

ERITREA ETHIOPIA CLAIMS COMMISSION

PARTIAL AWARD

**Prisoners of War
Ethiopia's Claim 4**

between

The Federal Democratic Republic of Ethiopia

and

The State of Eritrea

The Hague, July 1, 2003

ERITREA ETHIOPIA CLAIMS COMMISSION

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By the Claims Commission, composed of:
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George H. Aldrich
John R. Crook
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**PARTIAL AWARD – Prisoners of War – Ethiopia’s Claim 4
between the Claimant,
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I. INTRODUCTION

A. Summary of the Positions of the Parties

1. This Claim (“Ethiopia’s Claim 4;” “ET04”) has been brought to the Commission by the Claimant, the Federal Democratic Republic of Ethiopia (“Ethiopia”), pursuant to Article 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of December 12, 2000 (“the Agreement”). The Claim seeks a finding of the liability of the Respondent, the State of Eritrea (“Eritrea”), for loss, damage and injury suffered by the Claimant as a result of the Respondent’s alleged unlawful treatment of its Prisoners of War (“POWs”) who were nationals of the Claimant. In its Statement of Claim, the Claimant requested monetary compensation, and in its Memorial, it proposed that compensation be determined by a mass claims process based upon the five permanent camps in which those POWs were held.
2. The Respondent asserts that it fully complied with international law in its treatment of POWs.

B. The Eritrean POW Camps

3. Eritrea interned a total of approximately 1,100 Ethiopian POWs, virtually all male, between the start of the conflict in May 1998 and August 2002, when the remaining Ethiopian POWs registered by the International Committee of the Red Cross (“ICRC”) were released.
4. Eritrea utilized five permanent camps, some only briefly: Barentu, Embakala, Digdigta, Afabet and Nakfa (also known as Sahel). Eritrea utilized these camps one after the other and, with the exception of Barentu, closed each camp upon transfer of the POWs to the next camp.
5. Eritrea used facilities at Badme, Asmara, Tesseney and Barentu as transit camps during evacuation of the Ethiopian POWs from the various fronts. POWs were typically held in the transit camps for several days or weeks.
6. In the first days of the conflict, Eritrea captured approximately 100 Ethiopian POWs and held them for about three days in a building in Badme. From Badme, they were transferred to Barentu.
7. Eritrea used Barentu as a permanent POW camp for approximately five weeks in May and June 1998. Barentu was located some forty kilometers northwest of where the Eritrea-Ethiopia border coincides with the Mai Ambessa River. Barentu remained in use as a transit camp until at least May 16, 2000.
8. Eritrea operated its second permanent camp, Embakala, for three months between June and September 1998. Embakala was located some ninety miles north of the border

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and sixteen kilometers northeast of Asmara. Approximately 140 POWs were interned at Embakala, including those transferred from Barentu and others captured on the Central Front.

9. In September 1998, Eritrea transferred the POWs from Embakala to its third permanent camp, Digdigta. They were held in Digdigta until July 1999, some ten months. Digdigta was located approximately 120 kilometers north of the border and thirty-five kilometers northwest of Asmara. Eritrea also transferred Ethiopian POWs to Digdigta from a transit camp near Asmara, which was open from June 1998 through July 2000. A total of approximately 600 Ethiopian POWs were interned at Digdigta.

10. Eritrea utilized its fourth permanent camp, Afabet, from July 1999 to May 2000. Afabet was located about 200 kilometers north of the border and 100 kilometers northwest of Asmara. In addition to the POWs from Digdigta, Eritrea transferred new POWs to Afabet from the transit camp at Barentu. In all, approximately 800 Ethiopian POWs were interned at Afabet.

11. Following Ethiopia's May 2000 offensive, Eritrea moved the POWs from Afabet to the fifth and final permanent POW camp at Nakfa. Nakfa is in a mountainous region over 260 kilometers north of the border and 170 kilometers northwest of Asmara, just outside the town of Nakfa. Eritrea transferred additional prisoners to Nakfa from the transit camp near Tesseney, approximately twenty-five kilometers from the Sudan border. According to the ICRC List of Registered Ethiopian POWs, Eritrea interned a total of 1,017 POWs at Nakfa. Eritrea used Nakfa until August 2002, when the remaining prisoners registered with the ICRC were released and repatriated.

C. General Comment

12. As the findings in this Award and in the related Award in Eritrea's Claim 17 describe, there were significant difficulties in both Parties' performance of important legal obligations for the protection of prisoners of war. Nevertheless, the Commission must record an important preliminary point that provides essential context for what follows. Based on the extensive evidence adduced during these proceedings, the Commission believes that both Parties had a commitment to the most fundamental principles bearing on prisoners of war. Both parties conducted organized, official training programs to instruct their troops on procedures to be followed when POWs are taken. In contrast to many other contemporary armed conflicts, both Eritrea and Ethiopia regularly and consistently took POWs. Enemy personnel who were *hors de combat* were moved away from the battlefield to conditions of greater safety. Further, although these cases involve two of the poorest countries in the world, both made significant efforts to provide for the sustenance and care of the POWs in their custody.

13. There were deficiencies of performance on both sides, sometimes significant, occasionally grave. Nevertheless, the evidence in these cases shows that both Eritrea and Ethiopia endeavored to observe their fundamental humanitarian obligations to collect and

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protect enemy soldiers unable to resist on the battlefield. The Awards in these cases, and the difficulties that they identify, must be read against this background.

II. PROCEEDINGS

14. The Commission informed the Parties on August 29, 2001 that it intended to conduct proceedings in Government-to-Government claims in two stages, first concerning liability, and second, if liability is found, concerning damages. This Claim was filed on December 12, 2001. A Statement of Defense was filed on April 15, 2002. The Claimant’s Memorial was filed on August 1, 2002, and the Respondent’s Counter-Memorial was filed on November 1, 2002. A hearing on the issue of liability was held at the Peace Palace in December 2002 in conjunction with a hearing in the related Claim 17 of the State of Eritrea.

III. JURISDICTION

A. Jurisdiction over Claims Arising Subsequent to December 12, 2000

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

16. In this Claim, as in Eritrea’s Claim 17, each Party contends that the other’s treatment of POWs following the outbreak of hostilities in May 1998 did not meet governing standards of international law. Both Claims proceed from the premise, which the Commission fully shares, that the Agreement clearly establishes the Commission’s jurisdiction over claims regarding the treatment of POWs in the period after hostilities began in May 1998 until the conclusion of the Agreement on December 12, 2000. Claims relating to the treatment of POWs during that period clearly relate to the conflict; are for loss, damage or injury by one Government against the other; and involve alleged violations of applicable international law.

17. Ethiopia maintained in this Claim and in Eritrea’s related Claim 17 that the Agreement does not grant the Commission jurisdiction over claims based upon the treatment of POWs that arose subsequent to December 12, 2000, including claims for delays in their repatriation. Consequently, Ethiopia made no claims of that sort. However, in its Memorial in this Claim and during the hearing, Ethiopia asserted that, should the Commission determine that it has jurisdiction over violations of the requirement of repatriation of POWs without delay after the cessation of active hostilities found in customary international law and in Article 118 of the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (“Geneva Convention

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III”),¹ “the Commission should also find that Eritrea failed to repatriate Ethiopian POWs with all due dispatch in accordance with the *jus in bello*.”²

18. In its Partial Award in Eritrea’s Claim 17 of today’s date, the Commission finds that it has jurisdiction over Eritrea’s claims concerning the repatriation of POWs. Consequently, as a matter of temporal jurisdiction, the Commission has jurisdiction over claims by either Party based upon alleged delays in repatriation of POWs.

B. Jurisdiction over Claims Not Filed by December 12, 2001

19. It will be recalled that, in response to Eritrea’s Claim 17, Ethiopia challenged the jurisdiction of the Commission over several claims asserted by Eritrea in its Memorial which, Ethiopia asserted, were not included in Eritrea’s Statement of Claim on December 12, 2001, and consequently were extinguished by the terms of Article 5, paragraph 8, of the Agreement. The Parties agree that the Agreement extinguished any claims not filed with the Commission by that date. In its Partial Award in Eritrea’s Claim 17 of today’s date, the Commission holds that three claims asserted by Eritrea in its Memorial had not been filed in its Statement of Defense and consequently were extinguished and could not be considered by the Commission.

20. The same holding must be made with respect to Ethiopia’s claim concerning repatriation, which was not filed by December 12, 2001, and consequently has been extinguished by virtue by Article 5, paragraph 8, of the Agreement.

21. All other claims asserted by Ethiopia in this proceeding are within the jurisdiction of the Commission, including the claim concerning delayed access by the ICRC to Ethiopian POWs that Eritrea argued was late filed.

IV. THE MERITS

A. Applicable Law

22. Article 5, paragraph 13, of the Agreement provides that “in considering claims, the Commission shall apply relevant rules of international law.” Article 19 of the Commission’s Rules of Procedure is modeled on the familiar language of Article 38, paragraph 1, of the Statute of the International Court of Justice. It directs the Commission to look to:

1. International conventions, whether general or particular, establishing rules expressly recognized by the parties;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognized by civilized nations;

¹ 75 U.N.T.S. p. 135; 6 U.S.T. p. 3316.

² Ethiopia’s Claim 4, Prisoners of War, Memorial, filed by Ethiopia on August 1, 2000, p. 283 [hereinafter ET04 MEM].

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4. Judicial and arbitral decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

23. The most obviously relevant source of law for the present Award is Geneva Convention III. Both Parties refer extensively to that Convention in their pleadings, and the evidence demonstrates that both Parties relied upon it for the instruction of their armed forces and for the rules of the camps in which they held POWs. The Parties agree that the Convention was applicable from August 14, 2000, the date of Eritrea's accession, but they disagree as to its applicability prior to that date.

24. Ethiopia signed the four Geneva Conventions in 1949 and ratified them in 1969. Consequently, they were in force in Ethiopia in 1993 when Eritrea became an independent State. Successor States often seek to maintain stability of treaty relationships after emerging from within the borders of another State by announcing their succession to some or all of the treaties applicable prior to their independence. Indeed, treaty succession may happen automatically for certain types of treaties.³ However, the Commission has not been shown evidence that would permit it to find that such automatic succession to the Geneva Conventions occurred in the exceptional circumstances here, desirable though such succession would be as a general matter. From the time of its independence from Ethiopia in 1993, senior Eritrean officials made clear that Eritrea did not consider itself bound by the Geneva Conventions.

25. During the period of the armed conflict and prior to these proceedings, Ethiopia likewise consistently maintained that Eritrea was not a party to the Geneva Conventions.⁴ The ICRC, which has a special interest and responsibility for promoting compliance with the Geneva Conventions, likewise did not at that time regard Eritrea as a party to the Conventions.⁵

26. Thus, it is evident that when Eritrea separated from Ethiopia in 1993 it had a clear opportunity to make a statement of its succession to the Conventions, but the evidence shows that it refused to do so. It consistently refused to do so subsequently, and in 2000, when it decided to become a party to the Conventions, it did so by accession, not by succession. While it may be that continuity of treaty relationships often can be presumed, absent facts to the contrary, no such presumption could properly be made in the present case in view of these facts. These unusual circumstances render the present situation very different from that addressed in the Judgement by the Appeals Chamber of the

³ Case concerning the Gabcikovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. p. 7 para. 123 (Sept. 25).

⁴ Both parties referred to the Statement by Mr. Minelik Alemu, Observer for Ethiopia at the Fiftieth Session of the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities under Item 10 on "Freedom of Movement" in the Exercise of the Right of Reply (Geneva, August 24, 1998), *available at* <http://www.ethemb.se/s980824_2.htm>. See ET04 MEM p. 34 note 97, p. 57 note 241, p. 146 note 616; Professor Brilmayer, Transcript of the Eritrea/Ethiopia Claims Commission Hearings of December 3-14, 2002, Peace Palace, The Hague, p. 62 [hereinafter Transcript].

⁵ ICRC, *Ethiopia-Eritrea: Aid for medical facilities and the displaced*, ICRC News 98/23, June 12, 1998, in Eritrea's Claim 17, Prisoners of War, Memorial, filed by Eritrea on August 1, 2002, Documentary Annex p. 40 [hereinafter ER17 MEM].

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International Tribunal for the Former Yugoslavia in the *Čelebići Case*.⁶ It is clear here that neither Eritrea, Ethiopia nor the depository of the Conventions, the Swiss Federal Council, considered Eritrea a party to the Conventions until it acceded to them on August 14, 2000. Thus, from the outbreak of the conflict in May 1998 until August 14, 2000, Eritrea was not a party to Geneva Convention III. Ethiopia’s argument to the contrary, in reliance upon Article 34 of the Vienna Convention on Succession of States in Respect of Treaties,⁷ cannot prevail over these facts.

27. Although Eritrea was not a party to the Geneva Conventions prior to its accession to them, the Conventions might still have been applicable during the armed conflict with Ethiopia pursuant to the final provision of Article 2 common to all four Conventions, which states:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

28. However, the evidence referred to above clearly demonstrates that, prior to its accession, Eritrea had not accepted the Conventions. This non-acceptance was also demonstrated by Eritrea’s refusal to allow the representatives of the ICRC to visit the POWs it held until after its accession to the Conventions.

29. Consequently, the Commission holds that, with respect to matters prior to August 14, 2000, the law applicable to the armed conflict between Eritrea and Ethiopia is customary international law. In its pleadings, Eritrea recognizes that, for most purposes, “the distinction between customary law regarding POWs and the Geneva Convention III is not significant.”⁸ It does, however, offer as examples of the more technical and detailed provisions of the Convention that it considers not applicable as customary law the right of the ICRC to visit POWs, the permission of the use of tobacco in Article 26, and the requirement of canteens in Article 28. It also suggests that payment of POWs for labor and certain burial requirements for deceased POWs should not be considered part of customary international law.⁹ Eritrea cites the *von Leeb* decision of the Allied Military Tribunal in 1948 as supportive of its position on this question.¹⁰

⁶ *Čelebići Case* (The Prosecutor v. Delalic *et al.*), 2001 ICTY Appeals Chamber Judgement Case No. IT-96-21-A (Feb. 20).

⁷ 1946 U.N.T.S. p. 3; 17 I.L.M. p. 1488.

⁸ ER17 MEM p. 19.

⁹ Eritrea’s Claim 17, Prisoners of War, Counter-Memorial to ER17 MEM, filed by Ethiopia on November 1, 2002, pp. 27-28 [hereinafter ER17 CM].

¹⁰ U.S. v. Wilhelm von Leeb *et al.*, in TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW, NO. 10, VOLUME XI, p. 462 (United States Government Printing Office, Washington D.C. 1950).

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30. Given the nearly universal acceptance of the four Geneva Conventions of 1949, the question of the extent to which their provisions have become part of customary international law arises today only rarely. The Commission notes that the *von Leeb* case (which found that numerous provisions at the core of the 1929 Convention had acquired customary status) addressed the extent to which the provisions of a convention concluded in 1929 had become part of customary international law during the Second World War, that is, a conflict that occurred ten to sixteen years later. In the present case, the Commission faces the question of the extent to which the provisions of a convention concluded in 1949 and since adhered to by almost all States had become part of customary international law during a conflict that occurred fifty years later. Moreover, treaties, like the Geneva Conventions of 1949, that develop international humanitarian law are, by their nature, legal documents that build upon the foundation laid by earlier treaties and by customary international law.¹¹ These treaties are concluded for the purpose of creating a treaty law for the parties to the convention and for the related purpose of codifying and developing customary international law that is applicable to all nations. The Geneva Conventions of 1949 successfully accomplished both purposes.

31. Certainly, there are important, modern authorities for the proposition that the Geneva Conventions of 1949 have largely become expressions of customary international law, and both Parties to this case agree.¹² The mere fact that they have obtained nearly universal acceptance supports this conclusion.¹³ There are also similar authorities for the proposition that rules that commend themselves to the international community in general, such as rules of international humanitarian law, can more quickly become part of customary international law than other types of rules found in treaties.¹⁴ The Commission agrees.

32. Consequently, the Commission holds that the law applicable to this Claim is customary international law, including customary international humanitarian law as exemplified by the relevant parts of the four Geneva Conventions of 1949. The frequent invocation of provisions of Geneva Convention III by both Parties in support of their claims and defenses is fully consistent with this holding. Whenever either Party asserts that a particular relevant provision of these Conventions should not be considered part of customary international law at the relevant time, the Commission will decide that question, and the burden of proof will be on the asserting Party.

33. Contrary to the argument of Ethiopia, the Commission does not understand the reference to the Geneva Conventions of 1949 in Article 5, paragraph 1, of the Agreement

¹¹ See Richard R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. pp. 275, 286 (1965-66).

¹² See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. p. 226 para. 79 (July 8); Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (May 3, 1993), U.N. Doc. S/25704 para. 35; THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS p. 24 (Dieter Fleck ed., Oxford University Press 1995); and THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW p. 45 (Clarendon Press 1989).

¹³ See, e.g., Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. p. 971 (1986).

¹⁴ See MERON, *supra* note 12, at pp. 56-58.

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as a choice of law provision meaning that the Conventions in all their details became binding as treaty law retroactively upon Eritrea once it acceded to them. That reference to the Conventions was appropriate simply because, prior to the conclusion of the Agreement on December 12, 2000, both nations had become parties to the Conventions.

B. Evidentiary Issues

1. Quantum of Proof Required

34. The Commission’s brief Rules of Procedure regarding evidence reflect common international practice. Articles 14.1 and 14.2 state:

14.1 Each party shall have the burden of proving the facts it relies on to support its claim or defense.

14.2 The Commission shall determine the admissibility, relevance, materiality and weight of the evidence offered.

35. Also reflecting common international practice, the Rules do not articulate the quantum or degree of proof that a party must present to meet this burden of proof.

36. At the hearing, counsel for both Parties carefully addressed the quantum or level of proof to be required, describing the appropriate quantum in very similar terms. Counsel for Ethiopia indicated that in assessing its requests for findings of systematic and widespread violations of international law by Eritrea, “the bar should be set very high,” particularly given the seriousness of the violations alleged. Ethiopia accordingly proposed that the Commission should require evidence that is “very compelling, very credible, very convincing.”¹⁵ Counsel for Eritrea largely agreed, also noting the gravity of the violations alleged and urging the Commission to require “clear and convincing” evidence.¹⁶ In their written or oral pleadings, both sides cited jurisprudence of the International Court of Justice indicating the need for a high degree of certainty in matters involving grave charges against a state.¹⁷

37. The Commission agrees with the essence of the position advocated by both Parties. Particularly in light of the gravity of some of the claims advanced, the Commission will require clear and convincing evidence in support of its findings.

38. The Commission does not accept any suggestion that, because some claims may involve allegations of potentially criminal individual conduct, it should apply an even higher standard of proof corresponding to that in individual criminal proceedings. The Commission is not a criminal tribunal assessing individual criminal responsibility. It must instead decide whether there have been breaches of international law based on normal principles of state responsibility. The possibility that particular findings may

¹⁵ Professor Murphy, Transcript p. 185.

¹⁶ Professor Crawford, Transcript pp. 333-334.

¹⁷ See, e.g., ET04 MEM p. 47; Transcript pp. 333-334.

involve very serious matters does not change the international law rules to be applied or fundamentally transform the quantum of evidence required.

2. Proof of Facts

39. Ethiopia presented a large volume of documentation in support of its claims, including declarations of officials, news articles, copies of training materials, camp regulations and medical records. Ethiopia also presented three types of documents recording in differing ways information regarding the experiences of individual prisoners. It submitted thirty formal written declarations from former POWs signed by the declarants and containing affirmations of the accuracy of the translation and solemn representations that the declaration was truthful. During the hearing, counsel for Ethiopia indicated that it relied primarily on these declarations.¹⁸ Similar signed declarations also provided the heart of the evidence for Eritrea’s claims.

40. Ethiopia also submitted multiple volumes of what were in fact forms for collecting claims. These were lengthy documents filled in by a former POW or a person writing for him, responding at varying length to detailed questions regarding conditions and experiences in each of Eritrea’s POW camps. Ethiopia also filed four volumes containing typewritten distillations of the very brief answers some former prisoners gave to the claims questionnaires (generally involving pages containing only “yes” or “no” answers).

41. Eritrea objected to the second and third types of documents, arguing that the phrasing of the questions, the collection methodology and other factors inevitably resulted in inflated, inaccurate and unreliable responses. The Commission agrees that these documents are of uncertain probative value. It has not used them in arriving at the factual judgments that follow; instead it has relied on the formal signed declarations submitted by each Party, as supplemented by the testimony at the hearing and other documents in the record.

42. As noted, Ethiopia’s declarations include thirty by former POWs. The Commission is satisfied that Ethiopia selected these declarants in an objective way and, hence, that the declarations provide evidence that is as reasonably balanced as possible under the circumstances. Five declarations were dated in November 2001 and were submitted with the Statement of Claim. Counsel for Ethiopia explained at the hearing that Ethiopia also collected declarations from all twenty-five POWs who were repatriated on February 18, 2002, which was the first repatriation after the Commission notified the Parties that the POW claims would be heard first (and the last repatriation before August 2002).¹⁹ Ethiopia prepared those declarations approximately one month after the repatriation.

43. In evaluating the probative strength of a declaration to portray a violation (or several violations) of international law, the Commission has considered the clarity and

¹⁸ Transcript p. 96.

¹⁹ Transcript p. 105.

detail of the relevant testimony, and whether this evidence is corroborated by testimony in other declarations or by other available evidence. The consistent and cumulative character of much of the Parties’ evidence was of significant value to the Commission in making its factual judgements.²⁰ When the totality of the evidence offered by the Claimant provided clear and convincing evidence of a violation – *i.e.*, a *prima facie* case – the Commission carefully examined the evidence offered by the Respondent (usually in the form of a declaration or camp records) to determine whether it effectively rebutted the Claimant’s proof.

44. At the hearing, Ethiopia presented as a fact witness one former POW, who had been interned at Barentu, Embakala, Digdiga, Afabet and Nakfa. Eritrea presented no defense witnesses.

3. Evidence under the Control of the ICRC

45. Throughout the conflict, representatives of the ICRC visited Ethiopia’s camps. Beginning late in August 2000, the ICRC also began visiting Eritrea’s Nakfa camp. Both Parties indicated that they possess ICRC reports regarding these camp visits, as well as other relevant ICRC communications.

46. The Commission hoped to benefit from the ICRC’s experienced and objective assessment of conditions in both Parties’ camps. It asked the Parties to include the ICRC reports on camp visits in their written submissions or to explain their inability to do so. Both responded that they wished to do so but that the ICRC opposed allowing the Commission access to these materials. The ICRC maintained that they could not be provided without ICRC consent, which would not be given.

47. With the endorsement of the Parties, the Commission’s President met with senior ICRC officials in Geneva in August 2002 to review the situation and to seek ICRC consent to Commission access, on a restricted or confidential basis if required.

48. The ICRC made available to the Commission and the Parties copies of all relevant public documents, but it concluded that it could not permit access to other information. That decision reflected the ICRC’s deeply held belief that its ability to perform its mission requires strong assurances of confidentiality.²¹ The Commission has great respect for the ICRC and understands the concerns underlying its general policies of confidentiality and non-disclosure. Nevertheless, the Commission believes that, in the unique situation here, where both parties to the armed conflict agreed that these documents should be provided to the Commission, the ICRC should not have forbidden them from doing so. Both the Commission and the ICRC share an interest in the proper and informed application of international humanitarian law. Accordingly, the

²⁰ In this connection *see* SYLVAIN VITÉ, *LES PROCÉDURES INTERNATIONALES D’ÉTABLISSEMENT DES FAITS DANS LA MISE EN OEUVRE DU DROIT INTERNATIONAL HUMANITAIRE* pp. 345-346 (Editions de l’Université de Bruxelles 1999).

²¹ *See* Gabor Rona, *The ICRC Privilege not to Testify: Confidentiality in Action*, 84 INT’L REV. RED CROSS p. 207 (2002).

Commission must record its disappointment that the ICRC was not prepared to allow it access to these materials.

C. Violations of the Law

1. Organizational Comment

49. Ethiopia alleged extensive violations of applicable legal obligations in Eritrea's POW camps. Its legal claims were arranged in eleven separate categories, several with multiple subsidiary elements. Ethiopia alleged violations of all or almost all of the following eleven categories with respect to each of Eritrea's five camps:

- Capture of POWs and their evacuation to the camps;
- Physical and mental abuse in the camps;
- Lack of adequate medical care;
- Unhealthy camp conditions;
- Failure to maintain POWs well being;
- Impermissible forced labor;
- Improper handling of deaths;
- Lack of complaint procedures;
- Prohibiting communication with the exterior;
- Failure to post camp regulations; and
- Inhumane conditions during transfer from the camps.

50. In its written and oral presentations, Ethiopia clearly explained the factors leading it to structure its claims this way. However, the result is a matrix of over fifty issues, many with several subsidiary elements, for assessment and decision. Of greater concern, the Commission found that this complex and fragmented structure served to conflate very serious matters with others of much less gravity. Moreover, given the level of evidence presented and the limited time available for the Commission to complete its work on all claims, it is clear that the Commission must focus its attention on the substantive core of the claims.

51. Accordingly, the Commission has grouped several of Ethiopia's claims together or has otherwise re-aligned their elements in order to give greater weight to and clearer focus on those matters it sees as being of greatest concern.

52. As commentators frequently have observed, Geneva Convention III, with its 143 Articles and five Annexes, is an extremely detailed and comprehensive code for the treatment of POWs.²² Given its length and complexity, the Convention mixes together, sometimes in a single paragraph, obligations of very different character and importance. Some obligations, such as Article 13's requirement of humane treatment, are absolutely fundamental to the protection of POWs' life and health. Other provisions address matters of procedure or detail that may help ease their burdens, but are not necessary to ensure their life and health.

²² See, e.g., GEOFFREY BEST, WAR & LAW SINCE 1945 p. 135 (Clarendon Press 1994).

53. Under customary international law, as reflected in Geneva Convention III, the requirement of treatment of POWs as human beings is the bedrock upon which all other obligations of the Detaining Power rest. At the core of the Convention regime are the legal obligations to keep POWs alive and in good health.²³ The holdings made in this section are organized to emphasize these core legal obligations.

54. It should also be stated at the outset that the Commission does not see its task to be the determination of liability of a Party for each individual incident of illegality suggested by the evidence. Rather, it is to determine liability for serious violations of the law by the Parties, which are usually illegal acts or omissions that were frequent or pervasive and consequently affected significant numbers of victims. These parameters are dictated by the limit of what is feasible for the two Parties to brief and argue and for the Commission to determine in light of the time and resources made available by the Parties.

2. Eritrea’s Refusal to Permit the ICRC to Visit POWs

55. From the outset of the armed conflict in 1998, the ICRC was permitted by Ethiopia to visit the Eritrean POWs and the camps in which they were held. It was also permitted to provide relief to them and to assist them in corresponding with their families in Eritrea, although there is evidence that Eritrea refused to permit communications from those POWs to be passed on to their families.²⁴ In Eritrea, the ICRC had a limited role in the 1998 repatriation of seventy sick or wounded POWs, but all efforts by the ICRC to visit the Ethiopian POWs held by Eritrea were refused by Eritrea until August 2000, just after Eritrea acceded to the 1949 Geneva Conventions. The Commission must decide whether, as alleged by Ethiopia, such refusal by Eritrea constituted a violation of its legal obligations under the applicable law.

56. Eritrea argues that the right of access by the ICRC to POWs is a treaty-based right and that the provisions of Geneva Convention III granting such access to the ICRC should not be considered provisions that express customary international law. While recognizing that most of the provisions of the Convention have become customary law, Eritrea asserts that the provisions dealing with the access of the ICRC are among the detailed or procedural provisions that have not attained such status.

57. That the ICRC did not agree with Eritrea is demonstrated by a press statement it issued on May 7, 1999, in which it recounted its visits to POWs and interned civilians held by Ethiopia and said: “In Eritrea, meanwhile, the ICRC is pursuing its efforts to gain

²³ See Yoram Dinstein, *Prisoners of War*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, VOLUME 4, pp. 146, 148 (Rudolf Bernhardt ed., North-Holland Publishing Company 1982).

²⁴ See Ethiopia’s Claim 4, Prisoners of War, Counter-Memorial to ET04, filed by Eritrea on November 1, 2002, p. 140 and note 856.

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access, as required by the Third Geneva Convention, to Ethiopian POWs captured since the conflict erupted last year.”²⁵

58. The ICRC is assigned significant responsibilities in a number of articles of the Convention.²⁶ These provisions make clear that the ICRC may function in at least two different capacities – as a humanitarian organization providing relief and as an organization providing necessary and vital external scrutiny of the treatment of POWs, either supplementary to a Protecting Power or as a substitute when there is no Protecting Power. There is no evidence before the Commission that Protecting Powers were proposed by either Ethiopia or Eritrea, and it seems evident that none was appointed. Nevertheless, the Convention clearly requires external scrutiny of the treatment of POWs²⁷ and, in Article 10, where there is no Protecting Power or other functioning oversight body, it requires Detaining Powers to “accept . . . the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.” In that event, Article 10 also provides that all mention of Protecting Powers in the Convention applies to such substitute organizations.

59. The right of the ICRC to have access to POWs is not limited to a situation covered by Article 10 in which it serves as a substitute for a Protecting Power. Article 126 specifies clear and critical rights of Protecting Powers with respect to access to camps and to POWs, including the right to interview POWs without witnesses, and it states that the delegates of the ICRC “shall enjoy the same prerogatives.” Ethiopia relies primarily on Article 126 in its allegation that Eritrea violated its legal obligations by refusing the ICRC access to its POWs.

60. Professor Levie points out in his monumental study of the treatment of POWs in international armed conflicts that the ICRC “has played an indispensable humanitarian role in every armed conflict for more than a century.”²⁸ He also notes that, in addition to the work by the many Protecting Powers, the ICRC played a vital role in protecting POWs during the Second World War, when it made a total of 11,175 visits to installations where POWs and civilian internees were confined.²⁹ Levie also lists the places where the ICRC and protecting powers have been excluded in recent times – the Soviet Union (1940-45), North Korea and the Peoples Republic of China (1950-53), and North Vietnam (1965-73).³⁰ It is common knowledge that the treatment of POWs by the named Parties in those four places where the ICRC was unlawfully excluded was far worse than that required by the standards of applicable law. The long term result of these exclusions has been a reinforcement of the general understanding of the crucial role

²⁵ ICRC, *Ethiopia/Eritrea: ICRC Visits Newly Captured Prisoners*, ICRC NEWS, May 7, 1999, in ET04 MEM, Annex XV, Tab 94.

²⁶ See Articles 9, 10, 73, 81 and 126.

²⁷ See Articles 8 and 10.

²⁸ Howard S. Levie, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT, in INTERNATIONAL LAW STUDIES, VOLUME 59, p. 312 (United States Naval War College Press 1978).

²⁹ *Id.* at p. 310.

³⁰ *Id.* at p. 312.

played by outside observers in the effective functioning of the legal regime for the protection of POWs.

61. The Commission cannot agree with Eritrea’s argument that provisions of the Convention requiring external scrutiny of the treatment of POWs and access to POWs by the ICRC are mere details or simply implementing procedural provisions that have not, in half a century, become part of customary international law. These provisions are an essential part of the regime for protecting POWs that has developed in international practice, as reflected in Geneva Convention III. These requirements are, indeed, “treaty-based” in the sense that they are articulated in the Convention; but, as such, they incorporate past practices that had standing of their own in customary law, and they are of such importance for the prospects of compliance with the law that it would be irresponsible for the Commission to consider them inapplicable as customary international law. As the International Court of Justice said in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons:

79. It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity” as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel Case (I.C.J. Reports 1949, p. 22)*, that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.³¹

62. For the above reasons, the Commission holds that Eritrea violated customary international law from May 1998 until August 2000 by refusing to permit the ICRC to send its delegates to visit all places where Ethiopian POWs were detained, to register those POWs, to interview them without witnesses, and to provide them with the customary relief and services. Consequently, Eritrea is liable for the suffering caused by that refusal.

3. Mistreatment of POWs at Capture and its Immediate Aftermath

63. Of the thirty Ethiopian POW declarants, at least twenty were already wounded at capture and nearly all testified to treatment of the sick or wounded by Eritrean forces upon capture at the front and during evacuation. Consequently, in addition to the customary international law standards reflected in Geneva Convention III, the Commission also applies the standards reflected in the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field on August 12, 1949 (“Geneva Convention I”).³² For a wounded or sick POW, the provisions

³¹ Legality of the Threat or Use of Nuclear Weapons, *supra* note 12, at para. 79.

³² 75 U.N.T.S. p. 31; 6 U.S.T. p. 3114.

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of Geneva Convention I apply along with Geneva Convention III. Among other provisions, Article 12 of Geneva Convention I demands respect and protection of wounded or sick members of the armed forces in “all circumstances.”

64. A State’s obligation to ensure humane treatment of enemy soldiers can be severely tested in the heated and confused moments immediately following capture or surrender and during evacuation from the battlefield to the rear. Nevertheless, customary international law as reflected in Geneva Conventions I and III absolutely prohibits the killing of POWs, requires the wounded and sick to be collected and cared for, the dead to be collected, and demands prompt and humane evacuation of POWs.³³

a. Abusive Treatment

65. Ethiopia alleged that Eritrean troops regularly beat and frequently killed Ethiopians upon capture and its immediate aftermath. Ethiopia presented a *prima facie* case, through clear and convincing evidence, to support this allegation.

66. One-third of the Ethiopian POW declarations contain accounts of Eritrean soldiers deliberately killing Ethiopian POWs, most wounded, at capture or evacuation. Particularly troubling are accounts in three declarations of Eritrean officers ordering troops to kill Ethiopian POWs or beating them for not doing so. More than half of the Ethiopian POW declarants described repeated and brutal beatings, both at the front and during evacuation, including blows purposefully inflicted on wounds. Fortunately, these accounts were countered to a degree by several other accounts from Ethiopian declarants of Eritrean officers and soldiers intervening to curtail physical abuse and prevent killings.

67. In rebuttal, Eritrea offered detailed and persuasive evidence that Eritrean troops and officers had received extensive instruction during their basic training, both on the basic requirements of the Geneva Conventions on the taking of POWs and on the policies and practices of the Eritrean People’s Liberation Front (“EPLF”) in the war against the prior Ethiopian government, the Derg, for independence, which had emphasized the importance of humane treatment of prisoners. What is lacking in the record, however, is evidence of what steps Eritrea took, if any, to ensure that its forces actually put this extensive training to use in the field. There is no evidence that Eritrea conducted inquiries into incidents of physical abuse or pursued disciplinary measures under Article 121 of Geneva Convention III.

68. The Commission concludes that Eritrea has not rebutted the *prima facie* case presented by Ethiopia and, consequently, holds that Eritrea failed to comply with the fundamental obligation of customary international law that POWs, even when wounded, must be protected and may not, under any circumstances, be killed. Consequently, Eritrea is liable for failing to protect Ethiopian POWs from being killed at capture or its immediate aftermath, and for permitting beatings and other physical abuse of Ethiopian POWs at capture or its immediate aftermath.

³³ Common Article 3(1)(a), (2); Geneva Convention I, Articles 12, 15; Geneva Convention III, Articles 13, 20, 130.

b. Medical Care Immediately Following Capture

69. Ethiopia alleges that Eritrea failed to provide necessary medical attention to Ethiopian POWs after capture and during evacuation, as required under customary international law reflected in Geneva Conventions I (Article 12) and III (Articles 20 and 15). Many Ethiopian declarants testified that their wounds were not cleaned and bandaged at or shortly after capture, leading to infection and other complications. Eritrea presented rebuttal evidence that its troops provided rudimentary first aid as soon as possible, including in transit camps.

70. The Commission believes that the requirement to provide POWs with medical care during the initial period after capture must be assessed in light of the harsh conditions on the battlefield and the limited extent of medical training and equipment available to front line troops. On balance, and recognizing the logistical and resource limitations faced by both Parties to the conflict, the Commission finds that Eritrea is not liable for failing to provide medical care to Ethiopian POWs at the front and during evacuation.

c. Evacuation Conditions

71. Ethiopia also alleges that, in addition to poor medical care, Eritrea failed to ensure humane evacuation conditions. As reflected in Articles 19 and 20 of Geneva Convention III, the Detaining Power is obliged to evacuate prisoners humanely, safely and as soon as possible from combat zones; only if there is a greater risk in evacuation may the wounded or sick be temporarily kept in the combat zone, and they must not be unnecessarily exposed to danger. The measure of a humane evacuation is that, as set out in Article 20, POWs should be evacuated “in conditions similar to those for the forces of the Detaining Power.”

72. Turning first to the timing of evacuation, Eritrea submitted clear and convincing evidence that, given the reality of battle, the great majority of Ethiopians POWs were evacuated from the various fronts in a timely manner. Despite one disquieting incident in which a wounded Ethiopian POW allegedly was forced to spend a night on top of a trench while artillery exchanges occurred and his Eritrean captors took refuge in the trench, the Commission concludes that Eritrea generally took the necessary measures to evacuate its prisoners promptly.

73. Timing aside, the Ethiopian POW declarants described extremely onerous conditions of evacuation. The POWs were forced to walk from the front for hours or days over rough terrain, often in pain from their own wounds, often carrying wounded comrades and Eritrean supplies, often in harsh weather, and often with little or no food and water. Eritrea offered rebuttal evidence that its soldiers faced nearly the same unavoidably difficult conditions, particularly given the lack of paved roads in Eritrea.

74. Subject to the holding above concerning unlawful physical abuse during evacuation and with one exception, the Commission finds that Eritrean troops satisfied the legal requirements for evacuations from the battlefield under the harsh geographic, military and logistical circumstances. The exception is the Eritrean practice of seizing the footwear of all Ethiopian POWs, testified to by many declarants. Although the harshness of the terrain and weather on the marches to the camps may have been out of Eritrea's control, to force the POWs to walk barefoot in such conditions unnecessarily compounded their misery. The Commission finds Eritrea liable for inhumane treatment during evacuations from the battlefield as a result of its forcing Ethiopian POWs to go without footwear during evacuation marches.

d. Coercive Interrogation

75. Ethiopia alleges frequent abuse in Eritrea's interrogation of POWs, commencing at capture and evacuation. International law does not prohibit the interrogation of POWs, but it does restrict the information they are obliged to reveal and prohibits torture or other measures of coercion, including threats and "unpleasant or disadvantageous treatment of any kind."³⁴

76. Ethiopia presented clear and convincing evidence, unrebutted by Eritrea, that Eritrean interrogators frequently threatened or beat POWs during interrogation, particularly when they were dissatisfied with the prisoner's answers. The Commission must conclude that Eritrea either failed to train its interrogators in the relevant legal restraints or to make it clear that they are imperative. Consequently, Eritrea is liable for permitting such coercive interrogation.

e. Confiscation of Personal Property

77. Ethiopia alleges widespread and systematic confiscation by Eritrean soldiers of the personal property of Ethiopian POWs. The declarations of Ethiopian POWs submitted into evidence clearly and convincingly support this claim. Not only were all captured Ethiopian soldiers deprived of their shoes (presumably, to make escape more difficult), but almost all declarants assert that they were searched upon capture and that all of their personal possessions were taken by their captors. The items allegedly taken included cash, watches, family photos, radios, rings and cigarettes, as well as the POWs' identity cards and, occasionally, items of clothing. The declarants also assert that no receipts were given and that none of the confiscated property was returned.

78. Article 18 of Geneva Convention III requires that POWs be allowed to retain their personal property. Cash and valuables may be impounded on order of an officer, subject to detailed registration and other safeguards. If prisoners' property is taken, it must be receipted and safely held for later return. Under Article 17, identity documents can be consulted by the Detaining Power but must be returned to the prisoner. The Commission believes that these obligations reflect customary international law.

³⁴ Geneva Convention III, Article 17.

79. No rebuttal evidence was submitted by Eritrea with respect to this claim, and the Commission notes that Eritrea's camp procedures for POWs state that "every POW has the duty to hand over property which he had with him when he was captured to the concerned authority."³⁵ The Commission concludes that Eritrea failed to take the necessary measures to prevent the confiscation of prisoners' personal property. Consequently, given the unrebutted evidence of widespread takings of property and Eritrea's camp procedures, Eritrea failed to comply with the obligations of Articles 17 and 18 of Geneva Convention III and is liable to Ethiopia for the consequent losses suffered by Ethiopian POWs.

80. Taking of prisoners' valuables and other property is a regrettable but recurring feature of their vulnerable state. The loss of photographs and other similar personal items is an indignity that weighs on prisoners' morale, but the loss of property otherwise seems to have rarely affected the basic requirements for prisoners' survival and well being. Accordingly, while the Commission does not wish to minimize the importance of these violations, they loom less large than other matters considered elsewhere in this Award.

4. Physical and Mental Abuse in POW Camps

81. Ethiopia's evidence of physical and mental abuse of Ethiopian POWs in Eritrean POW camps takes several forms. First, there was the testimony before the Commission of a former POW; second, Ethiopia filed with its Memorial forty signed declarations, including thirty by former POWs in which they described their treatment while captive; third, Ethiopia filed many unsigned statements and claims forms of former POWs; and fourth, Ethiopia filed data it had drawn from the claims forms of other former POWs. The Commission has relied heavily on the first two of these forms of evidence, as it considers the others of uncertain probative value for the proof of liability.

82. The testimony at the hearing of a former POW and the declarations of the other POWs are consistent and persuasive that the Eritrean guards at the various POW camps relied often upon brutal force for the enforcement of rules and as means of punishment. All thirty POW declarations described frequent beatings of POWs by camp guards. Several guards accused of regularly abusing POWs were identified by name in numerous declarations. The evidence indicates that many of the same guards remained in charge as the numbers of POWs increased and as they were moved from one camp to another, and the conclusion is unavoidable that guards who regularly beat POWs were not replaced as a result. Beatings with wooden sticks were common and, on occasion, resulted in broken bones and lack of consciousness. There were multiple, consistent accounts that, at Digdigta, several POWs who had attempted to escape were beaten senseless, with one losing an eye, prior to their disappearance. Being forced to hold heavy objects over one's head for long periods of time, being punched or kicked, being required to roll on stony or thorny ground, to look at the sun, and to undergo periods of confinement in hot metal containers were notable among the other abuses, all of which violated customary international law, as exemplified by Articles 13, 42, 87 and 89 of Geneva Convention III. Regrettably, the evidence also indicates that the camp commanders did little to restrain

³⁵ See ER17 MEM, Documentary Annex pp. 100-101.

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these abuses and, in some cases, even threatened POWs by telling them that, as there was (prior to the first ICRC visits in August 2000) no list of prisoners, they could do anything they wanted to the POWs and could not be held accountable.

83. In addition to the fear and mental anguish that accompanied these physical abuses, there is clear evidence that some POWs, particularly Tigrayans, were treated worse than others and that several POWs were treated as deserters and given favored treatment. (Those given favored treatment were not among those who signed the thirty declarations relied on by Ethiopia on this issue.) Such discrimination is, of course, prohibited by Article 16 of Geneva Convention III.

84. The evidence is persuasive that beatings were common at all camps: Barentu, Embakala, Digdigta, Afabet and Nakfa. Solitary confinement of three months or more occurred at least at Digdigta and Afabet. At Nakfa, much of the evidence of beatings and other brutal punishments relates to POWs away from camp working on labor projects and occurred when fatigue slowed their work. After ICRC visits began, there is some evidence that POWs were threatened with physical punishment if they reported abuses to the ICRC.

85. Eritrea introduced little, if any, evidence to counter Ethiopia's evidence of physical and mental abuse of POWs. Eritrea sought to undermine the credibility of Ethiopia's witnesses by pointing to some discrepancies in their declarations or testimony on medical and food issues. Eritrea also asserted that the allegations of physical abuse were not sufficiently specific to make it possible to investigate or rebut them. However, Eritrea chose not to introduce any witnesses from among its camp commanders, and it did not unequivocally deny that specific abuses, such as the beating of the attempted escapees at Digdigta, had occurred.

86. In conclusion, the Commission holds that Eritrea violated international law from May 1998 until the last Ethiopian POWs were released and repatriated in August 2002 by permitting the pervasive and continuous physical and mental abuse of Ethiopian POWs in Eritrean POW camps. Consequently, Eritrea is liable for such abuse.

5. Unhealthy Conditions in Camps

a. The Issue

87. A fundamental principle of Geneva Convention III is that detention of POWs must not seriously endanger the health of those POWs.³⁶ This principle, which is also a principle of customary international law, is implemented by rules that mandate camp locations where the climate is not injurious; shelter that is adequate, with conditions as favorable as those for the forces of the Detaining Power who are billeted in the area, including protection from dampness and adequate heat and light, bedding and blankets; and sanitary facilities which are hygienic and are properly maintained. Food must be

³⁶ See Articles 13 and 21-29.

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provided in a quantity and quality adequate to keep POWs in good health, and safe drinking water must be adequate. Soap and water must also be sufficient for the personal toilet and laundry of the POWs.

88. Geneva Convention III declares the principle that any “*unlawful act or omission by the Detaining Power . . . seriously endangering the health of a prisoner . . . will be regarded as a serious breach of the present Convention.*”³⁷ The Commission believes this principle should guide its determination of the liability of the Parties for alleged violations of any of the obligations noted above. Rather than simply deciding whether there were violations, however minor or transitory, the Commission’s task in this proceeding is to determine whether there were violations which warrant the imposition of damages because they clearly endangered the lives or health of POWs in contravention of the basic policy of the Convention and customary international law.

89. Indeed, the claims of both Parties are implicitly, if not explicitly, cast in terms of serious violations of the standards set out above. Neither Party has sought to avoid liability by arguing that its limited resources and the difficult environmental and logistical conditions confronting those charged with establishing and administering POW camps could justify any condition within them that did in fact endanger the health of prisoners. Rather, in defense against claims of serious violations, each Party has relied primarily on the declarations of officers charged with the administration of each of its camps. All of these officers have indicated their full awareness of the basic standards for camp conditions of Geneva Convention III, have described the steps taken to meet them, and have denied that any conditions existed that seriously endangered the health of the POWs.

90. Faced with this conflicting evidence, the Commission has examined all of the claims of each Party relating to each camp that appear to allege a serious violation (as defined above) of each of the standards set out above at each camp. It has sought to determine whether there exists in the record clear and convincing evidence to support those claims. To sustain this burden in the context of camp conditions, the Commission finds that the Claimant must produce credible evidence that:

- (a) portrays a serious violation;
- (b) is cumulative and is reinforced by the similarity of the critical allegations;
- (c) is detailed enough to portray the specific nature of the violation; and
- (d) shows that the violation existed over a period of time long enough to justify the conclusion that it seriously endangered the health of at least some of the POWs in the camp.

b. Analysis of Health-Related Conditions at Each of Eritrea’s POW Camps

91. Ethiopia alleged that each of Eritrea’s POW camps failed to provide healthy conditions of captivity.

³⁷ Article 13 (emphasis added).

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92. While there certainly is evidence that the camp at Barentu was in violation of standards prescribed by Geneva Convention III, it is insufficient to prove that the health of prisoners there was seriously endangered. This camp was in operation for no more than six weeks, and the period of internment of most of the relatively few prisoners there was for lesser periods.

93. Only three of the thirty POW declarants speak to conditions at Embakala. This apparent paucity of testimony may be explained by the fact that no more than 150 Ethiopian prisoners (out of a total of approximately 1,100) were interned there and for no longer than three to four months each. Nevertheless, these three declarations present cumulative, reinforcing and detailed testimony constituting a strong indictment of the conditions at the camp. From the evidence, it appears that all the prisoners at Embakala were housed in one small building composed of corrugated metal sheets which was divided into two rooms and became dangerously overcrowded soon after the camp went into operation. The floor of these quarters consisted of dirt, which was over time converted to filthy dust as a result of the crowded living conditions and problems of hygiene. The roof was so low that the inmates could not stand erect. The prisoners were often confined in these quarters during the day with little opportunity to go outside, except when allowed to relieve themselves in an adjacent field (only once each day) and to bathe (no more than once a week). Confined in very close quarters, enduring stifling heat, often stripped to their underwear, the prisoners were also often enjoined to keep silent for long periods of time. Throughout their stay, they were provided with a meager diet consisting of bread and lentil stew. There were no latrines in the field used for toileting (once a day). Prisoners who suffered from diarrhea were forced to relieve themselves in the overcrowded quarters. The Commission finds this detailed evidence to be clear and convincing and to constitute a *prima facie* case of serious violations at Embakala of required health-related conditions, *i.e.*, the provision of healthy accommodation, which seriously endangered the health of prisoners.

94. There is more abundant evidence to justify similar conclusions regarding conditions at Digdigta (nineteen POW declarations), Afabet (twenty POW declarations), and Nakfa (thirty POW declarations). As to each of these camps, there is, *prima facie*, clear and convincing evidence that Eritrea failed to provide adequate housing, food and water, and that these failures constituted serious violations of Geneva Convention III. Cumulative, reinforcing and detailed testimony show that, at all of these camps, the quarters (consisting of corrugated steel structures) were seriously overcrowded, dirty, lacking in windows and ventilation, extremely hot during the day (when, again, prisoners sometimes stripped down to their underwear), and cold at night because of a lack of adequate provision for bedding and blankets. Many prisoners testified to the high incidence of diarrhea and tuberculosis, and to deaths resulting from these diseases, and to the fact that those afflicted with these diseases were not housed in separate quarters.

95. Efforts to provide sanitary toileting facilities at these camps were, at best, limited. At each camp, prisoners used adjacent fields, twice a day at prescribed and limited periods of time. Those who were sick (*e.g.*, with diarrhea) or otherwise in need during other periods of the day or night were forced to use containers or holes dug in the ground

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of their sleeping quarters. The smells and the absence of water to wash after toileting exacerbated the adverse conditions of hygiene.

96. Indeed, provision of adequate water for both drinking and bathing was a serious problem at all three camps. In each, water was brought in by tanker trucks. At Digdigta, the drinking water provided during the day (when housing conditions were stifling) was often too hot to drink in amounts adequate to relieve thirst, as well as insufficient in quantity. At Afabet, drinking water was in short supply and sometimes quite “salty.” At Nakfa, there were often serious water shortages because the tanker trucks failed to appear as scheduled or failed to supply enough to meet the needs of the camp. There is also testimony that the water secured from other sources (rain barrels and nearby “streams”) was dirty and insect-ridden. Water for bathing was also in short supply; prisoners were allowed, at best, to bathe and launder only once a week.

97. Virtually all of the declarants allege that, at all of these camps, the food provided consisted of inedible (*e.g.*, “dirty,” “worm-ridden”) bread and lentil stew. The testimony about food at Nakfa indicates that the diet was frequently insufficient in quantity and quality and that there was often widespread hunger.

98. Indeed, Nakfa presents a disturbing picture of inadequate efforts to prepare in advance for the health conditions of prisoners. At an earlier time, this site had served as an historic, key base for EPLF forces during their long war for independence against the armies of the Derg. The isolated, rugged terrain there includes underground caves. Long abandoned after the Derg collapsed in 1991, Nakfa was chosen in May 2000 as the site for a new camp to which all prisoners should be removed. The preparations for reception of prisoners appear to have been inadequate. There is considerable testimony that the first group of prisoners to arrive at Nakfa was put in underground, windowless, dark, dank and dirty quarters, which were littered with human trash and the dung of donkeys and goats, and thereafter these premises were never properly cleaned. This evidence, coupled with that portraying the problems encountered in providing enough water for the prisoners, suggests a serious failure to meet the basic obligation of Geneva Convention III to provide at the outset “premises . . . affording every guarantee of hygiene and healthfulness.”³⁸

99. The conditions described above existed in a context where, as discussed elsewhere, there is also clear and convincing evidence of physical mistreatment of prisoners (including beatings or threats of violence for those who asked to be allowed to relieve themselves outside of their sleeping quarters at times other than the period prescribed for toileting in the field) and clear and convincing evidence of arduous forced labor at all of the camps. These harsh regimes of discipline and labor exacerbated the dangers to the health of prisoners created by the sub-standard conditions of housing, sanitation, food, water and bathing.

³⁸ Geneva Convention III, Article 22.

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100. Eritrea has failed to rebut the *prima facie* case established by Ethiopia. Eritrea's rebuttal depended primarily on the declarations of two senior officers who were involved in the administration of the POW camps, who did not testify at the hearing.

101. Eritrea provided the declaration of an Army colonel, which tells the Commission that he was based at the Eritrean Ministry of Defense in Asmara where he commanded the Department of Military Police. This officer stated that he was responsible for "all aspects of oversight" over all of the prison camps, including procuring the necessary supplies for their operation. He testified that he ordered sufficient supplies for each camp to provide adequate bedding, blankets, clothing, soap and razors for each prisoner; to provide each camp with enough pasta and vegetables to supplement, twice a week, the daily diet of bread and lentils; and to supply meat for celebrations of religious holidays. In support of this testimony, Eritrea submitted a massive number of receipts, virtually all written in Tigrinya, which, the Commission is told, reflect the purchases during a three-year period of the above "specialty items" for the prison camps. Since these documents have not been translated into English, as required by Article 12 of the Commission's Rules of Procedure, the Commission is unable to analyze the implications of this submission. Moreover, since the colonel had been based in Asmara, he did not testify directly about the food or any other health conditions at any of the camps.

102. The declaration of an Eritrean Army lieutenant colonel who helped with the actual administration of Digdigta, Afabet and Nakfa contains virtually no testimony about the food provided at these camps. Thus, the Commission is unable to know with any certainty whether, and to what extent, these supplies of supplemental food actually reached the intended beneficiaries at any of these camps. This declaration is the only one the Commission has from an officer who had direct responsibility for the administration of camps and who was in a position to witness, firsthand, the health conditions there. The bulk of this declaration deals with this officer's efforts to advise prisoners of their duties and of procedures for raising questions about them. Nowhere does this declaration give a description of the housing, sanitary facilities, water, bathing opportunities and food provided for prisoners at the three camps which he administered. Nor does Eritrea's Counter-Memorial provide a guide to other direct evidence which might rebut Ethiopia's evidence.

103. In conclusion, the Commission finds that the conditions of housing, sanitation, drinking water, bathing opportunities and food at the prison camps at Embakala, Digdigta, Afabet and Nakfa were such as to constitute a serious violation by Eritrea of its basic duties to protect the health of prisoners in its custody, and these failures seriously endangered the health of these prisoners and thus constituted a violation by Eritrea of applicable international humanitarian law. Consequently, Eritrea is liable for this endangerment of the health of Ethiopian POWs.

6. Inadequate Medical Care in Camps

104. A Detaining Power has the obligation to provide in its POW camps the medical assistance on which the POWs depend to heal their battle wounds and to prevent further

damage to their health. This duty is particularly crucial in camps with a large population and a greater risk of transmission of contagious diseases.

105. The protections provided by Articles 15, 20, 29, 30, 31, 109 and 110 of Geneva Convention III are unconditional. These rules, which are based on similar rules in Articles 4, 13, 14, 15 and 68 of the Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929,³⁹ are part of customary international law.

106. Many of these rules are broadly phrased and do not characterize precisely the quality or extent of medical care necessary for POWs. Article 15 speaks of the “medical attention *required* by their state of health;” Article 30 requires infirmaries to provide prisoners “the attention they *require*” (emphasis added). The lack of definition regarding the quality or extent of care “required” led to difficulties in assessing this claim. Indeed, standards of medical practice vary around the world, and there may be room for varying assessments of what is required in a specific situation. Moreover, the Commission is mindful that it is dealing here with two countries with very limited resources.

107. Nevertheless, the Commission believes certain principles can be applied in assessing the medical care provided to POWs. The Commission began by considering Article 15’s concept of the maintenance of POWs, which it understands to mean that a Detaining Power must do those things required to prevent significant deterioration of a prisoner’s health. Next, the Commission paid particular attention to measures that are specifically required by Geneva Convention III, such as the requirements for segregation of prisoners with infectious diseases and for regular physical examinations.

a. Ethiopia’s Claims and Evidence

108. A large proportion of Ethiopian POW declarations contain detailed allegations that the available medical care was inadequate in all Eritrean POW camps. The specific allegations, however, vary considerably and are sometimes mutually inconsistent. While some declarants recount, for example, that medical care was simply unavailable at a specific camp, others state that they received treatment in the same camp but that it failed to heal their wounds or illnesses. Consequently, while the Commission is satisfied that medical care was available at each permanent camp, it is difficult to assess its adequacy.

109. As noted above, international law requires effective measures to maintain prisoners’ health. Given the often conflicting evidence regarding the details of medical care provided to the Ethiopian POWs, the Commission considered various possible measures to assess compliance with this basic obligation. While some writers have identified weight loss during captivity as a possible measure of the overall standard of health,⁴⁰ this measure was not available here. Ethiopia did not argue that POWs lost substantial weight during their captivity. The one former Ethiopian POW witness at the hearing testified that he had lost perhaps five kilograms during his nearly four years of

³⁹ 118 L.N.T.S. pp. 343-411.

⁴⁰ See, e.g., Levie, *supra* note 28, at p. 133.

detention, and that his health was not undermined when he returned to Ethiopia;⁴¹ there was no allegation that his weight loss *per se* indicated inadequate medical care.

110. The Commission was, however, sadly impressed by the high number of Ethiopian POWs who died in the Eritrean camps. A significant mortality rate among a group of predominantly young persons is objectively cause for concern. The evidence, although not wholly consistent, clearly indicated an abnormally high rate of deaths among the prisoners in Eritrean camps. In response to questioning from the Commission, the Ethiopian POW witness testified at the hearing that, within his group of fifty-five POWs (with whom he moved from camp to camp), four had died.⁴² Several declarations state that, of the total population of some 1,100 Ethiopian POWs, forty-eight died. Ethiopia gave a list of fifty-one POWs who did not survive the camps. (Eritrea estimated that thirty-nine POWs died in captivity.) Significantly, there was substantial and reinforcing evidence that many of these deaths resulted from diarrhea, tuberculosis and other illnesses that could have been avoided, alleviated or cured by proper medical care.

111. In the Commission's view, this high death toll, combined with the other specific serious deficiencies discussed below, is clear and convincing evidence that Eritrea did not give the totality of POWs the basic medical care required to keep them in good health as required by Geneva Convention III, and consequently constitutes a *prima facie* case.

112. The Ethiopian POW declarations contain frequent complaints that treatment was inadequate. Many indicate that clinic personnel often gave prisoners only painkillers, and not antibiotics or other critical drugs. Many indicate that treatment was often delayed, thereby adversely affecting recovery from wounds or illness. The evidence suggests that delays of one to several days were common, particularly just after the arrival of new POWs at a camp. Several recounted instances in which patients were not transferred to hospitals until it was too late for survival. Some contain allegations that medical personnel were inadequate, although the evidence conflicted in this regard.

113. The Ethiopian POW declarants also testify to the lack of basic preventive care. Numerous statements indicate that no regular medical examinations took place, except perhaps at Nakfa. The declarations also indicate that tuberculosis sufferers lived together with other POWs.

b. Eritrea's Defense

114. Eritrea sought to prove that it had provided substantial medical care by submitting declarations from several medical personnel and a massive amount of medical records. However, much of the medical record evidence was illegible, disorganized, out of chronological order, sometimes overlapping and apparently incomplete. The Commission could not, therefore, rely on much of this evidence.

⁴¹ Transcript p. 169.

⁴² Transcript pp. 170-171.

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115. Eritrea's evidence did demonstrate that many Ethiopian POWs were provided with medical attention, primarily at the camp clinics with the services of paramedical personnel. Some POWs with serious diseases or who required special treatment were referred on occasion to a more specialized hospital (*e.g.*, Keren, Afabet, Ghindu, Nakfa). There was evidence that Eritrea provided for dental care either in hospitals or in the camp clinic by having dentists visit. Likewise, there was evidence that Eritrea gave a few POWs extensive medical treatment, including multiple surgical interventions. It occasionally provided drugs and vitamins beyond such few drugs and pain relievers as were available at the clinics.

c. The Commission's Conclusions

116. Overall, while the Commission is satisfied from the evidence that Eritrea made efforts to provide medical care and that some care was available at each permanent camp, Eritrea's evidence is inadequate to allow the Commission to form judgements regarding the extent or quality of health care sufficient to overcome Ethiopia's *prima facie* case.

117. The camp clinic logs (where readable) do show that numerous POWs went to the clinics, but they cannot establish that care was appropriate or that all POWs in need of medical attention were treated in a timely manner over the full course of their captivity. For example, from the records it appears that the clinics did not register patients on a daily basis. Under international humanitarian law, a POW has the right to seek medical attention on his or her own initiative and to receive the continuous medical attention required by his or her state of health – which requires daily access to a clinic.

118. International humanitarian law also requires that POWs be treated at a specialized hospital or facility when required medical care cannot be given in a camp clinic. The hospital records submitted by Eritrea, however, are not sufficient to establish that all POWs in need of specialized treatment were referred to hospitals. Moreover, a quantitative analysis of those records shows that, while a few relate to treatment in the first half of 1999 at Digdigta, nearly one half relate to the period from August to December 2000 and one quarter to 2001 and 2002, *i.e.*, the time period after Eritrea acceded to the Geneva Conventions and ICRC camp visits started. Only a few records relate to treatment between July 1999 and May 2000, when the POWs were detained at Afabet, and none relates to the time when Barentu and Embakala were open.

119. Likewise, the medicine supply reports submitted by Eritrea indicate that Eritrea distributed some drugs and vitamins to the POWs, but they do not prove that Eritrea provided adequate drugs to all POWs in the camps. It is striking that, according to the evidence submitted, Eritrea apparently distributed substantially more Vitamin A, B and C and multi-vitamins to POWs after August 2000 than before.

120. Preventive care is a matter of particular concern to the Commission. As evidenced by their prominence in Geneva Convention III, regular medical examinations of all POWs are vital to maintaining good health in a closed environment where diseases are easily spread. The Commission considers monthly examinations of the camp

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population to be a preventive measure forming part of the Detaining Power's obligations under international customary law.

121. The Commission must conclude that Eritrea failed to take several important preventative care measures specifically mandated by international law. In assessing this issue, the Commission looked not just to Ethiopia but also to Eritrea, which administered the camps and had the best knowledge of its own practices.

122. As noted, Ethiopia submitted several declarations indicating that no regular medical examinations took place. Eritrea failed to submit records in rebuttal demonstrating that personal POW medical data, including weight records, were maintained on a regular basis. It appears that health inspections were performed only in the last months of captivity.

123. The evidence also reflects that Eritrea failed to segregate certain infected prisoners. POWs are particularly susceptible to contagious diseases such as tuberculosis, and customary international law (reflecting proper basic health care) requires that infected POWs be isolated from the general POW population. Several Ethiopian POW declarants describe how tuberculosis patients were lodged with the other POWs, evidence which was not effectively rebutted by Eritrea. The camp authorities should have detected contagious diseases as early as possible and organized special wards.

124. Accordingly, the Commission holds that Eritrea violated international law from May 1998 until the last Ethiopian POWs were released and repatriated in August 2002, by failing to provide Ethiopian POWs with the required minimum standard of medical care. Consequently, Eritrea is liable for this violation of customary international law.

125. In closing, the Commission notes its recognition that Eritrea and Ethiopia cannot, at least at present, be required to have the same standards for medical treatment as developed countries. However, scarcity of finances and infrastructure cannot excuse a failure to grant the minimum standard of medical care required by international humanitarian law. The cost of such care is not, in any event, substantial in comparison with the other costs imposed by the armed conflict.

7. Unlawful Conditions of Labor

126. Ethiopia claims that Eritrea forced POWs to work in conditions that violated requirements of Articles 13, 14, 26, 27, 49-55, 62, 65 and 66 of Geneva Convention III.

127. Article 49 of Geneva Convention III does not forbid a Detaining Power to compel POWs who are physically fit to work, but it does forbid compelling officers to work. The declarations by former Ethiopian POWs make clear that, while the most seriously disabled were generally excused from work, other sick or wounded POWs who were not physically fit were not excused and were generally forced to work and that officers were forced to work.

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128. The evidence also indicates that Ethiopian POWs, while at work at Afabet, Digdigta and Nakfa, were frequently beaten by the Eritrean guards when they tried to take rests or found themselves unable to carry heavy loads. Such treatment of POWs is not only a violation of Article 13 of Geneva Convention III, which requires humane treatment of POWs and their protection from acts of violence, but also of Article 51, which forbids making labor more arduous through disciplinary measures, *a fortiori* including beatings and other physical punishments.

129. The evidence also compels the finding that Eritrea failed to provide POWs at Afabet, Digdigta and Nakfa with suitable working conditions, as required by Articles 27 and 51 of Geneva Convention III. Examples include the deprivation of footwear while the POWs were forced to work on road construction, stone quarrying or carrying, or firewood collection, and the refusal of access to drinking water except during lunch.

130. There is also evidence, which was not rebutted, that POWs at Afabet, Digdigta and Nakfa were often required to work excessive hours, without sufficient breaks, in breach of Article 53 of Geneva Convention III.

131. The Commission finds that the evidence, which was not rebutted, establishes that none of the POWs was paid for his work, as required by Articles 54 and 62 of Geneva Convention III.

132. Ethiopia also has argued that for the POWs to be forced to work in weak health, hungry and thirsty, without appropriate footwear, and under the threat of beatings, was humiliating and therefore in breach of Article 52 of Geneva Convention III. However, the Commission believes that is not the purport of that Article.

133. Finally, Ethiopia asserted that Eritrea required its POWs to perform work of a military character in breach of Article 50 of Geneva Convention III. However, no sufficient evidence has been submitted for this allegation. To build residence houses and other facilities for the camp and the guards is not work of a military character, but concerns the installation of the camp, and is allowed under Article 50. Similarly, under Article 50, roads are considered works of public utility and therefore work on them is permissible, unless it is proven that they have a military character or purpose. Ethiopia did not submit such evidence. Consequently, the Commission does not find that Eritrea breached Article 50 of Geneva Convention III.

134. In conclusion, the Commission holds that Eritrea has subjected Ethiopian POWs to conditions of labor that violated Articles 13, 27, 49, 51, 53, 54 and 62 of Geneva Convention III. Consequently, Eritrea is liable for these unlawful labor conditions.

8. Conditions of Transfer Between Camps

135. The Commission turns next to Ethiopia's allegations that Eritrea treated POWs inhumanely in the course of transfer between camps. As recited by Ethiopia, Articles 46 and 47 of Geneva Convention III require the Detaining Power to conduct transfers

humanely. At a minimum, as with evacuation from the front, the Detaining Power should not subject POWs to transfer conditions less favorable than those to which its own forces are subjected. In all circumstances, the Detaining Power must consider the interests of the prisoners so as not to make repatriation more difficult than necessary, and should provide food, water, shelter and medical attention. The sick and wounded should not be transferred if it endangers their recovery, unless mandated by safety reasons.

136. The Ethiopian POW declarations consistently recount hours and days of travel on overcrowded military trucks or buses, over rough roads, in extremes of heat and cold, with few if any toilet breaks and little if any food and water. In rebuttal, Eritrea presented evidence that its own forces, at least to some extent, endured these same difficult transportation conditions, particularly given the lack of paved roads in Eritrea. The Commission recognizes that drastically limited Eritrean resources and infrastructure made transfer of prisoners in this conflict unavoidably miserable, but, again, only to some extent.

137. However, the evidence also reflects that, to a certain and critical extent, Eritrea did not do all within its ability to make transfer of the POWs as humane as possible. The evidence indicates that transfers were often accompanied by deliberate physical abuse by guards, and that Eritrea provided no effective measures to prevent such misconduct. The Commission is troubled by accounts, fortunately few, of purposefully cruel treatment; one declaration describes Eritrean soldiers pouring fuel on the bed of transport truck before a twelve-hour trip in open sun. Of even greater concern is the clear and convincing evidence presented by Ethiopia that Eritrean soldiers frequently beat POWs during transfer. Particularly serious is repetitive evidence of Eritrean soldiers beating the sick and wounded. In one case, two declarations recounted the death of one sick Ethiopian prisoner who was thrown from a truck on the transfer from Afabet to Nakfa and left to die.

138. In the absence of effective rebuttal by Eritrea, the Commission finds Eritrea liable for permitting unnecessary suffering of POWs during transfer between camps.

9. Treatment of the Dead

139. Ethiopia, unlike Eritrea, brought separate claims for alleged violations of customary international law requirements following the death of a POW. Specifically citing Articles 120 and 121 of Geneva Convention III, Ethiopia alleged that Eritrea failed to provide medical examination and death certificates for POWs who died in captivity, to investigate potential non-natural causes of death, or to ensure honorable burial with religious rites in marked graves.

140. There is little evidence in the record concerning treatment of the dead. Only a small number of the Ethiopian POW declarations address this issue, and they do so in an inconsistent fashion. For example, although all of the declarants were interned at Nakfa, only three recount that prisoners were not allowed to bury their dead (for some period of time) at Nakfa.

141. In the absence of clear and convincing evidence from Ethiopia, the Commission does not find Eritrea liable for violating international law obligations concerning treatment of Ethiopia POWs who died in captivity.

10. Failure to Post Camp Rules and Allow Complaints

142. As noted previously, Geneva Convention III establishes an extremely detailed regime. Earlier sections of this Award address Ethiopia’s claims alleging violations of core elements of this regime involving killings, physical or mental abuse of POWs, or matters vital to POWs’ survival, such as food, housing and medical care.

143. This final section addresses Ethiopia’s claims involving two sets of obligations of a somewhat different character. Ethiopia claims violations of requirements to (a) post camp regulations and (b) have complaint procedures. These provisions establish administrative or procedural requirements partly aimed at protecting POWs’ rights or at remedying deficiencies. The Commission does not mean to minimize their role in the total scheme of protection under the Convention. Nevertheless, these claims loom less large than many others considered previously.

a. Camp Regulations

144. Article 41 of Geneva Convention III requires every POW camp to post both the Convention and “regulations, orders, notices and publications of every kind,” where prisoners may read them in the prisoners’ language. Prior to August 14, 2000, the Geneva Convention was not in force between the Parties; the Commission sees no basis to hold that customary law requires the posting of the Convention before that date. However, the Commission finds that there is a customary obligation to post camp regulations in a clear and accessible location and otherwise to ensure that POWs are aware of their rights and obligations.

145. Ethiopia adduced little evidence to support this claim. It cited responses on a few of its claims forms regarding the alleged lack of posted regulations at Eritrea’s three initial camps, but the Commission held earlier that it is unable to rely on the claims forms given the circumstances of their collection and the uncertain reliability of the information they contain. Accordingly, the claim as to these three camps must fail for lack of proof. Ethiopia cites one generally phrased witness declaration concerning Afabet, and cites a second declaration to show the lack of posted regulations at Nakfa. Eritrea presented un rebutted evidence that there were camp rules and evidence suggesting that those rules were read out to prisoners. However, it did not directly represent to the Commission that the rules were posted.

146. Given the sparse evidence supporting Ethiopia’s claims regarding the situations at all five camps and the Commission’s requirement that claims must be established by clear and convincing evidence, this claim must be rejected for failure of proof.

b. Complaint Procedures

147. Ethiopia also claimed that Eritrea did not provide effective complaint procedures. Article 78 of Geneva Convention III assures POWs the right to “make known” to the military authorities holding them “requests” regarding their conditions. Requests and complaints cannot be limited, cannot be punished, and must be transmitted immediately.

148. Taking account, for instance, of the practice during World War I cited by Ethiopia⁴³ and the inclusion of this concept in the 1929 Convention, the Commission finds that both customary law and the Convention guarantee POWs a right to complain about their conditions of detention free from retribution. Ethiopia’s evidence, although not as extensive as on some other more fundamental issues, establishes that this right frequently was not allowed and that complaining prisoners were subjected to severe punishments.

149. Here, as in the previous claim, Ethiopia cites several claims forms discussing the alleged lack of complaint procedures. As noted above, the Commission is not prepared to rely on these forms because of their uncertain reliability. However, Ethiopia also cited a number of consistent witness declarations providing cumulative support for its claim. Ethiopia’s evidence suggested that prisoners sometimes complained to senior camp officers, although without effect. However, accounts of complaining prisoners being beaten or harassed by lower-ranking personnel were much more common. These included two former POWs who complained of being beaten at Barentu; allegations that complaints to the camp commander and to medical personnel at Embakala were ineffective; and accounts of the lack of complaint procedures and of beating of complaining prisoners at Digdigta and at Afabet. Conditions appear to have been particularly harsh for complaining prisoners at Nakfa.

150. Based on clear and convincing evidence, the Commission finds that Eritrea, in violation of its obligations under international law, did not allow Ethiopian POWs held at any of its camps to complain about their conditions and to seek redress. Further, the evidence shows that in all of the camps, but particularly in Nakfa, prisoners who attempted to complain were often subjected to heavy and unlawful sanctions, including segregation from the rest of the camp population and beatings by guards. Consequently, Eritrea is liable for these violations.

⁴³ Transcript p. 103.

V. AWARD

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

A. Jurisdiction

1. The Commission lacks jurisdiction over claims that were not filed by December 12, 2001. The claim asserted by the Claimant for the first time in its Memorial concerning delayed repatriation of POWs by the Respondent is dismissed for lack of jurisdiction.

2. All other claims asserted in this proceeding are within the jurisdiction of the Commission.

B. Applicable Law

1. With respect to matters prior to Eritrea’s accession to the Geneva Conventions of 1949, effective August 14, 2000, the international law applicable to this claim is customary international law, including customary international humanitarian law as exemplified by the relevant parts of the four Geneva Conventions of 1949.

2. Whenever either Party asserts that a particular relevant provision of those Conventions was not part of customary international law at the relevant time, the burden of proof will be on the asserting Party.

3. With respect to matters subsequent to August 14, 2000, the international law applicable to this claim is the relevant parts of the four Geneva Conventions of 1949, as well as customary international law.

C. Evidentiary Issues

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

D. Findings of Liability for Violation of International Law

The Respondent is liable to the Claimant for the following violations of international law committed by its military personnel and by 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;

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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.

E. Other Findings

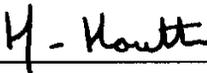
1. Claims based on alleged breaches by the Respondent of the *jus ad bellum* are deferred for decision in a subsequent proceeding.

2. All other claims presented in this case are dismissed.

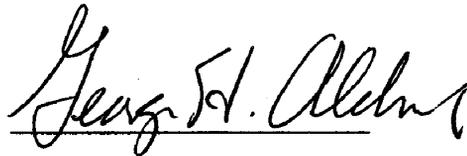
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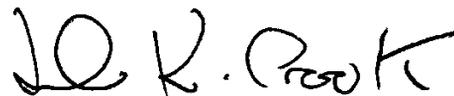
Done at The Hague, this 1st day of July 2003,



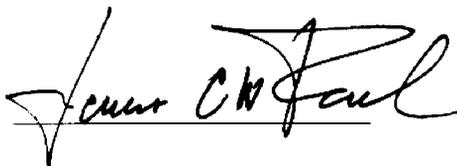
President Hans van Houtte



George H. Aldrich



John R. Crook



James Paul



Lucy Reed