethiopia "assigned" deaths to the regions of Tigray and Afar based on the relative populations of those regions. Based on an estimated population of 567,696 people in the war-affected weredas of Tigray and 106,526 people in Dalul and Elidar Weredas in Afar, Ethiopia concluded that 33,500 deaths occurred in Tigray and 6,381 occurred in Afar.

336. Although Ethiopia's Damages Group One Memorial regularly referred to the 36,000 figure as "the Bank's," the text of the cited paragraph makes clear that the figure was an estimate given to the World Bank by Ethiopia. Although the estimate was characterized as involving civilians and militia, a report in Ethiopia's evidence attributed the estimate of 36,000 deaths to the Ministry of Defense, creating ambiguity as to whether the number may in some way reflect military casualties.

337. The Commission has no means to assess the estimate of 36,000 deaths underlying this claim. There was no evidence showing how or by whom it was prepared, or whether it was borne out by later investigation. There was no indication whether the estimate included deaths due to disease or other natural causes not directly linked to the war. There was no basis in the record for the assumption that the estimate should be increased by 50% to reflect

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additional family members. There also was no basis for the assumption that the number of injuries was equal to the number of deaths.

338. Ethiopia's inclusion of the deaths and injuries of an unspecified number of militia members raised additional questions. Ethiopia's evidence showed that its militia forces were numerous, and frequently engaged in combat with Eritrean forces. There were frequent references to the deaths of militiamen in combat. Pursuant to the exclusion contained in the last sentence of Article 5(1) of the December 2000 Agreement, the Commission has no jurisdiction over claims for the combat deaths or injuries of militiamen.

339. Given these limitations, the Commission has reviewed Ethiopia's evidence from the earlier proceedings, in an effort to assess the extent of civilian deaths and injuries potentially attributable to Eritrea's *jus ad bellum* violation. The Commission paid particular attention to deaths from artillery fire, which Ethiopia described as a major cause of civilian deaths, and which indeed has caused the greatest proportion of casualties in modern international armed conflicts between organized armies. The evidence available to the Commission indicated that Eritrean artillery did cause many civilian deaths and injuries, but that these were far less numerous than Ethiopia contended.

340. For example, there were frequent references in these proceedings to artillery strikes in and around the town of Rama, located a few miles south of the Mereb River on one of the few north-south roads connecting Ethiopia and Eritrea. The declaration of Rama's town administrator spoke of considerable property damage from five shelling attacks on the town (two in February 1999 and three in May-June 2000), but he mentioned only two persons killed and six injured. A March 2001 U.S. AID report cited another local official referring to four killed and eight wounded by shelling at Rama. Whichever official was correct, these casualties were not extensive. Similarly, there were numerous references to Eritrea's artillery attack on Sheraro on October 21, 1998. (This attack apparently led Tigray officials to encourage civilians to evacuate from areas within artillery range of the front as a precaution.) However, a December 1998 report by the Relief Society of Tigray referred to eleven deaths and twenty-four injuries in the Sheraro attack. These casualties were tragic, but they did not support Ethiopia's claim of tens of thousands of civilian deaths from Eritrean guns.

341. Accounts by wereda officials in Tigray also suggested a much lower level of civilian casualties. An official in the Gulomakheda Wereda administration reported that in all of the wereda, ninety-five people were killed and ninety-two were injured by shelling or landmines. The administrator of Mareb Lekhe Wereda provided a table listing losses and damage in his wereda. The table identified just four deaths, three injuries and 505 damaged houses (170 described as "light," 147 as "medium," and 188 as "severe").

342. Accounts by Ethiopian and international non-governmental organizations were along similar lines. The Gulomakheda Wereda Farmer's Association provided a list of thirty people killed in Gulomakheda due to

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unlawful acts of Eritrea. The Norwegian Council for Refugees reported that, as of August 2000, some five hundred civilian deaths were reported in Tigray.

343. Ethiopia's evidence also contained multiple accounts by local officials describing casualties in their kebeles or tabias. Several did not mention any casualties, or mentioned a limited number of persons killed or injured, in communities of hundreds or thousands of people. A tabia chairman in Gulomakheda Wereda described a total of six deaths in his tabia from multiple shelling attacks during the war. Another described five deaths from artillery in his tabia of four villages. A third tabia chairman from Gulomakheda Wereda described five deaths. The chairman of a kebele of at least four thousand people in Mareb Lekhe Wereda described two farmers being shot by soldiers on one occasion, and others wounded by artillery on another. A kebele chairman from Ahferom Wereda described twelve people from his kebele of at least six thousand people being killed by artillery fire. Other reports by kebele and tabia officials were to similar effect.

344. A few accounts by local officials described civilian casualties from small arms fire. A tabia administrator in Mareb Lekhe Wereda referred to thirteen civilians shot and killed by Eritrean soldiers. However, this account also described active resistance to Eritrean forces by local militia, raising questions as to whether some of these casualties may have involved militia.

345. A few accounts in the record reported more extensive deaths and injuries in particular locations. The administrator of a tabia in Ahferom Wereda claimed that a two-day artillery attack in May 1998 killed thirteen civilians and wounded twenty-one in a village in his tabia, and that twenty-four other persons were killed, 123 injured and 330 houses destroyed or damaged during the conflict. The administrator of a kebele in Gulomakheda reported nineteen deaths and three injuries from artillery. These reported casualties were very high in comparison with most accounts in the record.

346. On the Eastern Front, evidence of civilian casualties was even less clear. Civilian witness testimony offered at the liability phase indicated that intense shelling caused numerous deaths and injuries in Elidar Wereda, particularly in Bure and surrounding areas. The evidence offered by Ethiopia did not provide the Commission a reliable basis to determine a precise figure for those deaths, however. In Dalul Wereda, Ethiopian witnesses testified to significant though less extensive shelling than occurred in Bure, particularly at the commencement of hostilities prior to the period of Eritrean occupation. The witnesses Ethiopia offered for that region did not testify specifically as to shelling deaths, though the Commission accepts that it is likely that some occurred.

347. Although it appeared that substantial death and injury resulted from shelling in Bure, the evidence submitted did not fully support Ethiopia's claim for the Afar region.

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348. Taken together, though, the cumulative weight of the reports in the record indicated levels of additional civilian deaths far below the 54,000 claimed on all three fronts.

349. Ethiopia's evidence did not permit a well-informed judgment regarding the number of civilian deaths or injuries attributable to Eritrea's *jus ad bellum* violation. There were such casualties, but the available evidence identified deaths and injuries numbering at most in the hundreds, not in the tens of thousands claimed here by Ethiopia. In addition, deaths and injuries resulting from some causes, such as landmines, unlawful conduct by Eritrean soldiers, and the June 1998 Mekele bombing, were covered by Ethiopia's other claims. Taking account of the available evidence, the casualties covered by Ethiopia's other claims, and the seriousness of the harm caused, the Commission awards US$8,500,000 in respect of civilian deaths and injuries related to Eritrea's breach of the *jus ad bellum*.

E. Damage to Civilian Property, Primarily From Shelling (Category 4)

1. Housing

350. The Commission previously addressed Ethiopia's claims for damage to housing and real property based on the Commission's *jus in bello* liability findings.[89] Ethiopia claimed an additional US$77 million as *jus ad bellum* damages for such injury. It contended that, in addition to the houses allegedly damaged or destroyed due to Eritrea's *jus in bello* violations, thousands more were damaged or destroyed by Eritrean shelling, and that Eritrea is liable for this damage on *jus ad bellum* grounds. This claim was presented in slightly less than five pages of Ethiopia's Damages Group One Memorial.

351. In its *jus in bello* housing claim, Ethiopia alleged that 35% of the aggregate value of all houses in large areas in six weredas was lost due to actions by Eritrean forces. This claim appeared to allege that an additional 40% of the value of all houses in large areas of these six weredas hit by shelling at any time during the war, and in corresponding areas in three other weredas, was also lost. Thus, Ethiopia appeared to contend that in large areas in six weredas at least 75% of the aggregate value of all houses was lost on account of Eritrea's violation of either the *jus in bello* or the *jus ad bellum*. In three other weredas, it claimed for at least 40% of the value of all houses in large areas because of the *jus ad bellum* breach. (Ethiopia did not make fixed-sum *jus ad bellum* claims for property losses from looting or other similar causes.)

352. Ethiopia calculated the amount of its *jus ad bellum* housing claim utilizing the same numbers of houses and per capita amounts for alleged property damage in Tigray and Afar as were used in the corresponding *jus in bello*

[89] Section VIII.C *supra*.

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claim. These per capita amounts were multiplied by the populations of the kebeles and towns that Ethiopia stated in its Memorials during the liability phase were subjected to shelling. Thus, the *jus ad bellum* claim started with a universe of about 77,000 houses. The implication was that either 40% of these houses were destroyed by Eritrean shelling, or that a larger number suffered damage in amounts cumulatively equaling 40% of the 77,000 houses' total value.

353. In its earlier discussion of Ethiopia's *jus in bello* housing claim, the Commission noted the substantial amount of earlier evidence in the record showing wartime damage to houses far less extensive than Ethiopia claimed. This evidence included both reports from official Ethiopian sources, and damage assessments by international relief agencies.[90] Several post-war documents referred to a World Bank assessment identifying about 16,400 houses in Tigray as having been damaged or destroyed by all causes; other later assessments suggested that such initial estimates may have significantly overstated the level of damage.

354. The earlier evidence also indicated that the cost of repairing or replacing damaged housing was significantly less than claimed. The World Bank allocated US$18.6 million for repair to damaged housing. This roughly corresponded to an Ethiopian agency's wartime estimate that repairing homes would cost about 120 million birr. A pilot World Bank project to repair four hundred damaged houses in Marta Tabia involved an outlay of 1.19 million birr for materials, about 3,000 birr per house. The Bank's housing reconstruction/rehabilitation package in Tigray ranged "from birr 3,000 for homes that sustained minor damage, birr 7,000 for homes that were heavily damaged and birr 15,000 for homes that require reconstruction because they were completely destroyed." All of this evidence went to the costs of restoring housing damaged by all causes, including looting by soldiers of both armies and by civilians and natural decay. It was not limited to damage caused by artillery fire.

355. The World Bank did not identify similar housing rehabilitation costs in Afar, finding that "[t]he housing needs in Afar do not require reconstruction activities. As the beneficiaries are largely pastoralist, they will be provided with traditional mobile houses which are estimated to cost Birr 500 per unit." The Commission notes in this regard that the border town of Bure experienced heavy shelling and probably experienced substantial damage to housing and other structures. However, there was no evidence in the record regarding damage to Bure comparable to that submitted by Ethiopia for Zalambessa, and the Commission has no basis for assessing the extent or value of damage to Bure.

356. Taking account of the uncertainties and ambiguities in the evidence regarding the extent of damage to housing attributable to Eritrea's *jus ad bellum* violation, the Commission awards US$6,000,000 for this claim.

[90] *See* para. 132 *supra*.

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2. Public Buildings and Infrastructure

357. Introduction. The Commission has addressed, in Section IX.D.1 of this Award, Ethiopia's claims for damage to public buildings and infrastructure based on the Commission's *jus in bello* findings. Ethiopia pleaded that it was entitled to compensation under either the Commission's *jus in bello* or its *jus ad bellum* liability findings and, accordingly, did not specify the liability basis of its claims for specific property. The Commission has therefore attempted to "deconstruct" Ethiopia's overlapping claims in order to assess the proper basis for an award of compensation.

358. Ethiopia claimed US$13,963,982 in damages for the destruction and looting of government buildings and infrastructure on all three fronts. On the Central and Western Fronts in Tigray, Ethiopia claimed US$11,397,980 for "at least" 331 administration buildings, schools, clinics, veterinary clinics, water supply systems and agricultural training centers, including US$536,765 for moveable property allegedly looted from those locations.[91] In Afar on the Eastern Front, Ethiopia sought US$2,566,002 for "at least" thirty-five schools, clinics, veterinary clinics and water supply systems, including US$93,891 for moveable property allegedly looted from those locations. As explained in Section IX.D.1 of this Award, evidentiary problems and a lack of clarity in assessing the cause of damages led to the failure of most of Ethiopia's *jus in bello* claims for this property.

359. The *jus ad bellum* liability for these claims may in some cases duplicate and in some cases be broader than the types of damage compensable under the *jus in bello.* At the liability phase, the Commission rejected as unproven both Parties' claims that the other engaged in shelling that was indiscriminate or otherwise contrary to the *jus in bello.* Consequently, any compensation for shelling damage rests solely on Eritrea's violation of the *jus ad bellum.*

360. Ethiopia's Claim and Supporting Evidence. For its claim of damages to the 331 buildings on the Central and Western Front, Ethiopia produced in Annex 66 to its Damages Group One Memorial an itemized list of all the claimed government buildings and infrastructure. This identified the location by wereda and listed values of alleged damage and loss to structures and moveable property. Each entry on the list referred to a separate annex. These annexes contained varying amounts of supporting evidence, such as purchase orders, invoices and construction contracts. For the Eastern Front, Ethiopia produced a similar list in Annex 242 of its Damages Group One Memorial, itemizing alleged losses relating to thirty-five buildings. Ethiopia also submitted evidence at the liability phase relating to the claimed damage.

361. In support of its damages phase annexes, Ethiopia introduced the declaration of the Regional Manager of the Ethiopian Social Rehabilitation and

[91] Ethiopia claimed US$5,938,314 of this amount for the destruction and looting of 162 buildings or pieces of infrastructure on the Central Front and US$5,459,666 for 169 buildings or pieces of infrastructure on the Western Front.

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Development Fund ("ESRDF") for Tigray, attesting that the documentation in those annexes related to structures damaged or destroyed during the war for which the ESRDF handled reconstruction financing. Ethiopia's rebuttal evidence included a declaration of the ESRDF's Deputy General Manager, who declared that the purchases evidenced by these materials were made through an Emergency Recovery Program ("ERP") financed by a World Bank credit. He stated that a portion of that credit was earmarked (by whom is not indicated) to finance 523 infrastructure projects "in the weredas most affected" by the conflict, and that only infrastructure "damaged or destroyed as a result of the war" could receive these earmarked funds. However, he also indicated that "[m]any of the projects involved the construction of entirely new structures, since these infrastructures were totally destroyed."

362. The ERP Credit Agreement between Ethiopia and the World Bank defined the "emergency" to include both the conflict between Ethiopia and Eritrea and "the drought." Ethiopia contended, however, that for structures not related to water supply for which financing was approved, drought would not have been the cause of damage, and that every structure for which it claimed was damaged or destroyed during the war.

363. Ethiopia did not indicate whether such damage was caused by artillery fire or other acts. It instead argued that if a building was located in an area where there was *jus in bello* liability, there would be a presumption that it was damaged in that way, and that otherwise Eritrea could be liable under the Commission's *jus ad bellum* finding.

364. Eritrea's Reply. In addition to denying the breadth of Ethiopia's *jus ad bellum* claims generally, Eritrea made three principal assertions in response to Ethiopia's claim. First, Eritrea contended that the new construction contracts and invoices offered as evidence did not provide a reliable basis on which to determine that such damage in fact occurred or from which to derive a credible value for that damage. Second, Eritrea cited to internal ESRDF documents submitted by Ethiopia at the liability phase indicating that much of the damage for which Ethiopia claimed was for pre-war construction projects that did not exist or had not been damaged during the war. Third, Eritrea contended that the ERP involved funding for projects, in particular those that related to the drought, that did not involve war damage.

365. The Commission's Conclusions. Ethiopia's damages phase evidence for this claim was problematic in several regards. It did not provide a reliable basis to determine whether the claimed reconstruction costs related to war damage for which Eritrea was liable. Where the Commission could ascertain that damage was war-related, Ethiopia offered no evidence to distinguish the cause of that damage. The liability phase evidence that the Commission reviewed for corroboration of Ethiopia's claim, however, indicated that shelling was widespread during the war.

366. While property destruction during the war might have involved acts other than shelling for which Eritrea was liable under the *jus in bello,* it can

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only be compensable on more general *jus ad bellum* grounds in the absence of proof of the cause of damage. Lacking a basis to distinguish the cause of damage, the Commission has reviewed most of this claim in the context of its *jus ad bellum* finding. Moreover, to the extent that Ethiopia recovered for looting of public property and infrastructure under the *jus in bello,* the Commission will not award double recovery here.

367. Ethiopia's damages phase evidence left unclear whether many of the buildings and pieces of infrastructure for which Ethiopia claimed involved wartime damage or were development projects unrelated to the war. Ethiopia asserted that all the new contracts, purchase orders and invoices for new property in its annexes were part of the ERP program and thus involved damage from the war. The World Bank Development Credit Agreement that funded the ERP, however, was drafted in broad terms. As noted above, the agreement targeted both areas affected by the war and by drought; it was not limited to buildings actually damaged in the war.[92] Notwithstanding the ESRDF officials' testimony, ESRDF internal documents in the record indicated that Ethiopia utilized this funding to do more than just repair properties destroyed or lost during the war.

368. In this regard, Ethiopia's liability phase evidence included a November 2001 internal impact assessment discussing the effect of the war on Ethiopia's pre-war development projects. This report stated that the ESRDF had constructed a number of basic infrastructure projects in the Tigray region, of which six had been damaged and destroyed due to the war. Another eight projects were simply described as being in war-affected weredas. Another 106 projects were described as having been planned prior to the war but not implemented because of the war. In the Afar region, the report noted that three schools and two clinics being constructed with ESRDF funds were destroyed due to the conflict, that twenty-three projects that would have been constructed were suspended due to the war, and that thirty-three projects were planned prior to the war but not implemented as a result of the war. The report indicated that ESRDF was also considering requests for financing from communities in war-affected areas for disbursement, estimating the total amount of "damage" based on these figures to be approximately 56,200,00 birr [*sic*]. For each of the Tigray and Afar regions, the report attached a "List of Projects Damaged, Suspended and Planned But Not Implemented Due to the War" providing an itemization for each development project in those regions.

[92] In the agreement, the World Bank undertook to provide financing for a program of actions relating to the "Emergency" that began in May 1998, which included both the conflict between Eritrea and Ethiopia and the drought. In order to receive such financing, Ethiopia affirmed that amounts borrowed would be committed to the objectives of the program, which included (i) "to assist the people affected by the Emergency rebuild their lived and resume economic activities," (ii) "rehabilitate and reconstruct social infrastructure," and (iii) "support macroeconomic stability."

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369. Although the ESRDF projects discussed in the November 2001 report could have involved some activities that were not part of the ERP, dozens of the projects it listed as "planned but not implemented" or "suspended" because of the war were also included in Annexes 66 and 242 of Ethiopia's Damages Group One Memorial, listing projects for which Ethiopia claimed damages. Ethiopia argued at the April 2007 hearing that some buildings slated for construction under the pre-war development plans were existing buildings that were indeed destroyed during the war, but it did not provide a basis for the Commission to identify any such buildings. While the Commission understands that the war halted implementation of many planned development projects, it cannot hold the State of Eritrea responsible for the costs of those projects after they were resumed.

370. Considering that the ERP was created in part to address a drought, the evidence relating to wells and reservoirs raised particular difficulties. The war clearly damaged such facilities. In a June 1999 Damage Assessment Report, submitted by Ethiopia at the liability phase, the Tigray Regional Bureau of Planning and Economic Development estimated that fifty-two hand pumps, twelve manually dug water wells, three motorized pumps, one generator and one 100-cubic meter reservoir, with a total value of 5,650,000 birr, were put completely out of use as a result of the war. This seems a plausible assessment, both in the number of facilities and the estimated amount of damage. However, most of the water points for which Ethiopia claimed in Annex 66 did not have this sort of corroborative support, and Ethiopia did not previously cite most of them as war damage. Moreover, many of the water points claimed by Ethiopia were cited as "planned but not implemented" by the ESRDF in 2001.

371. The damage claimed to public buildings and other public infrastructure was also much greater than Ethiopia's earlier evidence indicated. As discussed above, the ESRDF's November 2001 report stated that it had undertaken reconstruction of just six structures destroyed in the war in Tigray and three schools in Afar. Several reports of regional governmental entities offered by Ethiopia at the liability phase, as well as the declarations of several witnesses cataloguing destruction to schools, health clinics and water supply sources, also indicated levels of damage substantially less than Ethiopia claimed at the damages phase.

372. The new construction contracts offered by Ethiopia to show the amount of damage also gave rise to uncertainty. It was not apparent on the face of many whether the project involved repair or replacement of wartime damage, or a wholly new structure. Many contracts did not include site clearance or rubble removal, which would be a necessary step in reconstructing a war-damaged building. The contracts that did appear to involve wartime damage did not indicate its cause. Moreover, while contract prices might accurately reflect the value lost in a destroyed structure, Ethiopia is not entitled to the cost of a completely new structure to replace one that was partially damaged, or that was larger or more elaborate than its predecessor.

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373. Given these uncertainties in the damages phase evidence, the Commission believes damage and impact assessment reports of local officials at the liability phase provide a more reliable basis to assess the extent of damage to the disputed buildings. These include the Damage Assessment Report of the Tigray Regional Bureau of Planning and Economic Development (June 3, 1999), the Tigray Regional Bureau of Education Planning and Programming Report of Damages to Educational Establishments (September 22, 2000), a Report of the Eastern Zone Education Department—Adigrat (September 15, 2001), the ESRDF List of Projects Damaged, Suspended and Planned But Not Implemented Due to the War in the Afar Region (November 2001), and other reports and eyewitness accounts relating to particular structures.

374. Most of these materials were not prepared for the purposes of litigation, and appeared to provide a reasonable indication of the value lost in damaged or destroyed governmental structures, generally less than Ethiopia claimed. While relying principally on the liability phase evidence may limit the compensation that can be awarded, the Commission cannot rely solely on the damages phase evidence, given the flaws and inconsistencies discussed above.

375. The Commission has reviewed both the damages and liability phase evidence in search of sufficient proof of damages for each property claimed. It relied principally on the municipal and ESRDF damage assessments submitted at the liability phase and discussed above, but also considered the damages phase annexes where they contained information clarifying uncertainties in the earlier evidence. Where the amount claimed at the damages phase indicated an actual cost lower than the liability phase estimate, the Commission utilized the lower amount. Applying these criteria, the Commission reaches the following conclusions on the compensation.

376. For the Central Front, on the basis of all available evidence for property destruction caused to public buildings and infrastructure by the war, the Commission finds proof of substantial damage, mostly from artillery fire.

377. For the Western Front, on the basis of all available evidence for property destruction caused to public buildings and infrastructure by the war, the Commission finds proof of less damage than on the Central Front, but still significant damage, mostly from artillery fire.

378. For the Eastern Front, Ethiopian witness declarations indicated that extensive shelling occurred in the vicinity of Bure and more limited shelling occurred in Dalul Wereda. That evidence generally portrayed extensive property damage in the region, including damage to numerous water containers, schools and clinics in Bure and surrounding areas. The November 2001 ESRDF internal assessment report also cited the destruction of a clinic and two schools in Bure and Manda, although that report did not address the breadth of damage that occurred in the region. Ethiopia was limited by the fact that the liability phase testimony generally showing damage to Bure was not

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specific enough to corroborate claims for buildings listed for new construction at the damages phase. The Commission therefore finds proof of substantial damage to public buildings and infrastructure from shelling on the Eastern Front, particularly in Bure, although the Commission is restrained by the evidence Ethiopia offered at the damages phase and, as a result, the compensation awarded likely does not reflect the full extent of the *jus ad bellum* damage that actually occurred to public buildings and infrastructure in that region.

379. Considering that the amount of damages caused by Eritrea's violations of the *jus ad bellum* is subject to some uncertainty and that the causes of such damage are not themselves violations of the *jus in bello,* the total compensation for Eritrea's violation of the *jus ad bellum* with respect to public buildings and infrastructure is US$3,500,000.

3. Religious Institutions

380. Ethiopia claimed US$9,238,669 in compensation for material damage resulting from Eritrea's looting, destruction and damage to "at least 164" churches, monasteries, mosques, and parochial schools in the regions of Tigray and Afar. Ethiopia pleaded that it is entitled to compensation under either the Commission's *jus in bello* or its *jus ad bellum* findings, but did not specify the liability basis for its claims in specific instances.

381. The Commission awards US$4,500,000 in compensation for looting and damage to religious institutions on all three fronts for the *jus in bello* component of this claim addressed in Section IX.D.2 of this Award. This section of the Award excludes those injuries for which the Commission awards compensation for breach of the *jus in bello.* The Commission reiterates the concerns about damage to religious institutions articulated in its *jus in bello* finding. Damage to religious institutions is a particularly severe consequence of armed conflict that tears at the fabric of the affected communities and deprives them of safe places of worship.

382. On the Central Front, Ethiopia claimed US$5,229,389 in compensation for looting, destruction and damage to religious institutions. In considering the *jus in bello* component of this claim, the Commission accepted as credible the evidence offered to show the extent of damage to religious institutions there. Some of that evidence, however, either indicated that the cause of particular damage was shelling or was unclear as to the cause. The Commission accepts that the damage occurred and was war related, but the proof was not adequate to award compensation for a *jus in bello* violation. In such instances, however, Ethiopia's claim of compensation for war damage survives under the *jus ad bellum.*

383. On the Western Front, Ethiopia claimed US$3,956,528 in compensation for looting, destruction and damage to religious institutions in Tahtay Adiabo and Kafta Humera Weredas. In Kafta Humera, Ethiopia submitted a credible report sworn by local officials of the Setit Humera Office of Islamic

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Affairs claiming *jus ad bellum* damage to the Humera Mosque. Ethiopia also offered a report of the Humera Diocese itemizing losses associated with the looting and damage of various churches throughout the region. This property damage was not compensable under the *jus in bello* on the Western Front and is therefore incorporated as a component of the *jus ad bellum* compensation for that region.

384. In Tahtay Adiabo, Ethiopia submitted a letter of the Manager of the Northwestern Zone of Tigray Diocese to the Diocese Bishop Office of the Ethiopian Orthodox Church, listing destroyed and damaged church properties in the Shire Enda Selassie Diocese. This list did not contain sworn accounts of the local congregations to corroborate the damage or its value, as some of the other damages phase reports did. Some of the damage claimed for these institutions was, however, corroborated by the declarants who submitted testimony at the liability phase. The Commission has therefore incorporated consideration of damage to those properties for which liability phase corroboration was provided into its award of *jus ad bellum* compensation for this claim.

385. On the Eastern Front, Ethiopia claimed US$52,752 in compensation for looting, destruction and damage to religious institutions in Elidar Wereda. Ethiopia's evidence consisted of a report of the Afar Diocese Secretariat that summarized its investigation into war damage and provided detailed reports of damage to and looting of churches in the region. Ethiopian witness declarations offered at the liability phase indicated that several mosques in Bure and the Dalul region were destroyed, though Ethiopia did not provide damages figures for those structures at the damages phase.

386. Having reviewed all of the evidence of *jus ad bellum* damage to religious institutions on all three fronts and taking into account the seriousness of the harm caused, the Commission awards compensation additional to what is awarded for *jus in bello* violations for this claim of US$2,500,000.

4. Destruction in Zalambessa

387. In Section IX.A of this Award, the Commission awards US$16,812,094 in compensation for physical destruction caused in Zalambessa on the basis that Eritrea is liable under the *jus in bello* for causing 75% of such destruction. The Commission finds that Ethiopia is liable for the remaining 25% of such destruction under its liability for the *jus ad bellum*. As such, the Commission awards Ethiopia US$5,605,000 in *jus ad bellum* compensation for the severe and well-documented physical damage in Zalambessa.

F. Deaths and Injuries Caused by Landmines (Category 5)

388. The Commission previously rejected as unproven both Parties' claims that the other used landmines indiscriminately or otherwise contrary to international law. Ethiopia maintained, however, that Eritrea was respon-

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sible for deaths and injuries to Ethiopians caused by landmines laid by both Parties because of its *jus ad bellum* violation. It based this claim upon statistics developed by the Tigray Regional Office of the Rehabilitation and Development Organization reporting deaths and injuries from landmines and unexploded ordnance stemming from the conflict. These recorded 124 deaths (106 in Tigray and eighteen in Afar), and 340 physical injuries (264 in Tigray and seventy-six in Afar).

389. Ethiopia claimed US$1,635,622 in respect of these deaths and injuries, calculated in the same manner as its other fixed amount claims for deaths and injuries. The calculations began with undiscounted estimates of victims' projected lifetime earnings in Tigray or Afar. Ethiopia claimed 100% of these projected earnings in the case of deaths, and 75% in the case of injuries. Ethiopia claimed either US$598,966 or US$559,594 as compensation for the deaths, reflecting either US$4,859 or US$4,495 (both figures were cited) for each of 104 deaths in Tigray, and US$4,623 for the eighteen deaths in Afar. For the 340 injuries from mines, Ethiopia claimed US$1,094,028.

390. The Commission will not repeat its earlier reservations regarding the use of undiscounted estimated lifetime earnings in determining compensation, which apply with equal force to their use here.

391. Civilian deaths and injuries from landmines are a direct and readily foreseeable consequence of the use of these weapons. The Commission holds that deaths and injuries caused by landmines justify compensation, if they resulted from mines that were laid in the areas and during the periods for which Eritrea bears *jus ad bellum* liability. This includes deaths and injuries resulting from detonations occurring after the liability periods, and to casualties resulting from mines laid by either Party.[93] Civilian injuries from these weapons often occur long after they are deployed. In this regard, the evidence suggested that landmine casualties were much more frequent in later periods of the war and in its immediate aftermath, particularly as displaced persons sought to return to their homes after Ethiopian military successes in February 1999 and May and June 2000.

392. The Tigray Regional Office of the Rehabilitation and Development Organization statistics cited by Ethiopia indicated levels of civilian casualties somewhat higher than those indicated in Ethiopia's earlier pleadings and evidence. For example, an earlier declaration of a senior official of the Rehabilitation and Development Organization responsible for mine clearance and education accompanying Ethiopia's Central Front Memorial indicated a total of 365 deaths and injuries through mid-2002. However, the evidence in the record was broadly consistent regarding the aggregate level of such casualties, and the Commission has given significant weight to the statistics cited by Ethiopia in assessing the frequency of landmine casualties.

[93] *See* Eisenbach Brothers & Company, *supra* note 75.

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393. Based on its appraisal of the evidence, the Commission awards Ethiopia US$1,500,000 for deaths and injuries caused by landmines.

G. Business Losses and Other Actual Amount Damages (Category 6)

394. Ethiopia claimed substantial damages in respect of injuries said to have been suffered by many businesses, government agencies and organizations. These claims, and their supporting documentation, often appeared to have been prepared by the affected entity, and they varied in clarity and detail. The claims' legal basis often was not stated, but most appeared to involve an assertion of *jus ad bellum* liability.

395. Some of these claims included elements that were highly speculative or outside the Commission's temporal jurisdiction; these are dismissed. Ethiopia also asserted some claims for damages involving production delays, interruptions of foreign consultants' services, and other types of damages resulting from the general disruption of the civilian economy in wartime. In general, the Commission finds these not compensable. Both Parties agreed that claims for generalized social or economic dislocation in wartime should not be compensable, and cited with approval decisions of the U.S.-German Mixed Claims Commission to this effect. No system of legal liability can address all of the economic consequences of war. Costs and delays happen; business is injured; plans and expectations are disrupted. International law does not impose liability for such generalized economic and social consequences of war.

396. Adigrat Pharmaceutical Factory Claim. Ethiopia claimed 32,104,655.25 birr (which it converted to US$4,665,086) for damage allegedly suffered by Addis Pharmaceuticals Factory Share Company, which owned and operated a pharmaceutical plant in Adigrat, thirty kilometers south of Zalambessa. Ethiopia alleged that on account of "repeated artillery attacks on Adigrat," the plant suspended operations for six months, incurring 11,851,344 birr in lost profits, while continuing to pay its idle employees an additional 1.5 million birr. Ethiopia claimed another 5,355,000 birr for "value of profit that would have been acquired within two years," but that allegedly was lost due to the failure of a plan to recruit foreign professionals to help start a new product line. Smaller amounts were claimed for damage to a window and a wall allegedly caused by an Eritrean air aid; for the expenses of setting up a civil defense system; and for an employee killed in an artillery attack, whose life insurance would not pay a death benefit because the death resulted from war.

397. The only evidence cited in Ethiopia's Damages Group One Memorial to support this claim was the company's February 2001 claims form. This form described the amounts claimed in a summary manner, and provided no supporting documentation. It provided no evidence of the "heavy artillery fired repeatedly toward the factory" from Eritrean lines many kilometers away, and this allegation did not conform to other evidence in the record

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regarding the frequency and extent of artillery impacts in and around Adigrat. Beginning with its July 2003 Partial Award in Ethiopia's Prisoners of War Claims, the Commission has made clear its reservations about the adequacy of unsubstantiated claims forms as the principal support for damages claims.[94] This claims form was not sufficient evidence to support a claim for more than US$4.5 million, and the claim is dismissed for failure of proof. Accordingly, the Commission need not consider whether these claims, or any of them, fall within the scope of Eritrea's *jus ad bellum* liability.

398. Almeda Textile Factory. Ethiopia claimed US$30,263,432 for losses sustained by the Almeda Textile Factory in Adwa due to the war. The supporting evidence consisted of the factory's February 2001 claims form and a November 2006 declaration of the firm's general manager. The claims form listed losses of 29,235,435.19 birr, of which about 28.6 million birr were characterized as "contract losses." These were primarily for export sales allegedly lost on account of the war; the claim was apparently for the value of lost sales, not lost profits. Other losses claimed on the form included the costs of painting the factory "with muddy colored paint," apparently to reduce its visibility to Eritrean aircraft; water damage to T-shirts stored in a "deserted area" to protect them; and salaries and travel expenses of textile experts from the Philippines, who did not remain in Ethiopia on account of the war.

399. The 2006 declaration of the firm's general manager significantly expanded the claim. The original claim for 29,000,000 birr in lost sales was increased to 104,547,532 birr for "lost income from sales." These very large losses were not further documented or explained. The declaration also added over ten million birr for delays in the construction of the firm's textile factory, ten million birr for payments to "unused labor," and fifteen million birr in property allegedly taken at the port of Massawa (and therefore also covered by Ethiopia's separate claim for property allegedly lost in Eritrean ports).

400. The evidence for this claim was inconsistent and insufficient to sustain a claim for more than 145 million birr. The claim is rejected for failure of proof.

401. Dedebit Saving and Credit Institution Share Company. Ethiopia claimed 36,634,212.38 birr (which it converted to equal US$5,323,270) for losses allegedly incurred by the Dedebit Saving and Credit Institution Share Company, which provided unsecured short-term loans at 12.5% interest to low-income farmers and others in Tigray. About half of the amount claimed was for loans and accrued interest allegedly rendered uncollectible when the debtors were displaced (about eleven million birr) or joined the Ethiopian Army (about eight million birr). Most of the rest was for allegedly lost interest income from loans that were not made on account of the war. Ethiopia also claimed 100,077 birr for office property allegedly looted from five sub-offices in Zalambessa, Badme and other locations. The evidence for the claim consist-

[94] Partial Award in Ethiopia's POW Claims, paras. 40 & 41.

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ed of the November 2006 declaration of the firm's general manager and a 2001 claims form; the descriptions of the claim in both were largely consistent.

402. The Commission finds that the lost profits portion of this claim (which assumed growth of past loan volumes and a favorable interest rate) was speculative and insufficiently supported by evidence. The evidence regarding the alleged losses on loans claimed to be uncollectible was also quite limited. In any case, that portion involved business losses stemming from generalized conditions of economic disruption in wartime. The Commission regards such losses as too remote from Eritrea's *jus ad bellum* violation, and as not compensable. The portion of the claim alleging looting of property from Zalambessa and other locations duplicates Ethiopia's other claims for looting damage, for which the Commission elsewhere awards compensation. The claim accordingly is dismissed.

403. Messebo Building Materials Production Share Company. This was a claim for over 116,635,279.35 birr and US$2,405,832.35 (converted by Ethiopia to equal US$18,033,631) attributable to several months of delays and additional costs in the construction of a large cement factory in Mekele, allegedly on account of the war. The claim was extensively described in the declaration of a project engineer who worked on the project and who prepared an earlier claims form in 2001. Ethiopia also submitted contracts, invoices, time sheets and other detailed and extensive supporting documentation.

404. The claim included multiple components. The largest—over 80% of the claim—was for 102,869,332.66 birr in additional loan costs said to result from delays in the project, including 22,300,000 million birr for lost interest on the funds the owners invested in the project. Ethiopia also sought US$139,500.45 and 523,973.50 birr for about five weeks' interruption of construction following the June 1998 air bombings in Mekele. Most of this amount was for evacuation and idle labor costs for Turkish workers. It claimed US$115,319 and 530,277.90 birr for similar costs incurred when work was delayed around the time of Ethiopia's Operation Sunset in early 1999. These delays generated additional insurance, site running and other similar costs said to total US$416,824.41 and 2,020,943.47 birr. Ethiopia claimed US$356,699 and 210,250 birr for additional consultants' fees and expenses on account of both delays. Other claims covered additional transportation costs stemming from use of the port of Djibouti and property allegedly lost at Eritrean ports (apparently duplicating Ethiopia's ports claim).

405. Ethiopia presented an elaborate account of the costs associated with the delay of this project, but did not demonstrate that those costs should be regarded as proximately caused by Eritrea's *jus ad bellum* violation. The claim for evacuation expenses and expenses relating to delays appeared to arise out of some expatriate employers' concern for the safety of their employees and consultants at the site. (Following the attacks on Mekele by three Eritrean aircraft in June 1998, the Danish, Turkish and Indian contractors involved in the project evacuated their own nationals from the site.) The claimed costs of evac-

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uation, idle workers, expenses relating to resumption of work, and expenses associated with the delay of the contracting period appeared to have stemmed from generalized wartime economic conditions, including the desire of foreign contractors to remove their employees from an environment thought potentially to expose them to risk. Moreover, despite delays in the project, the evidence indicated that it was completed in October 2000. The claim for damage allegedly incurred by Ethiopia in respect of these costs is dismissed.

406. Ezana Mining. Ethiopia claimed US$803,742 for losses allegedly sustained by Ezana, a private company based in Mekele that explored for gold and other metals, apparently in areas close to the war fronts. Almost 62% of the claim, US$495,806, was for expenses allegedly incurred following the end of the war, after a foreign partner (which earlier agreed to pay these expenses) withdrew in December 2000, allegedly due to delays resulting from wartime conditions. Other claimed items included US$19,297 for costs of the premature departure of a foreign expert; US$96,000 in upgrades to an analysis laboratory that could not be used and were "rendered obsolete as a result of delays caused by the war;" 191,500 birr for income lost due to non-use of the laboratory; US$105,857 in salary payments to unproductive workers; and US$68,876 in assistance allegedly provided to displaced persons, apparently through charitable donations. (The only evidence for this last item was a voucher showing a 50,000 birr contribution to the Ethiopian Chamber of Commerce "to support victims of war on Tigray.")

407. The Commission concludes that this claim must fail. More than half of the claimed injuries followed from the departure of Ezana's foreign partner after the war ended. These injuries were causally far removed from Eritrea's delict and were incurred after the Commission's jurisdictional period. The other elements of the claim were either speculative (i.e., the claim for lost profits from non-use of the minerals laboratory) or involved decisions or consequences that again were causally far removed from Eritrea's delict. The claim for providing assistance (apparently on a charitable basis) stemmed from a decision by the company, and is not compensable.

408. Rama Child Birth and Maternal Health Clinic. Ethiopia claimed 2,215,102 birr (converted to US$321,874) for damage allegedly sustained by a new, privately owned clinic in Rama. Most of the claim was for 600,000 birr in allegedly lost capital and 1,530,150 birr for lost profits. An additional 33,000 birr was for damage to the building, 39,000 birr for building material that was "wasted," and 12,000 birr for lost medicine (including medicine with an estimated value of 10,000 birr).

409. The clinic was still under construction and just beginning to operate when its founders left Rama to seek safety elsewhere, so there was no record of past profitability. The handwritten statement of projected monthly revenues submitted to support the claim for lost future profits appeared significantly to understate expenses (for example, making no allowances for the costs of medicine, payments of principal and interest on loans, building maintenance, taxes

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and fees, etc.), and projected that almost 75% of estimated future revenues would go to profit. Given these limitations, Ethiopia's claim for 1.5 million birr for lost future profits is dismissed as speculative and unproven. The claim for 600,000 birr in allegedly lost capital is also dismissed, as the record showed that the daughter of the clinic's founders is in possession of the clinic building and is seeking to bring the clinic into operation. The remaining portion of the claim, for much smaller amounts for alleged shelling damage, was thinly documented and appeared to duplicate Ethiopia's separate *jus ad bellum* claim for damage to structures from shelling. The claim is dismissed.

410. Other Government Losses on the Central Front. Ethiopia claimed an amount it converted to US$2,142,527 for several categories of *jus ad bellum* government losses on the Central Front not otherwise covered by its claims. Almost 75% of the claimed amount (an amount converted to US$1,542,013) was for three warehouses, an office, 45,000 quintals of grain and other foodstuffs, a heavy truck and related property owned by the Tigray Regional Disaster Prevention and Preparedness Bureau ("DPPB") that was destroyed by the Eritrean air raid on Adigrat on June 11, 1998. The Commission referred to this attack in its Partial Award in Ethiopia's Central Front claims;[95] it occurred when there was intense fighting nearby in the area of Zalambessa. (Adigrat is about thirty kilometers from Zalambessa, and lies on the principal road leading there.) The Commission concludes that the destruction of the warehouses and related property in the June 1998 aerial attack was sufficiently connected in time and causal sequence with Eritrea's *jus ad bellum* violation, and that destruction of this nature was a foreseeable result of that violation.

411. Ethiopia provided persuasive evidence of the destruction, including a video of the aftermath of the June 11 attack clearly showing a large burning warehouse, burning sacks of grain, and a burning heavy truck inside the warehouse. However, the amount claimed is neither clearly explained nor supported. Ethiopia's Damages Group One Memorial claimed a total of 10,611,979 birr, which was almost twice the total amount of the losses described in the Memorial (5,711,114 birr), and appeared to reflect erroneous double-counting. The Commission also notes that the 850,000 birr claimed for the lost heavy truck greatly exceeds the amounts Eritrea claimed for similar trucks seized by Ethiopian authorities.

412. Based on its assessment of the evidence, the Commission awards Ethiopia compensation of US$250,000 for the destruction of the DPPB facilities in Adigrat.

413. In its other Central Front government claims, Ethiopia claimed: (a) 2,392,586 birr for property looted from facilities belonging to the Tigray Regional Agriculture Bureau in Badme and Zalambessa; (b) 57,830 birr for transportation, storage and office costs incurred by the Ethiopian Customs Authority to evacuate from Zalambessa, Sheraro and Bure to safer locations;

[95] Partial Award in Ethiopia's Central Front Claims, para. 32.

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(c) 120,162 birr for the destruction of a DPPB warehouse under construction in Dewhan in Irob Wereda; (e) 362,100 birr for grain and empty grain bags looted from the DPPB warehouse in Badme; (f) 1.2 million birr for DPPB loans to farmers in Gulomakheda Wereda, which became uncollectable when the farmers were displaced after Eritrea's invasion in June 1998; (g) 61,900 birr for damages to the Irob Wereda Police Station and its contents; and (h) 389,616 birr for destruction of the Mareb Lekhe Wereda Police Station in Rama.

414. The largest claim, namely that related to the looting of property from the Tigray Regional Agriculture Bureau facilities, was supported by detailed inventories of items looted from the Badme and Zalambessa facilities (from which Ethiopia segregated *jus in bello* claim amounts) valued at the time of the war. Similarly, the claims related to the destruction of the DPPB Dewhan warehouse and damages to the Police Station in Irob Wereda were reasonably supported by inventories and contract documents.

415. In comparison, the Commission finds little or no evidentiary support for the validity of or quantum for Ethiopia's claims for grain and grain bags looted from the DPPB warehouse in Badme, for the DPPB farmers' loans, or for damage to the Mareb Lekhe Wereda Police Station. The Commission also has concerns about the causative link as to certain claims, for example, the expenses of loading, moving and unloading 928 barrels of asphalt and various contraband goods between customs offices.

416. Based on its assessment of the evidence, the Commission awards Ethiopia compensation of US$162,500 for the Central Front government claims other than the DPPB warehouses and property in Adigrat.

417. Other Government Losses on the Western Front. Ethiopia sought an amount said to equal US$388,212 for three categories of government loss on the Western Front not covered by its other claims. The first claim was for 200,000 birr in cash allegedly looted from the Badme Kebele Administration Office following invasion of the town. In support of this claim, Ethiopia presented the declaration of the then head of the Economic Development Section of the Tahtay Adiabo Wereda Administration. His testimony was that the looted cash had been collected as tax revenue over the two months before the invasion, and that typical monthly tax revenue was between 100,000 and 200,000 birr. The second claim was for 1,481,631 birr for the looting of four police vehicles (1,400,000 birr) and other property (51,631 birr) from the Tigray Regional Police Commission in Badme, as well as damage to the police station itself (30,000 birr). As to police vehicles, the cumulative evidence supported the looting of at most three vehicles and the amounts claimed (averaging 350,000 birr for each of four vehicles) appeared excessive. The third and final government claim was for 990,000 birr in damages allegedly suffered by the Tigray Regional Justice Bureau: 240,000 birr to rebuild the Mareb Lekhe Wereda Justice Office in Rama, which was destroyed by an artillery attack on February 1, 1999; and 750,000 birr for the value of a looted Nissan patrol car and a Fiat truck. The three documentary attachments were missing from the

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sole declaration supporting the Justice Bureau claim, which left the numbers unsupported. On balance, the Commission awards Ethiopia US$75,000 for its Western Front *jus ad bellum* government claims.

418. Other Civic and Non-Governmental Losses. Ethiopia also sought compensation under the *jus ad bellum* for two categories of losses sustained by non-governmental and civic organizations, specifically the Relief Society of Tigray and the Tigray Youth Association, on the Central Front. First, Ethiopia alleged that Eritrean forces looted a bulldozer, a motorcycle and other equipment, valued at a total of 2,345,459 birr, from Relief Society of Tigray project sites near Gerhusernay in Afherom Wereda and Alitena in Irob Wereda. Second, Ethiopia sought 748,327 birr for loans made by the Tigray Youth Association to trainees who could not repay because they went to the war front or otherwise, for the costs of training new leadership, and for lost contributions. The Commission considers the second claim, related to the Tigray Youth Association, too attenuated to allow for compensation. However, based on the documentary evidence submitted, the Commission awards Ethiopia compensation of US$125,000 for the claim related to the Relief Society of Tigray.

419. Damage to Other Towns on the Western Front. Ethiopia also sought compensation for *jus ad bellum* damages to the towns of Adi Goshu in Kafta Humera Wereda and Sheraro in Tahtay Adiabo Wereda, not otherwise covered in its claims. As to Adi Goshu, Ethiopia claimed an amount said to equal US$336,953 for losses allegedly incurred during an eight-hour raid on December 20, 1998. The evidence reflected that Eritrean forces destroyed and looted the seven-room kebele administration building, took cash from the administrator and some twenty others, and looted or destroyed large quantities of grain and livestock. Based on the declaration of the representative of the head of the Kafta Humera Wereda and other supporting documentation in the liability and damages phases, the Commission awards Ethiopia compensation of US$150,000 for damage to Adi Goshu.

420. As to Sheraro, which was the target of Eritrean artillery attacks in October 1998, Ethiopia claimed an amount said to equal US$1,451,880 for shelling damage. The claim encompassed the destruction of several government buildings, including the Municipality Building and its two generators, three schools, a low-cost housing project, the municipal market, the kebele administration office, and the public recreation center; destruction of ninety-four residences and five businesses; and damage to the police station. To support its compensation claim, Ethiopia submitted the declaration of the head of the Sheraro Municipality Administration, who attached the construction contract for the rebuilding of the Municipality Building, showing total costs of 444,240 birr; specifications (other than price) for the two generators; and a list of the municipality engineer's estimated values for the other public buildings destroyed (total of 7,039,710 birr) and the homes and businesses destroyed (total of 2,493,941 birr, individually between 4,927 and 104,025 birr). Reviewing this evidence in the context of estimated valuation evidence for similar

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structures, the Commission awards Ethiopia compensation of US$625,000 for shelling damage to Sheraro.

H. Harm to Natural Resources and the Environment (Category 7)

421. Ethiopia claimed an amount said to equal more than one billion U.S. dollars (US$1,028,862,444) for environmental damage in Tigray. At the liability phase, the Commission found that the evidence did not sustain Ethiopia's claim that Eritrea caused this damage in violation of the *jus in bello*. However, Ethiopia claimed Eritrea is responsible for these losses under the *jus ad bellum*.

422. Approximately 90% of the claim, about 6.4 billion birr, was for alleged loss of gum Arabic and resin plants. Other smaller claims were for loss of trees and seedlings, and damage to terraces. Ethiopia also initially claimed about 300 million birr for loss of wild animals, but that claim was withdrawn prior to the May 2008 hearing on Ethiopia's Group Number Two claims.

423. This huge claim was summarily presented in less than two pages of Ethiopia's Damages Group One Memorial. The supporting evidence consisted of a claims form prepared by the Tigray Regional Agricultural and Natural Resources Development Bureau. This form did not identify the location of the lost plants, or the circumstances of their destruction. The Damages Memorial did not address the possibility that Ethiopian forces or civilians may have played some role in environmental degradation during the war.

424. Eritrea maintained that the gum Arabic trees at issue were located west of Badme, and so were in Eritrea and not Ethiopia; Ethiopia did not respond to this contention, and the issue was not resolved. Eritrea stressed the very limited and conclusory evidence offered to support a claim for more than a billion U.S. dollars. It also pointed out, in considerable detail, that the calculation of the amounts claimed for loss of gum Arabic and resin plants involved recurrent double-counting and other substantial errors, including that the sums claimed by Ethiopia for lost profits from future production took no account of production costs, provided no evidence or assessment of future markets and prices, assumed unjustifiably long productive lives, and did not discount claimed future income to present value.

425. The Commission noted above its views regarding the insufficiency of claims forms as the principal support for claims. Taking account of the huge amount claimed, the lack of supporting evidence, the unanswered questions regarding the trees' location, and the manifold errors in calculating the claimed damages, Eritrea's *jus ad bellum* claim for environmental damage is dismissed.

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I. The Mekele Bombings (Category 8)

426. On June 5, 1998, the day that Eritrean military aircraft dropped cluster bombs near the Ayder School in Mekele, another Eritrean aircraft attacked the Mekele airport. This attack caused civilian and military casualties and some damage to a civilian airliner belonging to Ethiopian Airlines. The Commission previously concluded that the airport was a lawful target, and that the injury and damage there did not violate the *jus in bello*. Ethiopia claimed an amount said to equal US$102,467, contending that the casualties and damage to the aircraft were proximate results of Eritrea's *jus ad bellum* violation.

427. Ethiopia claimed US$19,998 for eighteen civilians injured in the attack, based on 50% of the projected lifetime earnings of persons of the age of the wounded. It also claimed US$2,555 for the cost of medical treatment for the eighteen wounded persons, and US$79,914 for the cost of repairing punctures, cracks and other damage to a Fokker-50 civilian aircraft. The Commission agrees that this attack was sufficiently linked to Eritrea's initial *jus ad bellum* violation to warrant compensation. An attack such as this is a foreseeable consequence of that violation. However, the Commission does not accept Ethiopia's calculation of the claim. As previously explained, it does not accept the use of undiscounted projected future earnings as a blanket method for calculating compensation for injuries. Based on its own review of the evidence, the Commission awards US$65,000 for Eritrea's attack on the Mekele airport.

J. Prisoners of War (Categories 9 & 10)

428. Ethiopia filed a complex set of claims for injuries involving prisoners of war, combining claims for fixed amounts and for actual amount damages for violations of the *jus in bello* and the *jus ad bellum,* as well as substantial claims for moral damages. The *jus in bello* and moral damages elements of these claims have been addressed above.

429. In the *jus ad bellum* component of these claims, Ethiopia sought fixed-sum damages based on projections of lost lifetime earnings for fifty-one prisoners of war said to have died while in Eritrean POW camps.[96] Ethiopia maintained that the capture of POWs, their detention under harsh conditions, and the ensuing deaths of some prisoners were the natural and foreseeable result of Eritrea's actions initiating the conflict. Ethiopia did not cite evidence showing that the deaths of any of these fifty-one prisoners resulted from specific acts of negligence or misconduct by Eritrean personnel. Instead, it point-

[96] Ethiopia also claimed damages under the *jus in bello* for another 712 Ethiopia soldiers it estimated were killed at capture, based on its undocumented hypothesis that two-thirds as many surrendering soldiers were killed as were taken prisoner. Ethiopia's *jus in bello* claims involving POWs were considered in Section X.A above.

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ed in general terms to the Commission's earlier liability findings on Ethiopia's POW Claims, which identified harsh and abusive conditions in Eritrea's POW camps. (Ethiopia also initially claimed for expenses incurred in operating its POW camps, but this claim was withdrawn prior to the May 2008 hearing and will not be considered further.)

430. Eritrea contended that the connection between these deaths and the *jus ad bellum* violation for which it was found liable was too attenuated and indirect to lead to compensation. Eritrea also disputed the number of POW deaths alleged, maintaining that thirty-eight prisoners died while detained. In Eritrea's opinion, some of these deaths resulted from wounds suffered before capture, so that the Commission lacked jurisdiction over claims involving them.

431. The Commission need not resolve the disputed questions of how many POWs died while in Eritrean camps and the extent to which these deaths may have resulted from wounds prior to capture. It concludes that there is not a sufficiently clear and direct causal connection between the deaths of some POWs while in Eritrean custody and the events of May 1998 for which Eritrea has been found liable under the *jus ad bellum*. It is true that "but for" the war that began at Badme, Eritrea would not have taken POWs, but a clearer and more substantial degree of causal connection is required to establish liability for the deaths of a disputed number of disparate individuals based on Eritrea's *jus ad bellum* violation. The Commission recalls, however, that to the extent the Ethiopian POWs suffered the forms of abuse or mistreatment identified in the Commission's earlier Partial Award at the liability phase, Ethiopia is awarded compensation for *jus in bello* violations in Section X.A of this Award.

K. Departures from Eritrea (Category 11)

432. Ethiopia claimed over US$799 million in respect of thousands of Ethiopians who it said left Eritrea between May 1998 and December 2000 on account of Eritrea's breach of the *jus ad bellum*. (As discussed above, Ethiopia also claimed substantial amounts for injuries to Ethiopians in Eritrea involving Eritrea's *jus in bello* violations.) Ethiopia contended that 80,000 Ethiopians departed Eritrea between May 1998 and December 2000 "because of the harsh conditions caused by the war." Ethiopia claimed compensation with respect to each of these 80,000 persons, contending that (a) each one lost all income for four years following departure from Eritrea, and (b) their subsequent lifetime earnings were much lower because they earned the low per capita rate prevailing in Ethiopia (US$167), not the much higher average rates allegedly earned by Ethiopians in Eritrea (US$1,684). These projected losses of lifetime earnings were not discounted to present value or otherwise adjusted. However, the amount calculated in this manner (about US$2 billion) was reduced by amounts Ethiopia claimed for lost income on account of Eritrea's *jus in bello* violations, leaving a balance of US$499,870,390. Ethiopia then added an addi-

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tional US$3,740 for each of the 80,000 persons for moral injury on account of "brutality, severe hardship, pain and emotional shock," giving a moral damages claim of US$299,200,000.

433. Eritrea objected to this claim on multiple grounds, contending that the 1998 *jus ad bellum* violation was not the proximate cause of Ethiopians' subsequent departures from Eritrea. It also argued that the amounts claimed were excessive and based upon conjecture and invalid premises. In this regard, Eritrea presented Eritrean government records indicating that the actual incomes of many persons in the sample Ethiopia used to determine average earnings in Eritrea were far lower than these same persons later claimed. Ethiopia responded with twenty-two rebuttal declarations, most aimed at explaining the apparent discrepancies. Several of these explained why the declarants had previously lied to Eritrean officials regarding their incomes; for this and for other reasons, the Commission found these declarations largely unpersuasive.

434. The Commission doubts the assumptions underlying Ethiopia's computation of damages. No evidence was offered to support the contention that persons who returned to Ethiopia remained totally unemployed for four years; had such evidence existed, it should have been available to Ethiopia and in turn to the Commission. The Commission also doubts the contention that Ethiopians in Eritrea had earnings ten times those prevailing in Ethiopia. This is not consistent with other evidence indicating that many Ethiopians in Eritrea held low-paying jobs or worked intermittently as day laborers.

435. In any case, Ethiopia did not establish that the injuries claimed were proximately caused by Eritrea's May 1998 breach of the *jus ad bellum*. While the circumstances of Ethiopians in Eritrea during the war varied by location and time, the great majority of those who left Eritrea did so in the unsettled and difficult period following Ethiopia's successful May 2000 invasion of Eritrea and the end of hostilities, two years after the attack on Badme.[97] The principal factor in shaping this situation was the defeat of Eritrean forces by Ethiopia's army. It strains the chain of causality too much to contend that Eritrea should have foreseen in May 1998 that it would suffer this severe military defeat, the occupation of large portions of its territory, and the ensuing social and economic turmoil. Further, these claims fell well outside of the areas for which the Commission has determined Eritrea to be liable on account of the *jus ad bellum* violation. The claim is dismissed.

L. Ports Claim (Category 12)

436. Ethiopia next claimed an amount said to equal approximately US$117 million for property lost at Eritrean ports (principally Assab) by Ethiopian government agencies, businesses, non-governmental organizations and

[97] Partial Award in Ethiopia's Civilians Claims, paras. 6 & 7.

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individuals following the outbreak of the war. The primary evidence for the amount claimed was a list prepared by the Maritime Transit Services Enterprise ("MTSE"), the Ethiopian entity responsible for clearing and forwarding cargo and other cargo services.

437. The Commission dismissed Ethiopia's *jus in bello* claim for property lost in Eritrea's ports, finding that Ethiopia failed to prove a compensable taking of property during the relevant period.[98] The Commission noted the Parties' conflicting descriptions of the circumstances under which Ethiopian cargo stopped moving through Assab after fighting began at Badme, but concluded that the port of Assab remained open and continued to handle both Ethiopian export and import cargo for at least two weeks thereafter. The Commission also noted Eritrea's expressions of willingness to enter into a process to transfer to Ethiopia property still in storage in Eritrea and the proceeds derived from property sold or converted to Eritrean government use, subject to adjustments regarding costs incurred by Eritrea.

438. Eritrea contended that the Commission's liability Award effectively dismissed Ethiopia's port claims in their entirety, including any claim of *jus ad bellum* liability. The Commission does not share this interpretation. Its orders and directives to the Parties throughout these proceedings made clear that Ethiopia's *jus ad bellum* claims were all reserved to the final portion of the damages phase. As stated in its Decision Number 7, the Commission's earlier Partial and Final Awards "resolved the merits of all of the Parties' claims, *except for Ethiopia's claims relating to Eritrea's violation of the* jus ad bellum."[99]

439. In the damages phase, both Parties renewed many arguments from the liability phase. Eritrea introduced copies of numerous waybills said to show that cargo continued to be loaded onto trucks bound for Ethiopia from Assab well into May 1998, until, as Eritrea contended, Ethiopia closed the border. Ethiopia responded with the witness declaration of an Ethiopian customs official contending that these documents at most proved Ethiopian goods were loaded onto trucks at the Eritrean port; proof of delivery required additional documentation from Ethiopian Customs or consignees in Ethiopia. (The Commission notes that these forms of evidence would be located in Ethiopia and would not likely be available to Eritrea.)

440. Ethiopia also maintained that the waybills did not prove delivery of all of the property at issue. It cited as an illustration a shipment of seventy-six coils of rolled steel; Eritrea's documents showed that only a few of these coils were loaded onto trucks at the port. Eritrea responded, *inter alia,* that its waybill evidence was not intended to be complete, but that it did prove that

[98] Final Award, Ports, Ethiopia's Claim 6 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (December 19, 2005) [hereinafter Final Award in Ethiopia's Ports Claim], para. 19.

[99] Decision No. 7, *supra* note 10, para. 2 (emphasis added).

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Ethiopian cargo, including some now claimed as lost, continued to move to Ethiopia until late May 1998, when Ethiopia closed the border.

441. The Parties also revisited the nationality of the owners of some cargo. At the liability phase, the Commission noted that some claimed cargo belonged to foreign donors, not to Ethiopia or to Ethiopian nationals, so the Commission lacked jurisdiction.[100] Ethiopia returned to this issue at the damages phase, citing articles of its Civil and Maritime Code it interpreted to show that title to all ocean cargo passed to Ethiopian parties prior to arrival at the port. At the May 2008 hearing, however, it was determined that these established a default position, from which parties could, and often did, deviate by contract. The MTSE list of stranded property did not indicate the nationality of owners or consignees, but, at the hearing, Ethiopia emphasized substantial claims to property owned by several Ethiopian government agencies.

442. Ethiopia also invited the Commission to decide questions it saw as not settled at the liability phase, notably its claim for 46,000 tons of fuel allegedly due under contract to the Ethiopian Petroleum Enterprise, and other fuel said to belong to Ethiopian subsidiaries of international oil companies. Eritrea previously argued that the Ethiopian Petroleum Enterprise violated its contractual obligations by diverting fuel shipments from Eritrea, and that there was no real economic loss of the international oil companies' fuel, since it remained within the relevant corporate family. The evidence in support of this large claim was limited, but, for the reasons indicated below, the Commission need not revisit it.

443. Ethiopia contended that Eritrea was liable for property lost at Eritrea's ports because it unlawfully initiated a conflict "that proved impossible to keep from spreading along the border." In its view, Eritrea should have foreseen that its actions at Badme would end trade through the ports, and compel Ethiopia to curb commerce through them to protect its own interests. Thus, in Ethiopia's view, property loss—including property loss stemming from actions and decisions by Ethiopia—involved foreseeable injury for which Eritrea should bear full responsibility.

444. The Commission concludes that Ethiopia's ports claim for *jus ad bellum* damages fails, on several grounds. To begin, the Commission previously found that Ethiopia failed to prove a taking of property in violation of customary international law during the relevant period. Ethiopia also failed at the damages phase to prove such a taking. Eritrea made no claim to own much of the property at issue, and indicated willingness to transfer to Ethiopia property it still holds and the proceeds of perishable commodities or other property sold or put to Eritrean government use, subject to certain claims for storage and environmental costs. The Commission received no indication that Ethiopia ever responded to this offer. Ethiopia's pleadings suggested that

[100] Final Award in Ethiopia's Ports Claim, paras. 5 & 6.

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it rejected it. In these circumstances, the Commission again concludes that Ethiopia has not proved a compensable loss of property.

445. Further, as noted, some undetermined amount of disputed property did not belong to Ethiopia or its nationals, and lies outside the Commission's jurisdiction. Other claims advanced were decided previously and are barred by *res judicata*. Finally, the record did not establish that Eritrea's actions at Badme were the proximate cause of any injury involving stranded property. The Commission found that much Ethiopian cargo continued to move through Assab to and from Ethiopia after hostilities began.[101] While the Commission did not expressly find that Ethiopia's actions, including the requisitioning of Eritrean-owned heavy trucks and the diversion of trucks to carry cargo to and from Djibouti, were a significant cause of property becoming stranded, the record would have supported such a finding.

M. Ethiopian Airlines (Category 14)

446. Ethiopia initially claimed an amount it converted to equal US$45,700,000 for losses allegedly incurred by Ethiopian Airlines ("EAL") on account of Eritrea's violation of the *jus ad bellum*. This claim was significantly reduced, to an amount converted to equal US$14,464,729, prior to the May 2008 hearing. The revised claim withdrew as duplicative approximately US$23 million for "flight detouring and fuel purchase," and took account of reduced operating costs and other savings associated with wartime modifications in the airline's operations.

447. Most of the claim—converted to equal US$10,951,465, almost 76%—was for lost profits (described as "estimated net losses") for "one year following the conclusion of service to and from Asmara." This amount was calculated based on operating revenue and expenses on the Asmara service during July 1997 to March 1998. Ethiopia also claimed US$1,311,421 for additional "estimated net losses," apparently calculated in the same way, reflecting temporary suspensions of flights to destinations in north and northwestern Ethiopia during the war. Ethiopia also claimed: (a) US$1,703,020 for bank accounts at the Bank of Eritrea; (b) US$315,914 for costs associated with the airline's decision to relocate the operational base for its international fleet to Nairobi, Kenya from February 6 to 28, 1999, at the time of Ethiopia's Operation Sunset; and (c) US$182,909 for unpaid air tickets provided to six Eritrean government agencies for official travel and for transporting the Eritrean Foreign Ministry's diplomatic pouches prior to the war.

448. Eritrea's Counter-Memorial contended, *inter alia,* that many of the losses initially claimed resulted from operational decisions taken by EAL itself, and that Eritrea could not be responsible for the consequences. Eritrea also objected to the amounts claimed, noting that claims for lost flight revenues

[101] *Id.*, paras. 19–20.

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took no account of the airline's reduced operating costs due to the suspension of flights, nor did the claim for relocation to Nairobi take account of savings associated with the move. Many of Eritrea's objections appeared to have been taken into account in the claim as reformulated and significantly reduced prior to the hearing.

449. Lost Profits. The Commission generally has not looked with favor on claims for businesses' lost profits said to be attributable to Eritrea's *jus ad bellum* violation. However, the claim for EAL's lost profits on account of the termination of its Addis Ababa–Asmara international service involved unusual considerations. Airline service between the two capitals was not a typical commercial endeavor, but was closely linked to the Parties' overall political and economic relationship. Ethiopian Airlines is Ethiopia's State-owned national carrier, and is for many a symbol of the State of Ethiopia. Its aircraft were valuable property, vulnerable both to the risks of seizure by Eritrea and to damage in the course of hostilities. Its insurers would be sensitive to these risks, and might suspend coverage or raise premiums to unsustainable levels. Moreover, EAL's operations depended upon a steady flow of passengers and cargo, both vulnerable to interruption during hostilities on account of government actions or individual decisions by passengers or shippers concerned about safety.

450. Given these special circumstances, the Commission concludes that documented lost profits from termination of the Addis Ababa–Asmara service were the proximate result of Eritrea's *jus ad bellum* breach. Clearly it was, or should have been, foreseeable to Eritrea's leaders that a likely result of Eritrea's action at Badme would be the interruption of commercial air service between the two capitals, with attendant economic injury to EAL.

451. In its revised claim, Ethiopia sought 75,366,844 birr as lost profits for one year on the Addis Ababa–Asmara service. (Ethiopia's liability phase evidence suggested a higher figure, but the underlying calculations did not appear to reflect significant reductions in costs associated with suspension of the service.) Ethiopia's choice of one year as the measuring period was not explained, but appears reasonable in the circumstances. (The choice of one year may have reflected the fact that the Parties' air services agreement, which authorized bilateral air service, was terminable on a year's notice.) The principal supporting evidence for the amount currently claimed was the declaration of EAL's Acting General Counsel, who described how the amount of the claim was computed by EAL's finance department. The Acting General Counsel's declaration was accompanied by a short document prepared by EAL's finance department reciting some of the claimed losses, but there was no other evidence explaining or substantiating the specific amounts claimed. Based on its review of the record, and taking account of the limited evidence adduced, the Commission awards US$4,000,000 with respect to this claim.

452. There was little support in the record for Ethiopia's smaller claim for EAL's lost profits from temporary suspensions of some of its domestic services during the war. EAL's Acting General Counsel did not explain this por-

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tion of Ethiopia's claim or the services involved. The liability phase evidence contained a document suggesting the claimed losses, but the amounts were not explained or documented. This evidence also suggested that these interruptions may have involved services to regional airports at Axum, Mekele and a few other locations, primarily at the time of Ethiopia's successful attacks against Eritrean forces in Operation Sunset in 1999.

453. Ethiopia's claim for lost profits on interruptions of EAL's internal services is rejected for failure of proof. In addition, while it may have been reasonable for Ethiopia's state airline to decide not to operate to these locations during the period of Ethiopia's attacks, with ensuing revenue losses, EAL's decision to take that action is too causally remote from Eritrea's actions at Badme to be compensable.

454. *Bank Accounts*. Ethiopia next claimed US$1,703,020 for Ethiopian Airlines' bank accounts at the Bank of Eritrea. The principal supporting evidence was bank statements showing amounts on deposit before the war. The declaration of EAL's Acting General Counsel stated that EAL has been unable to close these accounts and repatriate the funds to accounts abroad, implying (although not explicitly stating) that EAL made post-war attempts to gain access to the funds. During the hostilities, it was lawful under the *jus in bello* for Eritrea to hold or block those funds to prevent their transfer to the other belligerent.

455. Eritrea did not rebut Ethiopia's evidence indicating that EAL was unable to secure the repatriation of its funds during or after the war. As to the EAL bank accounts, Eritrea 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,[102] 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,[103] to protect such assets for their return to their owners or other agreed disposition.[104] The appropriate remedy for the loss of those assets under these circumstances is compensation in the amount of funds lost in those accounts. The Commission therefore awards Ethiopia US$1,703,020 for EAL's bank accounts at the Bank of Eritrea.

456. Expenses of Transfer. The Commission concludes that Eritrea is not responsible for Ethiopian Airlines' expenses of US$315,914 related to the temporary transfer of its international operations to Nairobi for three weeks at the time of Ethiopia's Operation Sunset in 1999. The airline reportedly made

[102] Partial Award in Eritrea's Civilians Claims, para. 146.

[103] *Id.*, paras. 151 & 152.

[104] *See also* Article 46 of 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, 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."

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this move on or about February 6, 1999. This was the day that Ethiopia initiated Operation Sunset and resumed its offensive air operations, ending the air moratorium established in June 1998. The temporary relocation to Nairobi was apparently a precautionary measure to avoid possible Eritrean air attacks on the Addis Ababa airport following the resumption of wide-scale fighting, including air attacks by Ethiopia. This action reflected too many intervening steps and decisions to be regarded as the proximate consequence of Eritrea's *jus ad bellum* violation.

457. Unpaid Passenger Tickets and Freight Charges. Finally, Ethiopia claimed US$182,909 for unpaid Ethiopian Airlines' passenger tickets and for freight charges for transporting diplomatic pouches on behalf of Eritrea's Ministry of Foreign Affairs and other government agencies. This portion of the claim involved a commercial dispute involving prewar relationships, and is outside the Commission's jurisdiction.

N. Loss of Tourism, International Development Assistance, and Foreign and Domestic Investment (Categories 15, 16 & 17)

1. Loss of Tourism

458. Ethiopia claimed slightly over US$104 million for lost revenue from tourism, which it alleged was the direct and foreseeable consequence of Eritrea's action in initiating the war. Ethiopia's Damages Group Two Memorial calculated the amount of this claim based on estimates that: (a) but for the war, 125,941 additional tourists would have visited during the war years;[105] (b) an additional 82,167 would have visited during the years 2001–2004; and (c) tourists spent an average of US$500 per capita. These estimates of the numbers of tourists appeared to have been calculated on the assumption that the prewar annual growth rate in the number of tourists (6.7% per annum during the years 1992–1997) would have continued uninterrupted.

459. The principal evidence submitted in support of the claim was a report prepared for purposes of the Commission's proceedings by the Ethiopian Tourism Council. This report observed that it was "very difficult to quantify the various injuries and to establish their accuracy with concrete evidence," and that "evidentiary substantiation of the war's adverse future effects on tourism has been problematic." While the report speculated that the war resulted in fewer post-war tourists, it acknowledged that "concrete evidence is hard to come by." The Tourism Council's cautious assessments appear correct to the Commission. Ethiopia's evidence did not provide any basis for concluding that it was reasonable to expect a continued average increase in tourist arrivals of 6.7%. Indeed, the Commission notes that Ethiopia computed this average

[105] Ethiopia's liability phase evidence estimated the wartime losses of tourists to be variously 100,753 and 125,941. The difference between the two estimates was not explained nor was it apparent to the Commission.

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based on a five-year period that included one year of very strong growth in tourism soon after the defeat of the Dergue, followed by several years of less than 6.7% growth.

460. Moreover, the Council's estimates of tourism losses during the war and after were belied by other evidence submitted by Ethiopia at the liability phase. This included statistics collected by the World Travel and Tourism Council, an international organization of travel industry executives. These showed continuous increases in the value of Ethiopia's tourism from the 1997 level (as measured in both U.S. dollars and birr) during the war years of 1998 and 1999, with further significant increases estimated for 2000 and subsequent years. The record included a fax from the Council to Ethiopia's outside counsel regarding this discrepancy. The fax noted some possible reasons for the discrepancy, but did not convincingly rehabilitate the Council's estimates.

461. The evidence supporting the claimed amount essentially rested on assumptions and hypotheses that were uncorroborated and, indeed, were contradicted by Ethiopia's other evidence. The record was not sufficient to sustain a claim for US$104 million. The claim is dismissed for insufficient evidence. The Commission, accordingly, does not address whether, or under what conditions, a breach of the *jus ad bellum* might be the proximate cause of a loss of tourism.

2. Declines in International Development Assistance

462. Ethiopia claimed US$1.694 billion for foreign assistance allegedly frozen, suspended or terminated by multilateral and bilateral aid donors on account of Eritrea's attack on Badme and the subsequent war. This included US$1,165,450,000 in grants and loans to Ethiopia allegedly denied by multilateral and bilateral donors; an amount identified as either US$208,560,000 or US$108,560,000 in development assistance from bilateral donors; and a reduction in US$320,000,000 in foreign assistance withheld by the European Union.

463. The claim was presented in broad-brush terms. Ethiopia's 2004 Claim 7 Memorial and its Damages Group Two Memorial provided little information regarding specific loans, grants or programs allegedly affected, or regarding post-war developments. Ethiopia referred to some aid transactions as having been "delayed" or "suspended," and there was evidence in the record indicating that many transactions were resumed or restored after the war. However, it was not clear how or whether these resumed relationships were taken into account in the large amount claimed.

464. Eritrea objected that the claimed reduction in foreign assistance lacked sufficient causal connection with the Commission's liability finding. It stressed that any reduction resulted from decisions by third party donors, and that it could not be held responsible for decisions made by outside parties for their own reasons. Eritrea also contended that there were major shortcomings

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in the evidence, and that Ethiopia actually failed to prove any losses. Eritrea contended in this regard that some figures cited to support the claim either did not show pre-war levels of assistance or levels during the war, making comparisons impossible. Indeed, Eritrea urged that Ethiopia's evidence actually showed no reduction in assistance during the war, but rather an increase in grant aid.

465. Given the enormous size of this claim—almost US$1.7 billion—the supporting evidence was extremely modest. The record was not sufficient to establish either the amount of the alleged loss, or a sufficient causal connection between that loss and Eritrea's violation of the *jus ad bellum*. In this connection, any reduction of development assistance to Ethiopia resulted from decisions taken by international financial institutions and foreign governments for their own reasons. Particularly where the immediate cause of the alleged injury was decisions made by third parties, much more compelling evidence would be required to show that the loss was attributable to Eritrea's *jus ad bellum* violation. The claim is dismissed.

3. Lost Foreign and Domestic Investment

466. Ethiopia claimed more than US$2 billion for foreign and domestic investment in the Ethiopian economy that allegedly was not made during the war years because of Eritrea's *jus ad bellum* violation. This huge claim was presented in less than one page of Ethiopia's Damages Group Two Memorial, and two pages of its earlier Claim 7 Memorial. Ethiopia appeared to have estimated this amount by comparing the levels of foreign and domestic investment projects approved by the Ethiopian Investment Authority in 1997–1998, with the lower levels approved during the war years. (The record did not indicate patterns of investment in Ethiopia after the war ended.)

467. Eritrea vigorously disputed this claim, contending that Ethiopia failed to show a sufficient causal connection between the claimed losses and the attack on Badme. It also denied that Ethiopia had proved any loss. In Eritrea's view, Ethiopia's evidence did not prove a steady trend of increasing investment that would have continued in 1998–2000. There was a brief pre-war increase in foreign investment resulting from the Ethiopian government's 1995–1996 privatization program, but Eritrea believed this trend would not have continued. It also contended that any fluctuations in investment levels by domestic and foreign investors involved decisions by third parties shaped by various political, economic and social factors, many unrelated to the war.

468. At the 2008 damages hearing, the Commission sought to clarify the theory underlying this claim. It asked how the claimed reduction in investment, which would not have gone directly to the Government of Ethiopia, and which might or might not have produced benefits for Ethiopia's domestic economy, translated into an equivalent amount of damage to the State. Counsel confirmed that the claim was not for any direct loss of property or funds

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by the State. Instead, Ethiopia invited the Commission to conduct its own economic analysis, to identify the extent of injury to the total Ethiopian economy resulting from the claimed reduction in investment.

469. Particularly given the huge amount claimed—over US$2 billion—there was insufficient evidence to show the amount of any compensable injury to the State of Ethiopia. Of greater import, the evidence did not establish a sufficient causal connection between Eritrea's *jus ad bellum* delict and any injury to Ethiopia stemming from reductions in foreign and domestic investment during the war years. As with the decisions by foreign assistance agencies addressed above, decisions whether or not to invest were made by a myriad of private investors inside and outside of Ethiopia. Each decision reflected particular facts and considerations unique to the investor. The evidence simply did not show that their behavior, individually or in the aggregate, primarily resulted from Eritrea's actions in May 1998. The claim is dismissed.

O. Reconstruction and Assistance (Categories 18, 19 & 20)

470. Ethiopia claimed a total amount it converted to equal US$99,957,819 for expenses related to the Disaster Prevention and Preparedness Commission ("DPPC") (totaling US$32,563,967) and the Relief Society of Tigray ("REST") (totaling US$67,393,852) for assisting persons displaced on account of the war and returnees from Ethiopia. The presentation of these claims was extremely brief, both in Ethiopia's Claim 7 Memorial (just over two pages) and in its Damages Group Two Memorial (half a page). The supporting evidence for these claims was also quite limited, and the manner of their calculation and other significant details was often unclear.

471. The Commission holds above that Eritrea bears *jus ad bellum* liability for damages on account of the internal displacement of many thousands of Ethiopians during the war. Caring for internally displaced persons is an important responsibility of a State. Displaced people must have sustenance and support. It is readily foreseeable that in circumstances causing large-scale internal displacement, relief agencies will incur expenses to provide such help. The Commission concludes that Ethiopia is entitled to damages reflecting demonstrated expenses reasonably incurred by Ethiopia, or by Ethiopian public or private entities, to assist and support IDPs displaced on account of Eritrea's *jus ad bellum* violation.

472. The Commission holds above that Eritrea is not similarly liable for damages on account of the many Ethiopians who departed from Eritrea, either during the war or in the following months. As Eritrea is not legally responsible for the return of these Ethiopians to Ethiopia on account of its *jus ad bellum* violation, it likewise is not responsible for amounts expended by Ethiopia for their support and resettlement.

473. *The DPPC Claim.* The evidence for the DPPC portion of the claim was an October 2001 report prepared by the DPPC, which listed an amount of

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404,033,230 birr as "costs incurred to undertake relief and rehabilitation activities for war affected people." From this, Ethiopia subtracted approximately 92,000,000 birr expended to support Ethiopian military forces and rehabilitate demobilized veterans, because claims for support to Ethiopian military forces are outside the Commission's jurisdiction. It also subtracted approximately 67,000,000 birr, the cost of a "Household Rehabilitation Programme," as Ethiopia made separate *jus ad bellum* claims for damage to houses and households. Ethiopia claimed for 224,101,964 birr, converting this to US$32,563,967.

474. The twenty-eight page October 2001 DPPC report was not sworn or corroborated. Nor was it detailed, with almost half its pages listing employees in various regions "engaged in the relief operation for IDPs" and their salaries. However, the Commission is prepared to give weight to the report because it was not prepared for litigation and, taken in the context of the circumstances and the entire record, the amounts do not appear unreasonable. Certain reductions are necessary, because the report did not distinguish between assistance to IDPs, which is compensable, and assistance to returnees from Eritrea, which is not. Moreover, some items cited fell outside the scope of Eritrea's liability or did not involve compensable damage to Ethiopia, including at least the value of shelter materials provided by foreign NGOs (about 21.3 million birr), and transportation of "expelled victims" from Eritrea (about one million birr).

475. After making the necessary reductions, the Commission awards US$6,000,000 for the DPPC claim.

476. The REST Claim. Ethiopia's Claim 7, which initially presented Ethiopia's claims for assistance to IDPs, did not refer to any outlays involving REST. The principal evidence in support of the current claim for US$67,393,852 was a one-page declaration by the Society's head and an accompanying one-page table, which showed the amounts of various foodstuffs, bedding and shelter items, household items, and other supplies distributed, and their bottom-line values. . As with the DPPC portion of the claim, the amounts appear to be reasonable in the context of the circumstances and entire record, but reductions are necessary. First, there was no distinction between the amounts attributable to assistance for IDPs and returnees. Second, a large percentage of the relief appeared to have been donated. The declaration does not assert that the food commodities distributed (valued at 407,106,000 birr, almost 90% of the total claim) were purchased by Ethiopia. Instead, the declaration stated that the value attributed to these commodities was that indicated in agreements among REST, *donors* and transporters, creating the clear implication that these goods were donated. This was reinforced by the "per unit values" allocated to bulk foodstuffs (cereals, pulses, vegetable oil, etc), which did not appear to be market prices, but rather round numbers used for estimation (i.e., as four, six or eight thousand birr per metric ton). In addition, the DPPC report described above clearly stated that food commodities for assistance were donated rather than purchased. Other goods, such as plastic sheets worth over twenty million birr, were also likely donated.

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477. The Commission does not regard the value of commodities donated by foreign aid donors, without any indication that repayment was required or expected, as constituting an element of damage to Ethiopia. Absent any evidence indicating that any of the food commodities involved in the REST claim involved some cost to Ethiopia (and with convincing evidence in the DPPC report that they did not), the approximately four hundred million birr portion of the REST claim relating to food commodities and the value of other donated goods is disallowed.

478. After making these and other necessary reductions, the Commission awards US$1,500,000 for the REST claim.

479. Accordingly, the Commission awards a total of US$7,500,000 for Ethiopia's *jus ad bellum* claim for reconstruction and assistance.

XII. Award

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

1. US$11,000,000 for death, physical injury, disappearance, forced labor and conscription of Ethiopian civilians;
2. US$2,000,000 for failing to prevent rape of known and unknown victims in Irob, Dalul and Elidar Weredas;
3. US$13,900,000 for looting, and destruction of and damage to houses;
4. US$20,195,000 for damage, destruction and looting in Zalambessa;
5. US$2,500,000 for death, injury and property damage in Mekele;
6. US$315,000 for looting of and damage to government buildings and infrastructure;
7. US$4,500,000 for looting, destruction and damage to religious institutions;
8. US$3,216,000 for seizure and looting of the Saba Dimensional Stones Share Company;
9. US$7,500,000 for mistreatment of Ethiopian prisoners of war;
10. US$2,000,000 for failure to protect Ethiopian civilians in Eritrea from threats and violence;
11. US$1,500,000 for failure to ensure Ethiopian civilians in Eritrea access to employment;
12. US$50,000 for failure to ensure that Ethiopian civilians in Eritrea were able to receive medical care to the same extent as Eritrean nationals;
13. US$2,000,000 for wrongful detention and abusive treatment of

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Ethiopian civilians in Eritrean custody;

14. US$1,500,000 for harsh treatment of Ethiopian civilians at the Hawshaite detention camp;
15. US$10,000,000 for detaining significant numbers of Ethiopian civilians under harsh conditions during and after May 2000;
16. US$500,000 for deaths and injuries suffered by detainees at Wi'a Camp;
17. US$2,000,000 for failure to protect the property of Ethiopian detainees expelled from Eritrea;
18. US$1,000,000 for failure to protect the property of other departing Ethiopians; and
19. US$1,100,000 for failing to ensure the safe and humane repatriation of departing Ethiopians in transports that were not conducted or supervised by the ICRC.

B. The Commission awards Ethiopia the following compensation for Eritrea's violations of the *jus ad bellum:*

1. US$45,000,000 for human suffering and lost income associated with internal displacement of persons;
2. US$8,500,000 for Ethiopian civilian deaths and injuries;
3. US$6,000,000 for damage to civilian property, primarily from shelling;
4. US$3,500,000 for damage to public buildings and infrastructure;
5. US$2,500,000 for looting, destruction and damage to religious institutions;
6. US$5,605,000 for destruction in Zalambessa;
7. US$1,500,000 for deaths and injuries caused by landmines;
8. US$250,000 for destruction of Disaster Prevention and Preparedness Bureau facilities in Adigrat;
9. US$162,500 for damage to other government facilities on the Central Front;
10. US$75,000 for other government losses on the Central Front;
11. US$125,000 for looting of property from the Relief Society of Tigray;
12. US$150,000 for damage in Adi Goshu;
13. US$625,000 for shelling damage in Sheraro;
14. US$65,000 for damage caused by the attack on the Mekele airport;
15. US$4,000,000 for profits lost by Ethiopian Airlines;
16. US$1,703,020 for failing to provide Ethiopian Airlines access to its bank accounts at the Bank of Eritrea; and

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17. US$7,500,000 for reconstruction and assistance to internally displaced persons.

C. As determined at the liability phase, the Commission considers its finding that Eritrea violated the Vienna Convention on Diplomatic Relations by arresting and detaining the Ethiopian Chargé d'Affaires and by violating official Ethiopian diplomatic correspondence and interfering with the functioning of the Ethiopian diplomatic mission to be appropriate reparation.

D. All of Ethiopia's other claims are dismissed.

E. In addition to the award of satisfaction to Ethiopia for all of the Commission's liability findings, the total monetary compensation awarded to Ethiopia in respect of its claims is US$174,036,520. At the conclusion of these lengthy proceedings and the issuance of this Final Award, and the parallel Final Award in Eritrea's claims against Ethiopia, 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.

Done at The Hague, this 17th day of August 2009,

[*Signed*] President Hans van Houtte

[*Signed*] George H. Aldrich

[*Signed*] John R. Crook

[*Signed*] James C.N. Paul

[*Signed*] Lucy Reed

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