ERITREA ETHIOPIA CLAIMS COMMISSION

PARTIAL AWARD

Central Front
Eritrea's Claims 2, 4, 6, 7, 8 & 22

between

The State of Eritrea

and

The Federal Democratic Republic of Ethiopia

The Hague, April 28, 2004

ERITREA ETHIOPIA CLAIMS COMMISSION

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By the Claims Commission, composed of:
Hans van Houtte, President
George H. Aldrich
John R. Crook
James C.N. Paul
Lucy Reed

PARTIAL AWARD – Central Front – Eritrea's Claims 2, 4, 6, 7, 8 & 22
between the Claimant,
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Professor Lea Brilmayer, Legal Advisor to the Office of the President, Co-Agent for the Government of Eritrea
Ms. Lorraine Charlton, Deputy Legal Advisor to the Office of the President
Mr. Solomon M. Yacob
Mr. Michael T. Hagis

Counsel and Advocates

Professor James Crawford
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Consultants

Ms. Semhar Araia
Major Giorgis Abraha
Ms. Amanda Jones
Ms. Priscilla Munoz
Mr. Brian O'Donoghue
Ms. Danielle Tully

and the Respondent,
The Federal Democratic Republic of Ethiopia, represented by:

Government of Ethiopia

Mr. Habtom Abraha, Consul General, Ethiopian Mission in The Netherlands
Mr. Reta Alemu, First Secretary, Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia, Addis Ababa
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I. INTRODUCTION

A. Summary of the Positions of the Parties

1. These Claims ("Eritrea's Claims 2, 4, 6, 7, 8 and 22") have been brought to the Commission by the Claimant, the State of Eritrea ("Eritrea"), pursuant to Article 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of December 12, 2000 ("the Agreement"). The Claimant asks the Commission to find the Respondent, the Federal Democratic Republic of Ethiopia ("Ethiopia"), liable for loss, damage and injury suffered by the Claimant, including loss, damage and injury suffered by the Claimant's nationals, persons of national origin and agents, as a result of alleged infractions of international law occurring on the Central Front of the 1998–2000 international armed conflict between the Parties. The Claimant requests monetary compensation. These Claims do not include any claims set forth in separate claims by the Claimant, such as those for mistreatment of prisoners of war (Eritrea's Claim 17) or for mistreatment of other Eritrean nationals in areas of Ethiopia not directly affected by the armed conflict (Eritrea's Claims 15, 16, 23 and 27–32).

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

B. Background and Territorial Scope of the Claims

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

4. For purposes of these Claims, the Central Front encompassed the area of five Sub-Zobas in Southern Eritrea, that is Adi Quala, Senafe, Areza, Tserona and Mai Mene.

C. General Comment

5. As the findings in this Partial Award and in the related Partial Award in Ethiopia's Claim 2 describe, the allegations and the supporting evidence presented by the Parties frequently indicate diametrically opposed understandings of the relevant facts. Such incompatible views of the relevant facts may perhaps be considered not surprising in light of the confusion and uncertainty characteristic of military operations and the polarizing effects of warfare. It has often been said that, in war, truth is the first casualty.[1] Or, as Julius Stone expressed it half a century ago, modern warfare tends to produce "nationalization of the truth."[2] Nevertheless, the Commission must note the obvious difficulties it faces when each Party presents large numbers of sworn declarations by

[1] That comment is generally attributed to Senator Hiram Johnson, an opponent of entry by the United States in the First World War. *See* PHILIP KNIGHTLY, THE FIRST CASUALTY – FROM THE CRIMEA TO VIETNAM: THE WAR CORRESPONDENT AS HERO, PROPAGANDIST AND MYTH MAKER p. 17 (1975).
[2] JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT pp. 321–323 (1954).

witnesses asserting facts that disagree completely with the facts asserted in large numbers of sworn declarations by the witnesses of the other Party.

6. In these unhappy circumstances, the Commission, which is charged with determining the truth, must do its best to assess the credibility of such conflicting evidence. Considerations of time and expense usually prevent more than a handful of witnesses being brought to The Hague to testify before the Commission, so the Commission is then compelled to judge the credibility of any particular declaration, not by observing and questioning the declarant, but rather on the basis of all the relevant evidence before it, which may or may not include evidence from persons or parties not directly involved in the conflict. In that connection, the Commission recalls its holding on the required standard of proof in its Partial Awards: "Particularly in light of the gravity of some of the claims advanced, the Commission will require clear and convincing evidence in support of its findings."[3] The same requirement is applicable to the claims presented in the present Partial Award.

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

II. PROCEEDINGS

8. 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. These Claims were filed on December 12, 2001, and a Statement of Defense on April 15, 2002. The Claimant's Memorial was filed on October 15, 2002, and the Respondent's Counter-Memorial on September 1, 2003. Both Parties filed additional evidence on October 13, 2003. A hearing on liability was held at the Peace Palace in November 2003, in conjunction with a hearing in Ethiopia's related Claim 2.

III. JURISDICTION

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

10. In these Claims, as in Ethiopia's Claim 2, the Claimant alleges that the Respondent's conduct related to military operations on the Central Front violated

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

numerous rules of international humanitarian law. Thus, the claims fall directly within the scope of the Commission's jurisdiction.

11. In its Counter-Memorial, Ethiopia contests the Commission's jurisdiction over certain claims presented in Eritrea's Memorial that allegedly were not presented in its Statements of Claim.

12. As stated in the Commission's prior Awards, the Parties agree that the Agreement extinguished any claims not filed with the Commission by December 12, 2001, which was the date on which all Statements of Claim had to be filed. The question before the Commission, therefore, is to determine whether any claims asserted by Eritrea in the present proceeding were not among the claims presented in its Statements of Claim.

13. The following claims asserted by Eritrea in its Memorial are subject to this challenge:

1. Alleged violations of international law by Ethiopia occurring after March 2001;
2. Alleged refusal or failure of Ethiopian military commanders to stop illegal conduct by Ethiopian soldiers in Senafe Sub-Zoba and in Tserona Sub-Zoba;
3. Alleged unlawful use of landmines by Ethiopia in Areza Sub-Zoba;
4. Alleged conduct by Ethiopia of unlawful political re-education classes in Mai Mene Sub-Zoba;
5. Alleged violations of Protocol II of the 1980 Convention on Certain Conventional Weapons ("Protocol II of 1980")[4] or of Articles 52, 57 or 59 of Additional Protocol I of 1977 to the Geneva Conventions ("Protocol I");[5] and
6. Alleged continuing unlawful occupation after March 2001 of Eritrean territory on the Central Front and unlawful conduct during such continued occupation.

14. The Commission finds that the first, third, fourth and sixth of these claims were not identified or referred to in any way in the relevant Statements of Claim filed by Eritrea on December 12, 2001. Consequently, they were extinguished pursuant to Article 5, paragraph 8, of the Agreement and cannot be considered by the Commission. The second and fifth of these claims require separate consideration.

15. With respect to the second claim, the Commission finds that there was one reference in the Statement of Claim for Senafe Sub-Zoba to an Ethiopian commanding

[4] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Oct. 10, 1980, 1342 U.N.T.S. 168, *reprinted in* 19 I.L.M. p. 1529 [hereinafter Protocol II of 1980].
[5] Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, arts. 52 and 57, June 8, 1977, 1125 U.N.T.S. p. 3 [hereinafter Protocol I].

officer ignoring a complaint of rapes allegedly committed by his men.[6] However, that Statement of Claim does not include in its lists of relevant treaty articles any dealing with the responsibility of commanders; nor, more importantly, does it include any reference to the failure of commanders to stop illegal conduct by the troops under their command when it lists the violations of international law in Senafe Sub-Zoba on which it bases its claims.[7] The Commission concludes that the second claim, as it relates to Senafe Sub-Zoba, was not identified in the Statement of Claim sufficiently to satisfy the jurisdictional requirements of the Agreement and, consequently has been extinguished pursuant to Article 5, paragraph 8, of the Agreement and cannot be considered by the Commission. The Commission notes that the extinguishment of these claims does not affect Eritrea's claims that Ethiopia is liable for illegal conduct by members of its armed forces.

16. In the Statement of Claim for Tserona Sub-Zoba, there was no reference to any failure of commanders. On the contrary, the allegations in that Statement of Claim are that the acts complained of were intentional or deliberate actions by the Ethiopian army. Consequently, the second claim as it relates to Tserona Sub-Zoba was extinguished pursuant to Article 5, paragraph 8, of the Agreement and cannot be considered by the Commission.

17. Finally, with respect to the fifth of the challenged claims, the Commission notes that the challenge is to the failure of Eritrea to refer to certain specific treaty provisions in its Statements of Claim. This is considerably different from the other four challenged claims, all of which alleged unlawful Ethiopian acts or failures to act. While the Commission's Rules of Procedure state that Statements of Claim shall include a "precise statement" of the "violation or violations of international law on the basis of which the claim or claims are alleged to have arisen,"[8] that does not require that the Statement of Claim specify every treaty article that might be relevant to a claimed illegal act. What is required is adequate notice to the Respondent of the act that gives rise to the claim and the assertion that it was in violation of applicable international law. Thus, where illegal use of mines or booby-traps is alleged in the Statement of Claim, the claim is not extinguished simply because no reference is made to Protocol II of 1980.[9] The same is true where destruction of property is alleged, and no reference is made to Article 52 of Protocol I or where targeting of civilians is alleged, and no reference is made to Article 57 of Protocol I.[10] On the other hand, Article 59 of Protocol I presents a qualitatively different situation. Article 59 deals with undefended localities that are declared pursuant to that article and comply with the conditions of that article, or are established by agreement of the Parties to the conflict.[11] The Commission finds no reference to such undefended localities in Eritrea's Statements of Claim. Consequently, any claim made on that basis was extinguished and cannot not be considered by the Commission.

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[6] Eritrea's Statement of Claim, Claim 4, filed by Eritrea on December 12, 2001, Senafe, at Section C, para. 9.
[7] *Id.* at Section D, paras. 33–67.
[8] Eritrea-Ethiopia Claims Commission Rules of Procedure, art. 24(3)(d).
[9] Protocol II of 1980, *supra* note 4.
[10] Protocol I, *supra* note 5.
[11] *Id.* at art. 59.

18. All other claims asserted by Eritrea in this proceeding are within the jurisdiction of the Commission.

IV. THE MERITS

A. Applicable Law

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

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

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

21. In its Partial Awards on Prisoners of War, the Commission held that the law applicable to those claims prior to August 14, 2000, when Eritrea acceded to the four Geneva Conventions of 1949,[12] was customary international humanitarian law.[13] In those same awards, the Commission also held that those Conventions have largely become expressions of customary international humanitarian law and, consequently, that the law applicable to those claims was customary international humanitarian law as exemplified by the relevant parts of those Conventions.[14] Those holdings apply as well to the Central Front claims addressed in the present Award and, indeed, to all the claims submitted to the Commission.

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[12] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. p. 3114, 75 U.N.T.S. p. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. p. 3217, 75 U.N.T.S. p. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. p. 3316, 75 U.N.T.S. p. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. p. 3516, 75 U.N.T.S. p. 287 [hereinafter Geneva Convention IV].

[13] Partial Award in Eritrea's Claim 17, *supra* note 3, at para. 38; Partial Award in Ethiopia's Claim 4, *supra* note 3, at para. 29.

[14] Partial Award in Eritrea's Claim 17, *supra* note 3, at paras. 40–41; Partial Award in Ethiopia's Claim 4, *supra* note 3, at paras. 31–32.

22. The Parties have identified no other potentially relevant treaties to which both Eritrea and Ethiopia were parties during their armed conflict. As the claims presented for decision in the present Award arise from military combat and from belligerent occupation of territory, the Commission makes the same holdings with respect to the customary status of the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 and its annexed Regulations ("Hague Regulations")[15] as those it has made with respect to the Geneva Conventions of 1949. The customary law status of the Hague Regulations has been recognized for more than fifty years.[16] Had either Party asserted that a particular provision of those Conventions or Regulations should not be considered part of customary international humanitarian law at the relevant time, the Commission would have decided that question, with the burden of proof on the asserting Party. In the event, however, neither Party contested their status as accurate reflections of customary law.

23. Both Parties also relied extensively in their written and oral pleadings on provisions contained in Protocol I. Although portions of Protocol I involve elements of progressive development of the law, both Parties treated key provisions governing the conduct of attacks and other relevant matters in this Case as reflecting customary rules binding between them. The Commission agrees and further holds that, during the armed conflict between the Parties, most of the provisions of Protocol I were expressions of customary international humanitarian law. Again, had either Party asserted that a particular provision of that Protocol should not be considered part of customary international humanitarian law at the relevant time, the Commission would have decided that question, but the need to do so did not arise.

24. Both Parties presented numerous claims alleging improper use of anti-personnel landmines and booby traps, but there was limited discussion of the law relevant to the use of these weapons in international armed conflict. The Commission notes that the efforts to develop law dealing specifically with such weapons has resulted in the following treaties: Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects,[17] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices,[18] that Protocol as amended on May 3, 1996,[19] and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and

[15] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Annexed Regulations, Oct. 18, 1907, 36 Stat. p. 2277, 1 Bevans p. 631 [hereinafter Hague Regulations].
[16] International Military Tribunal, Trial of the Major War Criminals by the International Military Tribunal 253-54 (1947); United States v. Von Leeb [High Command Case], 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10, at p. 462 (1950); Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808, Annex, at 9, U.N. Doc. S/25704 (1993); *see also* 2 LASSA OPPENHEIM, INTERNATIONAL LAW pp. 234–236 (Hersch Lauterpacht ed., 7th ed. 1952); Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. p. 971 (1986).
[17] U.N. Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. p. 137, *reprinted in* 19 I.L.M. p. 1523.
[18] Protocol II of 1980, *supra* note 4.
[19] *Id.*, as amended at Geneva, May 3, 1996, *reprinted in* 35 I.L.M. p. 1209 (1996).

on Their Destruction.[20] None of these instruments was in force between the Parties during the conflict. The Commission holds that customary international humanitarian law is the law applicable to these claims. In that connection, the Commission considers that those treaties have been concluded so recently and the practice of States has been so varied and episodic that it is impossible to hold that any of the resulting treaties constituted an expression of customary international humanitarian law applicable during the armed conflict between the Parties. Nevertheless, there are elements in Protocol II of 1980, such as those concerning recording of mine fields and prohibition of indiscriminate use, that express customary international law. Those rules reflect fundamental humanitarian law obligations of discrimination and protection of civilians.

25. While Eritrea suggested in its Memorial that the 1966 Covenant on Civil and Political Rights[21] might also be relevant,[22] it has not relied on the Covenant or identified any relevant provisions. Moreover, the Commission notes that the Covenant permits parties to derogate from many of its provisions during public emergencies, such as war.[23] As the Parties have not referred in their written pleadings to any specific provisions of the Covenant, the Commission need not decide its applicability.

B. Evidentiary Issues

1. Question of Proof Required

26. As discussed above,[24] the Commission will require clear and convincing evidence in support of its findings.

2. Proof of Facts

27. In its last written submissions in this case, filed less than a month before the hearing, Eritrea submitted witness statements by deserters from the Ethiopian forces and by former Eritrean prisoners recruited by Ethiopia for the Eritrean opposition. None of these witnesses was presented by Eritrea at the hearing. In the circumstances, the Commission has decided not to rely on these statements. Nor has the Commission relied on interviews reported in news stories, although Eritrea cited such reported stories along with sworn witness statements for proof of facts.

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

[20] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. p. 1507 (1997).
[21] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. p. 171 [hereinafter ICCPR].
[22] Eritrea's Memorial, Claims 2, 4, 6, 7 and 8, filed by Eritrea on Oct. 15, 2002, Vol. 1, para. 1.17.
[23] ICCPR, *supra* note 21, at art. 4.
[24] *See supra* para. 6.

By Eritrea:

Mr. Laurent Bouillet – Fact and Expert Witness
Mr. Henrik Tobiesen – Fact and Expert Witness
Mr. William Arkin – Expert Witness
Dr. Bereket Berhane Woldeab – Fact Witness
Dr. Mariana Rincon – Fact Witness

By Ethiopia:

General (Ret.) Charles W. Dyke – Expert Witness
Brigadier General Alemu Ayele – Fact Witness

3. Estimation of Liability

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

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

30. After the armed conflict began on the Western Front in May 1998, both Eritrea and Ethiopia began to strengthen their armed forces along what would become the Central Front. From mid-May to early June, Eritrean armed forces attacked at a number of points, first in Ahferom and Mereb Lekhe Weredas, then in Irob and Gulomakheda Weredas. In Gulomakheda Wereda, the significant border town of Zalambessa (with a pre-war population estimated at between 7,000 and 10,000) was also taken. In all four weredas, Eritrean forces moved into areas administered prior to the conflict by Ethiopia, occupied territory, and established field fortifications and trench lines, sometimes permanently and sometimes only for a brief period before returning to adjacent territory administered prior to the conflict by Eritrea. In all cases, they carried out intermittent operations that extended beyond the occupied areas. These operations included artillery fire, intermittent ground patrols, and the placement of defensive fields of land mines.

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

32. When Ethiopia later introduced substantial numbers of its armed forces into the four weredas, a static, although not fully contiguous, front was created that remained

largely the same for nearly two years. Hostilities varied in intensity during that period and included some instances of intense combat during 1999. However, in May of 2000, Ethiopia launched a general offensive that drove all Eritrean armed forces out of the territory previously administered by Ethiopia and took Ethiopian forces deep into Eritrea. Eritrea's claims in the present case arose only in the period beginning in May 2000, when Ethiopian armed forces entered Eritrean territory on the Central Front. In Eritrea, the Central Front extended from Areza and Mai Mene Sub-Zobas in the west, through Adi Quala and Tserona Sub-Zobas to Senafe Sub-Zoba in the east.

33. On May 12, 2000, Ethiopian troops crossed the Mereb River in the Western Front area and moved northeast to Molki. From there, they advanced eastward toward Areza, engaging in combat at several places, including the village of Adi Nifas and the town of Mai Dima. Ethiopian troops then moved south towards Mai Mene. After about ten days, Ethiopian forces in Areza and Mai Mene Sub-Zobas moved east and southeast and returned to Ethiopia through Adi Quala Sub-Zoba.

34. On May 23, Ethiopian forces launched a separate offensive in the Tserona area and captured the town of Tserona on May 25. On May 24, Ethiopian forces also attacked in the vicinity of Zalambessa. They quickly took Zalambessa and, on May 26, moved north into Eritrea, through the town of Senafe to high positions beyond at Keshe'at and Emba Soira, where the advance stopped and the front stabilized. The Ethiopian forces remained in occupation of parts of Tserona and Senafe Sub-Zobas until February and March 2001 when they withdrew to territory administered by Ethiopia prior to the conflict, pursuant to the December 12, 2000 Peace Agreement.

35. Eritrea's claims are based upon actions within the five Sub-Zobas of the Central Front for which Ethiopia was responsible that allegedly were unlawful and resulted in the looting and destruction of public and private property, destruction of infrastructure, personal injury to civilians and desecration of places of worship, graves and monuments. Following a general comment on the evidence of rape on the Central Front, the Commission shall consider these claims sub-zoba by sub-zoba.

D. Comment on Rape

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

37. The Parties agree that rape of civilians by opposing or occupying forces is a violation of customary international law, as reflected in the Geneva Conventions. Under Common Article 3(1), States are obliged to ensure that women civilians are granted fundamental guarantees, including the prohibition against "violence to life and person, in

particular murder of all kinds, mutilation, cruel treatment and torture . . . outrages on personal dignity, in particular humiliating and degrading treatment." Article 27 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War ("Geneva Convention IV") provides (emphasis added):

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
>
> *Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault*.

38. Article 76.1 of Protocol I adds: "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault."

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

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

> The Commission does not see its task to be the determination of liability of a Party for each individual incident of illegality suggested by the evidence. Rather, it is to determine liability for serious violations of the law by the Parties, which are *usually* illegal acts or omissions that were frequent or pervasive and consequently affected significant numbers of victims.[25]

41. Rape, which by definition involves intentional and grievous harm to an individual civilian victim, is an illegal act that need not be frequent to support State responsibility. This is not to say that the Commission, which is not a criminal tribunal, could or has

[25] Partial Award in Ethiopia's Claim 4, *supra* note 3, at para. 54; Partial Award in Eritrea's Claim 17, *supra* note 3, at para. 56.

assessed government liability for isolated individual rapes or on the basis of entirely hearsay accounts. What the Commission has done is look for clear and convincing evidence of several rapes in specific geographic areas under specific circumstances.

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

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

E. Areza Sub-Zoba

44. Areza Sub-Zoba is a predominantly agricultural region that became the area of the initial fighting in Eritrea during Ethiopia's May 2000 offensive. A strategically important east-west road crosses the sub-zoba running from Molki through Mai Dima and continuing up a high escarpment to the town of Areza (which remained in Eritrean hands). The Ethiopian advance largely followed this road, and there was heavy fighting at several places to control it. Of the twenty kebabis (residential areas) in the sub-zoba, Ethiopian forces entered only eight. These included the largest kebabi, Mai Dima, which had a population of some 9,000. The town of Mai Dima was known for a major eye clinic that served both Eritrea and Ethiopia before the war.

45. The evidence clearly indicates that Ethiopian armed forces were in Areza Sub-Zoba for only a few days and that intense fighting occurred in and around the village of Adi Nifas and the town of Mai Dima, which are the only two places in the sub-zoba concerning which Eritrea presented any significant evidence. Adi Nifas was a strategically important hilltop village above the main road that was strongly defended by Eritrean armed forces. Eritrea asserted that Ethiopian forces intentionally killed several civilians there. The village was the scene of intense combat between the two armies and, although civilians remaining there may have become inadvertent and tragic casualties, the evidence fails to sustain Eritrea's claim that any civilians were killed deliberately. Eritrea also alleged intentional destruction, looting and offenses against civilians in Mai Dima, another important point on the main road that was strongly defended by Eritrean forces. After being taken by Ethiopian forces, it was shelled by Eritrean forces, firing from the high ground to the east. Given these circumstances, the limited evidence submitted by Eritrea of individual casualties is insufficient to justify the requested finding that Ethiopia is liable for unlawful mistreatment of civilians in the sub-zoba.

46. Eritrea presented a small number of statements from witnesses who asserted seeing Ethiopian soldiers and civilians looting property, primarily in Mai Dima. These assertions are denied in statements by the relevant Ethiopian military commanders, who allege that there was extensive looting by local civilians and that the Ethiopian forces sought to control it by deploying military police. The evidence is inconclusive regarding responsibility for looting. Typical was the statement by the doctor from the Mai Dima eye clinic who stated that the clinic had been looted by the Ethiopian army, even though he did not witness the event and therefore did not see who was responsible. In any event, such limited evidence relating solely to two localities where intense fighting indisputably took place is inadequate to support a finding of frequent or pervasive looting in the entire sub-zoba.

47. All claims relating to Areza Sub-Zoba are dismissed for failure of proof.

F. Mai Mene Sub-Zoba

48. Mai Mene Sub-Zoba, which is in the south-central section of Eritrea on the Central Front, is a predominantly agricultural region with sixteen kebabis and approximately 14,000 families. The evidence showed that Ethiopian forces were present in the sub-zoba for a few days in May 2000 as they re-deployed back towards Ethiopia in preparation for attacks further east. Ethiopian troops moved south from the Mai Dima area to Mai Mene, where they connected with a road east to Enda Giorgis in Adi Quala Sub-Zoba. Many then moved south to Rama in Ethiopia, before being re-deployed to operations elsewhere.

49. Eritrea submitted evidence only for the town of Mai Mene, from which one quarter of the population fled before the Ethiopian forces arrived in May 2000 and which was under Ethiopian control for approximately one week only. Eritrea asked the Commission to accept that the experience of Mai Mene town typified the events in the entire sub-zoba. That would be unreasonable, particularly in view of the rapid movement of events and the brief presence of the Ethiopian forces.

50. Like Adi Nifas and Mai Dima, Mai Mene was the scene of intense fighting and was under Ethiopian control only for approximately one week in May 2000. Eritrea presented witness statement evidence of physical abuse of civilians, particularly during searches of homes by Ethiopian soldiers who were looking for weapons and Eritrean soldiers, and of looting and property destruction by Ethiopian soldiers and civilians, particularly of public property, such as a Ministry of Agriculture building, a medical clinic and schools. Ethiopia submitted rebuttal evidence that the fighting, including shelling by Eritrean forces, had caused considerable damage to property in the town and that many Eritreans had engaged in looting of both public and private properties in Mai Mene. Considering the evidence as a whole, the Commission finds that the claims of looting and property destruction are not proved.

51. All claims relating to Mai Mene Sub-Zoba are dismissed for failure of proof.

G. Adi Quala Sub-Zoba

52. Adi Quala Sub-Zoba, which also lies on the south-central section of the Central Front, has twenty kebabis in total and approximately 10,900 families. It was a developing agricultural area and a center of cross-border trade before the war, with a new immigration, customs and police center near the Mereb River in Kisad Ika.

53. The Ethiopian forces that had been in Areza and Mai Mene Sub-Zobas transited Enda Giorgis and Kisad Ika in Adi Quala Sub-Zoba on their return to Ethiopia from Areza and Mai Mene Sub-Zobas. As Eritrean armed forces were also in Adi Quala Sub-Zoba, there was recurring combat there before the last Ethiopian forces left the sub-zoba.

54. Eritrea submitted evidence relating only to four towns or villages that were controlled by Ethiopian forces for periods ranging from a week or ten days to six weeks and all of which had largely been evacuated before the Ethiopian troops arrived. That evidence included a small number of accounts of individual civilians being shot by Ethiopian soldiers, in two of which other Ethiopian soldiers intervened to assist the Eritrean victim. The evidence also included a few troubling accounts of arrests and deportations of civilians to Ethiopia. One Eritrean priest and group leader for the Peoples Front for Democracy and Justice (the governing political party in Eritrea) described being taken to Rama in Ethiopia, where he was detained in a cell for a month and interrogated by police, and then imprisoned in Aksum with political prisoners and subjected to two weeks of political re-education. However, the evidence was not sufficient to indicate a pattern of such events.

55. Eritrea also submitted many witness statements describing homes, businesses and schools that had been looted or destroyed. Most of these statements were by returning residents who testified as to their lost or damaged property, but who had not witnessed what happened to it. In defense, Ethiopia submitted evidence that Eritrean shelling caused substantial damage to civilian property and that Eritreans had frequently looted properties of other Eritreans.

56. Considering the evidence as a whole, and in view of the brief period of time during which Ethiopia controlled the locations concerned, the Commission holds that the evidence is not sufficient to establish a pattern of misconduct attributable to Ethiopian forces. All claims relating to Adi Quala Sub-Zoba are dismissed for failure of proof.

57. The Parties disagreed on an issue that arose not just in Adi Quala Sub-Zoba but in all three Eritrean sub-zobas in which Ethiopian armed forces were present only for limited periods, particularly in areas where the troops were passing through on their way to other locations. That issue was whether the provisions of the Geneva Conventions applicable to occupied territory were applicable to parts or all of those three sub-zobas. On the one hand, clearly an area where combat is ongoing and the attacking forces have not yet established control cannot normally be considered occupied within the meaning of the Geneva Conventions of 1949. On the other hand, where combat is not occurring in an area controlled even for just a few days by the armed forces of a hostile Power, the

Commission believes that the legal rules applicable to occupied territory should apply.[26] Nevertheless, given the Commission's dismissal of all claims arising in those three sub-zobas, the Commission need not decide whether any areas within them that were, at any time, under the control of Ethiopian armed forces were occupied territory.

H. Tserona Sub-Zoba

58. Tserona Sub-Zoba, which lies in the middle of the Central Front, has twenty kebabis and approximately 30,000 families. Although a small number of Eritrean witness statements addressed conditions in small villages, the vast majority of the evidence concerned Tserona Town and the three small towns of Logo Sarda, Mai Chena and Dibar.

59. The principal town in the sub-zoba is Tserona Town, which, before the war, had a population of some 3,500 people. It is undisputed that Tserona Town was heavily damaged during the war. The Commission received much evidence and argument addressing whether that damage was attributable to Ethiopia. Eritrea contended that Tserona Town was subjected to massive looting by Ethiopian forces and that public buildings there were deliberately and unlawfully destroyed by Ethiopian demolition. After the war began in May 1998, the Eritrean forward trenches were only two or three kilometers south of Tserona Town, and the evidence indicates that the town suffered some damage from Ethiopian artillery fire. Apparently, much of the population of the town left for safety in IDP camps deeper inside Eritrea and, in January 1999, Eritrea ordered the complete evacuation of civilians from the town. From that time, the only occupants of the town were some Eritrean military personnel who used some buildings in the town.

60. Ethiopia began its offensive in the Tserona area on May 23, 2000, and Ethiopian troops took control of the town by May 25. While the Ethiopian front lines moved a considerable distance north of the town, it remained within range of Eritrean artillery for the remainder of the war. Ethiopian armed forces remained in place in the sub-zoba until late February 2001, when they withdrew pursuant to the December 12, 2000 Peace Agreement. When they withdrew to the south, the United Nations Mission in Ethiopia and Eritrea ("UNMEE") personnel were present, but Eritrea did not send any police or local administrative personnel back into the town or surrounding areas until June 2001. This delay produced what the Secretary General of the United Nations referred to as a "potentially dangerous vacuum of authority."[27] Ethiopia argued that much of the damage in the sub-zoba for which Eritrea is claiming may well have occurred during that period, but it offered no supportive evidence relating to events in Tserona during that three-month period.

61. The evidence indicates that the town suffered some damage due to combat, although its extent is not clear. Further, when Eritrea resumed administrative control of Tserona Town and the surrounding areas in June 2001 and the former residents returned

[26] See the discussion of this matter in U.S. DEP'T OF ARMY, LAW OF LAND WARFARE (Field Manual No. 27–10, 1956, rev. 1976), at paras. 351–356.
[27] Report of the Secretary General on Ethiopia and Eritrea, U.N. Doc. S/2001/202 (Mar. 7, 2001), at p. 2, para. 11.

to the town, they found that several major buildings had been destroyed by demolition and that virtually all buildings in the town had been stripped of roofs, doors and windows, as well as any contents of value. Eritrea claims that Ethiopia is responsible for this damage. Ethiopia denies responsibility, pointing out that some damage resulted from combat and asserting that some buildings were destroyed by denial operations by retreating Eritrean forces and that Eritrean military and civilian personnel themselves looted the town.

62. Eritrea submitted in evidence a satellite photograph of the town taken on May 31, 2000, a few days after Ethiopian armed forces occupied the town. That photograph, purchased from a commercial supplier like the others introduced by Eritrea, shows that roofs remained on most of the structures in the town. Eritrea states that, unfortunately, no subsequent satellite photographs of the town could be found. However, the Commission finds the other evidence persuasive that, by June 2001, virtually all roofs, doors and windows were missing. The evidence is also persuasive that three buildings that were evidently intact when the satellite photograph was taken on May 31, 2000 – the sub-zoba administrative headquarters, the sub-zoba health center and the Warsai Hotel – were subsequently destroyed by explosives. For two other destroyed buildings, the courthouse and the town health clinic, the satellite photograph is unclear as to whether they were standing on May 31, 2000.

63. The Commission must determine whether Eritrea has proved that Ethiopia is liable for some or all of the damage to and stripping of buildings and for the destruction of the administrative headquarters, the health center and the hotel. In view of the evident, substantial use of explosives to destroy those three buildings, which were intact when the occupation began, the Commission concludes that Ethiopia, as the Occupying Power, must be held responsible for their destruction. Ethiopia does not contend that such destruction was lawful because it was "rendered absolutely necessary by military operations."[28] The Commission dismisses for lack of sufficient proof the claim for the destruction of the courthouse and health clinic, since the evidence does not show that they had been intact when Ethiopia took control.

64. With respect to the claim for looting and stripping buildings in Tserona Town, there is considerable evidence that must be weighed. The satellite photograph of May 31, 2000 shows that at least ninety percent of the structures in the town had roofs at that time and consequently may be presumed not yet stripped before the arrival of Ethiopian troops.

65. Turning first to the Claimant, Eritrea submitted credible witness statements of civilians stating that they saw Ethiopian soldiers and civilians stripping houses in the town and loading the roofs, doors and windows onto trucks, as well as other statements from civilians who witnessed such items being sold from trucks in Ethiopian border towns.

66. In defense, Ethiopia submitted credible evidence that, prior to its entry into Tserona Town, some roofs and other materials from houses had been used by Eritrean

[28] Geneva Convention IV, *supra* note 12, at art. 53.

troops in the construction of trenches near the town. Also, NGO observers noted some battle damage to the town as of March 2001; in this connection, Ethiopia asserts that there was some Eritrean shelling of the town subsequent to May 31, 2000. The Commission is prepared to accept that assertion for the several weeks prior to the conclusion of the Cease-Fire Agreement, but it doubts that much additional damage was caused by such long-range shelling.

67. Ethiopia occupied Tserona Town for nearly nine of the twelve months between May 31, 2000 and June 2001 when the damage was assessed. Whether or not Ethiopian military personnel were directly involved in the looting and stripping of buildings in the town, Ethiopia, as the Occupying Power, was responsible for the maintenance of public order, for respecting private property, and for preventing pillage.[29] Consequently, Ethiopia is liable for permitting the unlawful looting and stripping of buildings in the town during the period of its occupation. Ethiopia is not liable for damages to the town caused by combat or for looting and stripping of buildings that occurred either before or after its occupation of the town.

68. Eritrea's claims for the destruction of the town's water tank and several water holes are dismissed for lack of proof. With respect to the water tank, Ethiopia submitted evidence that it had been destroyed prior to the town's capture on May 25, 2000, and neither the satellite image nor Eritrea's expert on bomb damage assessment, Mr. William Arkin, provided relevant information.

69. Assessing relative responsibility for the looting and stripping of the town is difficult, not least because some damage resulted from combat operations and its population was absent during the relevant period, including two or three months after Ethiopian forces withdrew. Given this, and considering the evidence as a whole, the Commission finds that Ethiopia is liable for seventy-five percent of the damage caused by looting and stripping in Tserona Town.

70. The principal caretaker of the Tserona Patriots Cemetery provided a witness statement in which he stated that the cemetery, which was located immediately outside Tserona Town, had been destroyed during the Ethiopian occupation. He said that the cemetery was essentially undamaged when he fled shortly before the Ethiopian troops arrived and that, when he returned in June 2001, it had been desecrated. He said that the remains of the soldiers buried there were scattered over the ground, the metal vaults that had held them were missing, as were the windows, doors and roofs of the buildings where they had been kept, and that the memorial trees had been cut down and the metal fence removed. He also said that empty mess tins and garbage were everywhere. Eritrea submitted in evidence a photograph of the ruined cemetery that confirmed the statements by the caretaker.

71. As the Ethiopian troops had left Tserona three months prior to the caretaker's return, the possibility cannot be excluded that the cemetery was looted and stripped during that interval, although the presence there of mess tins suggests that it is more likely

[29] Hague Regulations, *supra* note 15, at arts. 43, 46, 47.

that this happened prior to their departure. In any event, Ethiopia was the Occupying Power of the area that included the cemetery from late May 2000 until late February 2001, and Ethiopia presented no defensive evidence to this claim. Consequently, as with Tserona Town, the Commission finds that Ethiopia is liable for seventy-five percent of the damage caused to the cemetery.

72. As to the rest of the sub-zoba, Eritrea presented a very small number of witness statements describing isolated instances of physical abuse and shelling of IDP camps located close to Tserona Town. These overall claims relating to the sub-zoba, including its claims for widespread mistreatment of civilians in the sub-zoba, are dismissed for failure of proof.

I. Senafe Sub-Zoba

73. Senafe Sub-Zoba, at the eastern end of the Central Front, was developed substantially by Eritrea after independence into a center of cross-border trade. There are twenty-four kebabis in total, but the two main population centers of the sub-zoba are Senafe Town and the village of Serha.

74. Ethiopia invaded in May 2000 and it is undisputed that it occupied some seventy-five percent of the sub-zoba for ten months, until February 2001. Of the approximately 20,000 families (comprising 86,000 residents), slightly over half fled early to IDP camps. Eritrea submitted witness statements only from residents of Senafe Town and Serha, and from the Administrator of Zigfet Kebabi, who fled his village in May 2000 and returned a year later.

1. Serha

75. The new village of Serha is located near the southern edge of Senafe Sub-Zoba close to the Ethiopian town of Zalambessa on the main road between Addis Ababa and Asmara. Prior to the war, it had become home for some 800–1,000 residents and had grown partly by virtue of cross border trade. After the war began in May 1998, the village was affected by Ethiopian artillery fire that was interdicting Eritrea's supply lines to the front in Ethiopia. As a result, some of the residents fled at that time, and the evidence indicates that most residents had left for IDP camps by mid-1999. In any event, satellite photography submitted by Eritrea shows that, in March 2000, roofs were on all of the large buildings and all but a few of the smaller buildings. The exact extent of shelling damage could not, of course, be ascertained from satellite photography, but the March 2000 image suggests that Serha was substantially intact at that time.

76. In late May 2000, the Ethiopian offensive broke the Eritrean front in northern Ethiopia, and Ethiopian troops retook Zalambessa, and quickly moved through Serha and Senafe. Serha was on the main axis of the Ethiopian advance, but there is no direct evidence in the record concerning the extent of damage there from the combat during those days. The next available satellite photographs are from August 19, 2000 and September 18, 2000. They reveal that many more roofs were missing than in March.

77. Eritrea's expert witness, Mr. William Arkin, testified about his inspection of Serha in October 2002. He indicated that the village had been essentially completely destroyed. He stated that, unlike Tserona and Senafe Towns, where the principal buildings had been demolished by explosives, Serha showed more complete destruction, frequently by other direct means, such as artillery fire, mortars and tanks or bulldozers.[30] Mr. Arkin was asked by the Commission whether he had obtained any explanation for the more complete destruction of all buildings in Serha. He responded that many people thought that "the damage inflicted in Serha was retaliation for the damage inflicted in Zalambessa."[31]

78. The Commission is unable to determine from the evidence the precise extent to which the damage to Serha resulted from combat in late May 2000 or previously, but the Commission is satisfied that the bulk of that damage occurred while Ethiopia occupied the village and acted in violation of Article 53 of Geneva Convention IV, and consequently is damage for which Ethiopia is liable. In that respect, at least, Serha is similar to Zalambessa. The Commission decides that Ethiopia is liable for seventy percent of the total damage inflicted on Serha from May 1998 through February 2001.

2. Senafe Town

79. Senafe Town was a substantial community with a pre-war population estimated at 26,000. It was continuously occupied by Ethiopian forces from the time they entered the town on May 26, 2000 until they departed in February 2001. While the declarations of some Ethiopian officers indicated that they sought to limit access to the town to their troops, numerous credible accounts indicated the regular presence of at least some Ethiopian soldiers there.

a. Rape

80. Eritrea presented detailed and cumulative evidence of several rapes by Ethiopian soldiers of Eritrean civilian women in Senafe Town. Particularly disquieting were the credible accounts of an eyewitness to the rape of a girl by several Ethiopian soldiers, who then beat the eyewitness; a rape of a seventy-year-old blind woman, who died two weeks later and whose screams brought neighbors to her home, who allegedly saw an Ethiopian soldier running away; and multiple and consistent accounts of the rape of a named eighty-year-old woman, who died shortly thereafter, whose neighbors heard screams and found her home surrounded by Ethiopian soldiers. Dr. Mariana Rincon testified convincingly at the hearing, as well as by written statement, about treating several pregnant women in the month she served in the *Médecins Sans Frontières* ("MSF") hospital in Senafe. She said that their behavior, in her experience, could only be explained by rape. Dr. Bereket Berhane Woldeab, both in his written statements and at the hearing, gave similar testimony. The Commission found additional support for these accounts of participation by Ethiopian soldiers in the corroborated statement of a rape victim in Mai Mene, who described being raped at gunpoint by one Ethiopian soldier while another looked on and four kept guard.

[30] Transcript of the Eritrea-Ethiopia Claims Commission Hearings of Nov. 2003, Peace Palace, The Hague, at pp. 193–194 and 217–218.
[31] *Id.* at p. 213.

81. The Commission finds this specific evidence, taken together with multiple general statements about unreported opportunistic rape by Ethiopian soldiers, sufficient to support an Eritrean *prima facie* case. Ethiopia's limited documentation that rape complaints were investigated and soldiers arrested and its emphasis on the scope of its humanitarian law compliance training were insufficient to rebut this *prima facie* case. Accordingly, the Commission finds Ethiopia liable for failure to take effective measures to prevent rape by its soldiers of Eritrean civilian women during Ethiopia's invasion and occupation of Senafe Town.

b. Looting

82. Eritrea presented some thirty witness statements from Senafe Town residents, based on what they saw during Ethiopia's occupation and upon their return from IDP camps. They describe a pattern of Ethiopian soldiers seizing property during the day from the homes and businesses of those who had fled, and going door-to-door at night to take property by force from those who remained in their homes. They describe widespread looting and destruction of property from homes, businesses, schools, clinics and churches. They state that, often with the help of Ethiopian civilians, Ethiopian soldiers took metal roofing, doors and window frames and other building materials, furniture and household goods, money, jewelry, electronic equipment, business inventories and clothing, and either took or destroyed livestock, grain, beehives, sacred religious objects and medical and school fittings.

83. Ethiopia denied these allegations, asserting that its troops were well trained in the rules of international humanitarian law and that its officers did their best to ensure that those rules were respected. Ethiopia asserted that most of the looting of homes and other properties that occurred in Senafe Town was done either before its troops arrived on May 26, 2000 or after they departed in February 2001 and before the Eritrean administration returned in June 2001, ending the "vacuum of authority," but it provided no evidence directly supporting either contention. Ethiopia acknowledged that, despite its efforts, some looting occurred during its occupation, but it asserted that Eritrean civilians were responsible for the looting.

84. Considering all the conflicting evidence with respect to looting, the Commission holds that Ethiopia, as the Occupying Power for approximately nine of the twelve months that Senafe town was not administered by Eritrea, is liable for seventy-five percent of the losses resulting from looting that occurred in the town between May 26, 2000 and the Eritrean administration returned in June 2001.

c. Infrastructure Destruction

85. The principal damage claim by Eritrea relating to Senafe Town is for the deliberate, unlawful destruction of infrastructure, in particular of a number of substantial buildings. The Commission received evidence from multiple sources showing that a significant number of local government and other important buildings in Senafe had been destroyed by the time Eritrea resumed administration of the town in June 2001. Most of these buildings had been demolished by military explosives, including anti-tank mines of types found in the weapons inventories of both Parties.

86. The evidence indicates that the last of Eritrea's retreating troops passed through Senafe Town near midnight on May 25, 2000 and that the first of the Ethiopian troops entered the town early in the morning on May 26. Eritrea asserts that the town was quiet and undamaged at both of those times, while Ethiopia, on the contrary, asserts that, when its forces arrived at the town, some buildings in the town had been damaged or destroyed and that some fires were burning. Ethiopia suggested that such damage was probably a result of Eritrean denial operations. Ethiopia alleges that the buildings that Eritrea claims it destroyed were either destroyed by Eritrea before Ethiopian troops arrived or were destroyed later, either by Eritrean shelling or by unknown causes after Ethiopian forces left in February 2001.

87. Ethiopia also asserts that, even if it had destroyed some of the buildings in question, such destruction would have been lawful. The Commission cannot agree with that assertion. The relevant rule of law is found in Article 53 of Geneva Convention IV, which states:

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.[32]

88. Ethiopia has not suggested any reason why the destruction of any of the properties in question could have been rendered "absolutely necessary" by military operations other than simply to prevent their reuse by Eritrea if and when it should regain control of Senafe Town. The Commission does not agree that denial of potential future use of properties like these, which are not directly usable for military operations as are, for example, bridges or railways, could ever be justified under Article 53.

89. The task facing the Commission is to determine whether there is clear and convincing evidence that Ethiopia is responsible for the evident damage or destruction inflicted on these important buildings. Consequently, the Commission has examined the available satellite imagery, expert reports, photographs and an Ethiopian video of the arrival of its troops in the town, as well as witness declarations and testimony by Ethiopian officers and by Eritrean residents of the town. With respect to these declarations and testimony, their completely contradictory character makes reliance on them hazardous and unlikely to lead to clear and convincing results.

90. The video is claimed by Ethiopia to have been taken entirely on May 26, 2000, the day its troops arrived in Senafe. This is attested to by an Ethiopian sergeant, who states that he was the sole video photographer. Counsel for Eritrea disputes that the video was taken all on that day. The video, which clearly has been edited, presents a number of disconnected scenes in and around the town, among which are scenes showing severe damage to the police station, the hospital, the courthouse and the Momona Hotel. The video also shows the new and not fully completed telecommunications building, which

[32] Geneva Convention IV, *supra* note 12, at art. 53.

appears undamaged, although Ethiopia argues that some evidence of damage can be observed at one side of the structure. In view of its decisions, *infra*, the Commission need not decide whether the video was filmed entirely on May 26, 2000. Whether taken on one day or several, the video does establish that, at that time or times, the telecommunications building was standing and the other structures referred to were severely damaged or destroyed.

91. The satellite imagery that is available to the Parties from commercial sources is helpful, but it has significant limitations. Unfortunately, only two relevant satellite images of Senafe town are available, one taken on June 3, 2000, just a few days after the occupation began, and the other two-and-a-half months later, on August 19, 2000. Moreover, these images are incapable of showing damage to certain types of buildings, including structures made of reinforced concrete which, if collapsed, would be likely to still have a solid, concrete roof in place. Consequently, the images cannot tell us whether such buildings were undamaged. The police station, the courthouse, the Momona Hotel and the telecommunications building were all of that type.

92. An additional difficulty may seem to arise from the fact that, following the departure of Ethiopian forces in late February 2001, Eritrea did not resume administration of the occupied areas, including Senafe Town, until June of that year. Ethiopia points out that it cannot properly be held responsible for looting and damage or destruction of buildings that occurred during that period or for any later time. However, there is no evidence that it would have been feasible for anyone remaining in Senafe after Ethiopia's withdrawal to have demolished major buildings with explosives. Following Eritrea's resumption of administration, it would certainly have had no motive to do so, and Ethiopia has not suggested the contrary. Consequently, the Commission presumes that all major buildings found by the experts in 2002 to have been demolished by explosives had suffered that fate prior to the departure of the Ethiopian forces.

93. Eritrea submitted a useful report by its expert, Mr. William Arkin, who also testified at the hearing. Mr. Arkin visited Senafe Town in October 2002. He stated that he visited the remains of sixteen "major facilities or complexes of buildings" in the town. He listed these sites as follows:

1. Bissrat Hotel
2. Courthouse
3. Electrical Authority
4. Ministry of Agriculture Storage/Office Building
5. Ministry of Agriculture Veterinary Complex
6. Momona Hotel
7. New Town Administrative Headquarters
8. Old Town Administrative Headquarters and Offices West
9. Old Town Administrative Headquarters and Residence East
10. Police Station
11. Senafe Secondary School
12. Senafe Hospital
13. Sub-Zoba Administrative Headquarters

14. Sub-Zoba Administrative Offices
15. Sub-Zoba Administrator Residence
16. Telecommunications ("PTT") Building

94. The Commission understands these sixteen buildings and complexes to constitute the complete list of destroyed buildings in Senafe Town for which Eritrea is claiming. The Commission considers each one to be of sufficient importance to be treated as a separate claim, so it will address them one by one, beginning with those in which the Commission finds for the Claimant:

Building 3. *The Electrical Authority*

95. Mr. Arkin stated that his inspection of the facility in 2002 showed that both buildings lacked roofs, doors and windows and that most electrical equipment was gone. He also said that there were signs of fire in the generator/transformer building but no sign of detonation. With respect to timing, he noted that both satellite images were inconclusive. The Commission notes that there was credible evidence that the town was lighted when Ethiopian forces entered early on May 26, 2000, so the Commission may assume that the Electrical Authority buildings were then undamaged. The Commission notes evidence that generators were needed by December 2000, as shown by the testimony of Mr. Henrik Tobiesen who delivered generators to the UNMEE personnel then in the town. Accordingly, the Commission can presume that the Electrical Authority building was damaged during the period of the occupation. In those circumstances, the burden is on Ethiopia to prove that the damage was caused by another party or is otherwise not attributable to Ethiopia. As Ethiopia has not presented defensive evidence to prove how that damage was caused, the Commission holds Ethiopia, as Occupying Power, liable for the damage to the Electrical Authority buildings.

Buildings 4./5. *Ministry of Agriculture Buildings*

96. Mr. Arkin stated that the June 2 satellite image shows that both buildings had roofs and the August 19 image shows that both are without roofs. Consequently, the Commission concludes that both buildings were damaged while Ethiopia occupied Senafe Town. As Ethiopia has not proved how the damage was caused, the Commission holds Ethiopia, as Occupying Power, liable for the damage to these two buildings.

Building 7. *New Town Administrative Headquarters*

97. Mr. Arkin stated that the building was under construction in 2000 and that damage to it first shows up in the satellite image of August 19. After his inspection of it in 2002, he described it as "a particularly egregious case of a structure that has undergone intentional destruction." As the destruction presumptively occurred while Ethiopia was the Occupying Power, and as it has not proved how the destruction occurred, Ethiopia is liable for the damage to this building.

Building 8. *Old Town Administrative Headquarters and Offices West*

98. Mr. Arkin stated that it appeared intact in the June 2 satellite image and without a roof in the August 19 image. As the damage to this building presumptively occurred while Ethiopia was the Occupying Power of Senafe Town and, as Ethiopia has not proved how that damage occurred, it is liable for the damage to this building.

Building 9. *Old Town Administrative Headquarters and Residence East*

99. Mr. Arkin stated that the satellite image of June 2 shows this building intact and that the image of August 19 shows it "intact or partially intact." While Mr. Arkin's report did not clarify that delphic remark, the Commission considers that it must imply at least that the second image shows some damage. Consequently, the Commission will presume that some damage occurred to the building while Ethiopia was the Occupying Power of Senafe Town. As Ethiopia has not proved how that damage occurred, it is liable for that damage.

Building 11. *Senafe Secondary School*

100. Mr. Arkin stated that the school, which was under construction in May 2000, appears undamaged in the June 2 satellite image and "partially demolished" in the August 19 satellite image. Consequently, the Commission may reasonably presume that the damage to the partially completed school occurred while Ethiopia was the Occupying Power of Senafe Town. As Ethiopia has not proved how that damage occurred, it is liable for that damage.

Building 12. *Senafe Hospital*

101. Mr. Arkin pointed out that the hospital consisted of a walled compound enclosing buildings and open spaces. He indicated that the June 2 satellite image showed some damage but was "not clear in determining the level of damage." With respect to the August 19 image, he said that it "suggests that the main building is still intact. The level of damage at the rest of the complex is ambiguous." That description may indicate the limited utility of commercial satellite images at that time, but it is a frustrating description, because he went on to say that, when he inspected the hospital in 2002, he concluded that "a number of buildings within the Hospital compound exhibited the characteristic signs of having been demolished as a result of internal detonations." However, the Commission notes the testimony of Dr. Mariana Rincon, a U.S. physician who was working in Eritrea for MSF. Dr. Rincon testified that she visited Senafe early in March 2001, approximately one week after the end of the occupation, and that the Senafe hospital was then completely flattened and was "nothing but rubble." Dr. Rincon appeared before the Commission at the hearing and was briefly cross-examined by counsel for Ethiopia, but that cross-examination did not refer to that part of her testimony. On the basis of the testimony by Mr. Arkin and Dr. Rincon, the Commission decides that, while the hospital may have suffered some damage prior to the beginning of the occupation, there is clear and convincing evidence to justify the presumption that the bulk of the damage occurred during the occupation. As Ethiopia has not shown how that

damage occurred, it is liable for that damage, which the Commission concludes amounted to ninety percent of the value of the hospital.

Buildings 13./14./15. *Sub-Zoba Administrative and Residential Buildings*

102. Mr. Arkin stated that the June 2 image shows three of these buildings to be intact and that the August 19 image shows them to be "completely demolished." Consequently, the Commission is satisfied that the buildings were demolished while Ethiopia was the Occupying Power of Senafe Town. As Ethiopia has not proved how that occurred, it is liable for the destruction of those three buildings.

Building 16. *Telecommunications ("PTT") Building*

103. Mr. Arkin stated that from the satellite images "there is absolutely no evidence of damage to the building" and that, because of the construction of the building, "little can be determined regarding the degree of damage" from the two satellite images. He points out that inspection on the ground in 2002 made clear that the building was damaged by detonations in the interior. He stated that there were more than a dozen separate detonation locations in the partially completed building. The Commission notes that the video submitted by Ethiopia showed both the new incomplete building and the small, adjacent old building standing apparently undamaged after the occupation began. In addition, a copy of a BBC web page dated February 13, 2001 (shortly before the end of the occupation) that was submitted in evidence by Eritrea contains a photograph showing the new building in the same, sagging and essentially destroyed condition as Mr. Arkin observed in 2002. Consequently, the Commission considers these pieces of evidence clear and convincing evidence that the telecommunications building was destroyed by detonation during the occupation. As Ethiopia has not proved how that occurred, it is liable for the destruction of this building.

Building 1. *The Bissrat Hotel*

104. Mr. Arkin noted that "the date and cause of the damage to the Bissrat Hotel was inconclusive." The Commission agrees that the claim for that building must be dismissed for failure of proof.

Buildings 2./6./10. *The Courthouse, the Momona Hotel and the Police Station*

105. Mr. Arkin stated that his inspection of the courthouse in 2002 showed that it was completely demolished and that its sloping, slab roof crushed the structure when it was demolished. He added that the two satellite images were inconclusive, which means that whether the courthouse was demolished prior to the arrival of the Ethiopian forces or during the occupation cannot be established by those images. He stated that the same is true of the satellite images of the Momona Hotel and the police station. The Commission also has examined the relevant satellite imagery, from which it concludes that the courthouse appears seriously damaged by June 3, 1998 and that it is impossible to determine with any certainty the condition at that time of the hotel or the police station. Accordingly, the satellite imagery cannot reveal whether these three buildings were

demolished prior to or during the time Ethiopia was occupying Senafe Town. Consequently, the Commission does not find Eritrea proved that these three buildings were demolished during the time Ethiopia was occupying Senafe Town, and the claims for these three buildings must be dismissed for failure of proof.

106. All other claims related to Senafe Town are dismissed for lack of proof.

3. The Stela of Matara

107. The stela is an obelisk that is perhaps about 2,500 years old. It is an object of great historical and cultural significance to both Eritrea and Ethiopia. It is located near the small village of Matara a few kilometers south of Senafe Town and off the main highway from Zalambessa to Senafe and Asmara. The stela stood alone on a plain 4.68 meters above ground, with another meter under ground. There were no houses or other structures near the stela.

108. The evidence indicates that the area where the stela is located was controlled by Ethiopian armed forces at least from May 28, 2000, and that those forces established a camp on high ground quite near the stela (perhaps as close as 100 meters). Witnesses who lived not far from the stela and regularly walked by it during the day stated that it was standing on the evening of May 30 and was lying on the ground on the morning of May 31. Some also described hearing an explosion during the night.

109. Eritrea presented an expert witness, highly experienced in the analysis and restoration of stone artifacts and structures, Mr. Laurent Bouillet, who inspected the stela in September 2002. Mr. Bouillet testified that a military type of explosive had been used to bring down the stela, pointing to the nature and areas of fragmentation of the stone and the white traces of explosive as proof of that conclusion. Eritrea's other expert witness, Mr. Arkin, also looked briefly at the stela a few weeks later than Mr. Bouillet, and testified that he saw no evidence of explosive damage. The Commission is satisfied that Mr. Bouillet's expertise is more directly related to the effects of explosives on stone than is Mr. Arkin's, and it is persuaded that the stela was damaged and toppled by an explosive charge of the type Mr. Bouillet described.

110. Ethiopia denied any knowledge about the damage inflicted on the stela. It submitted a statement by Brigadier General Berhane Negash, in which the only thing he said relevant to the damage to the stela of Matara was the following: "During this campaign, intense fighting occurred in the vicinity of the Eritrean locality of Matara. The only targets that were destroyed by Ethiopian forces in this locality were the barracks used by the Eritrean soldiers."

111. In effect, Ethiopia asserts that it is unclear what caused the stela to fall, that Eritrea has the burden of proof, and that it has not met that burden.

112. The Commission believes that Eritrea has proved that the stela was felled on the night of May 30–31, 2000, that it was felled by an explosive of a military type fastened at its base, and that an encampment of Ethiopian soldiers was quite near the stela when this

occurred. In these circumstances, the Commission concludes that Ethiopia, as the Occupying Power in the Matara area of Senafe Sub-Zoba, is responsible for the damage, even though there is no evidence that the decision to explode the stela was anything other than a decision by one or several soldiers.

113. The Commission holds that the felling of the stela was a violation of customary international humanitarian law. While the 1954 Hague Convention on the Protection of Cultural Property[33] was not applicable, as neither Eritrea nor Ethiopia was a Party to it, deliberate destruction of historic monuments was prohibited by Article 56 of the Hague Regulations, which prohibition is part of customary law. Moreover, as civilian property in occupied territory, the stela's destruction was also prohibited by Article 53 of Geneva Convention IV and by Article 52 of Protocol I. The Commission notes that the applicability of Article 53 of Protocol I may be uncertain, given the negotiating history of that provision, which suggests that it was intended to cover only a few of the most famous monuments, such as the Acropolis in Athens and St. Peter's Basilica in Rome. However, given the clear applicability of the principles reflected in Article 56 of the Hague Regulations, the Commission need not attempt to weigh the comparative cultural significance of the stela.

114. Consequently, Ethiopia is liable for the unlawful damage inflicted upon the Stela of Matara in May 2000. Eritrea's request that Ethiopia also be obligated to apologize for that damage is dismissed. As the Commission stated in its Decision No. 3, in principle, the appropriate remedy for valid claims should be monetary compensation, except where other remedies can be shown to be in accordance with international practice and the Commission determines that another remedy would be reasonable and appropriate. No such showing was made here.

4. Other Senafe Sub-Zoba Claims

115. Eritrea's other claims relating to Senafe Sub-Zoba, based as they are essentially on one witness statement, are dismissed for failure of proof.

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. Consequently, the following claims are hereby dismissed for lack of jurisdiction:

   a. claims that violations of international law by Ethiopia occurred after March 2001;

[33] Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. p. 215.

b. claims based on the alleged refusal or failure of Ethiopian military commanders to stop illegal conduct by Ethiopian soldiers in Senafe and Tserona Sub-Zobas;
c. the claim of unlawful use of land mines in Areza Sub-Zoba;
d. the claim that Ethiopia conducted unlawful re-education classes in Mai Mene Sub-Zoba; and
e. the claim based on alleged violations of Article 59 of Protocol I.

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

B. Applicable Law

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

2. Had either Party asserted that a particular relevant provision of those Conventions was not part of customary international law at the relevant time, the burden of proof would have been on the asserting Party, but that did not happen.

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

4. Most of the provisions of Protocol I of 1977 to the Geneva Conventions were expressions of customary international humanitarian law applicable during the conflict. Had either Party asserted that a particular provision of Protocol I should not be considered part of customary international humanitarian law at the relevant time, the Commission would have decided that question, but that did not happen.

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

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

C. Evidentiary Issues

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

D. Findings of Liability for Violation of International Law

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

1. For permitting the looting and stripping of buildings in Tserona Town while it occupied the town from late May 2000 until late February 2001, it is liable for 75% (seventy-five percent) of the total damage caused by looting and stripping in the town;

2. For permitting the looting and stripping of the adjacent Tserona Patriots Cemetery, it is liable for 75% (seventy-five percent) of the total damage caused by looting and stripping of the cemetery;

3. For the destruction of the Sub-Zoba Administrative Building, the Sub-Zoba Health Center, and the Warsai Hotel in Tserona Town;

4. For inflicting damage on the infrastructure of the village of Serha during its occupation of that village, it is liable for 70% (seventy percent) of the total damage inflicted on Serha from May 1998 through February 2001;

5. For failure to take effective measures to prevent rape of women by its soldiers during its occupation of Senafe Town;

6. For permitting looting and stripping in Senafe Town during its occupation, it is liable for 75% (seventy-five percent) of the total damage from looting and stripping suffered in the town between May 26, 2000 and June 2001;

7. For the unlawful destruction of or severe damage to the following thirteen major structures in Senafe Town during the Ethiopian occupation of the town:

a. The Electrical Authority (two buildings);
b. The Ministry of Agriculture (two buildings);
c. The New Town Administrative Headquarters;
d. The Old Town Administrative Headquarters and Offices West;
e. The Old Town Administrative Headquarters and Offices East;
f. Senafe Secondary School;
g. Senafe Hospital;
h. Sub-Zoba Administrative and Residential (three buildings); and
i. Telecommunications Building.

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

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

E. Other Findings

1. The Claimant's request that the Commission order the Respondent to apologize for the damage to the Stela of Matara is denied.

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

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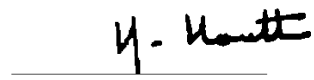
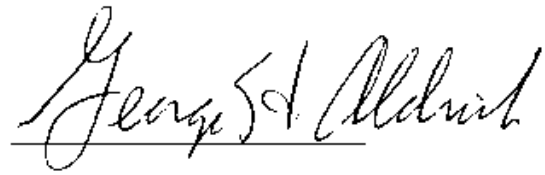
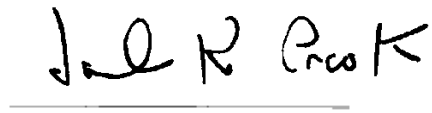
Done at The Hague, this 28th day of April, 2004,



President Hans van Houtte



George H. Aldrich



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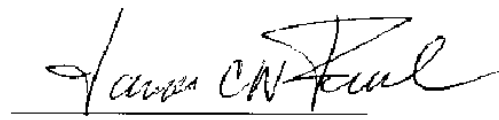

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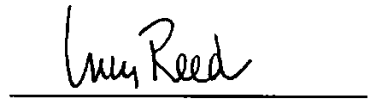

Lucy Reed