ERITREA ETHIOPIA CLAIMS COMMISSION

PARTIAL AWARD

Civilians Claims
Eritrea's Claims 15, 16, 23 & 27–32

between

The State of Eritrea

and

The Federal Democratic Republic of Ethiopia

The Hague, December 17, 2004

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

ERITREA ETHIOPIA CLAIMS COMMISSION

phone: +31 (0) 70 302 4165
fax: +31 (0) 70 302 4167
Email: claimscommission@pca-cpa.org

c/o International Bureau
Permanent Court of Arbitration
Peace Palace - Carnegieplein 2
2517 KJ The Hague - The Netherlands

PARTIAL AWARD

Civilians Claims
Eritrea's Claims 15, 16, 23 & 27–32

between

The State of Eritrea

and

The Federal Democratic Republic of Ethiopia

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

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

PARTIAL AWARD – Civilians Claims – Eritrea's Claims 15, 16, 23 & 27–32
between the Claimant,
The State of Eritrea, represented by:

Government of Eritrea

H. E. Mr. Mohammed Sulieman Ahmed, Ambassador of the State of Eritrea to The Netherlands
Professor Lea Brilmayer, Co-Agent, Legal Advisor to the Office of the President of Eritrea; Howard M. Holtzmann Professor of International Law, Yale Law School
Ms. Lorraine Charlton, Deputy Legal Advisor to the Office of the President of Eritrea

Counsel and Advocates

Professor James R. Crawford, SC, FBA, Whewell Professor of International Law, University of Cambridge; Member of the Australian and English Bars; Member of the Institute of International Law
Dr. Payam Akhavan, Esq.

Counsel and Consultants

Ms. Georgia Albert
Ms. Semhar Araia
Ms. Amanda Costikyan Jones
Mr. Yosief Solomon
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
Mr. Henok Mengistu, Third Secretary, Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia, Addis Ababa
Ms. Firdosa Abdulkadir, Third Secretary, Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia, Addis Ababa
Mr. Tsegaye Demeke, Consulate of Ethiopia to The Netherlands

Counsel and Consultants

Mr. B. Donovan Picard, Piper Rudnick LLP, Washington, D.C.; Member of the Bar of the District of Columbia; Member of the Bar of the Supreme Court of the United States
Professor Sean D. Murphy, George Washington University Law School, Washington, D.C.; Member of the State Bar of Maryland
Mr. Knox Bemis, Piper Rudnick LLP, Washington, D.C.; Member of the Bar of the District of Columbia; Member of the Bar of the Supreme Court of the United States
Mr. Edward B. Rowe, Piper Rudnick LLP, Washington, D.C.; Member of the Bar of the District of Columbia; Member of the State Bar of Colorado
Ms. Virginia C. Dailey; Piper Rudnick, LLP, Washington, D.C., Member of the Bar of the District of Columbia and State Bar of Florida; Member of the Law Society of England and Wales
Mr. Thomas R. Snider, Piper Rudnick LLP, Washington, D.C.; Member of the Bar of the District of Columbia; Member of the State Bar of Massachusetts
Mr. Won Kidane, Piper Rudnick LLP, Washington, D.C.; Member of the Bar of the District of Columbia; Member of the State Bar of Illinois
Ms. Christina Evans, Piper Rudnick LLP, Washington, D.C.; Consultant

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

TABLE OF CONTENTS

I. INTRODUCTION
- A. Summary of the Positions of the Parties 1
- B. Proceedings 1

II. FACTUAL BACKGROUND 2
III. JURISDICTION 3
IV. APPLICABLE LAW 6
V. EVIDENCE 8
VI. ERITREA'S CLAIMS: INTRODUCTORY OBSERVATIONS 9
VII. ERITREA'S CLAIM FOR DEPRIVATION OF NATIONALITY 14
VIII. ERITREA'S CLAIM FOR EXPULSION 18
IX. DETENTION WITHOUT DUE PROCESS 24
X. DEPRIVATION OF PROPERTY 27
XI. FAMILY SEPARATION 33
XII. CLAIMS ON BEHALF OF SPECIFIC INDIVIDUALS 35
XIII. AWARD 35
- A. Jurisdiction 35
- B. Applicable Law 36
- C. Evidentiary Issues 36
- D. Finding on Dual Nationality 36
- E. Findings on Liability for Violation of International Law 37
- F. Other Findings 38

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

I. INTRODUCTION

A. Summary of the Positions of the Parties

1. These Claims ("Eritrea's Claims 15, 16, 23 and 27–32," "Eritrea's Civilians Claims") covering expellees, civilian detainees and "persons of Eritrean extraction living in Ethiopia,"[1] have been brought to the Commission by the Claimant, the State of Eritrea ("Eritrea") against the Federal Democratic Republic of Ethiopia ("Ethiopia"), pursuant to Article 5 of the Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia of December 12, 2000 ("the December 2000 Agreement"). The Claimant asks the Commission to find the Respondent, Ethiopia, liable for loss, damage and injury it suffered, including loss, damage and injury suffered by Eritrean nationals and a large number of other persons, resulting from alleged infractions of international law in the treatment of civilian Eritrean nationals and other persons by Ethiopia in connection with the 1998–2000 international armed conflict between the two Parties.

2. Ethiopia contends that it has fully complied with international law in its treatment of such civilians.

3. This Partial Award and the companion Partial Award rendered today in Ethiopia's Claim 5 ("Ethiopia's Civilians Claims") are the third in a series of Partial Awards by the Commission on the merits of the Parties' claims. Previous Partial Awards have addressed the Parties' claims relating to the treatment of prisoners of war[2] and to the conduct of military operations on the Central Front.[3]

4. This claim does 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 Ethiopian nationals in the Central Front (Eritrea's Claims 2, 4, 5, 6, 8 and 22).

B. Proceedings

5. The Commission informed the Parties on August 29, 2001 that it would conduct proceedings in Government-to-Government claims in two stages, first concerning liability and, second, if liability is established, concerning damages. Pursuant to Article 5 of the December 2000 Agreement, this claim was filed on December 12, 2001. A Statement of Defense was filed on June 15, 2002, the Claimant's Memorial on November 15, 2002, and the Respondent's Counter-Memorial on January 15, 2004. Both Parties filed additional evidence

[1] Eritrea's Claims 15, 16, 23 & 27–32, Memorial, filed by Eritrea on Nov. 15, 2002, para.1.01.
[2] Partial Award, Prisoners of War, Eritrea's Claim 17 Between the State of Eritrea and The Federal Democratic Republic of Ethiopia 46 (July 1, 2003) [hereinafter Partial Award in Eritrea's POW Claims], Partial Award, Prisoners of War, Ethiopia's Claim 4 Between The Federal Democratic Republic of Ethiopia and The State of Eritrea (July 1, 2003) [hereinafter Partial Award in Ethiopia's POW Claims].
[3] Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22 Between the State of Eritrea and the Federal Democratic Government of Ethiopia (April 28, 2004) [hereinafter Partial Award in Eritrea's Central Front Claims]; Partial Award, Central Front, Ethiopia's Claim 2 Between the Federal Democratic Government of Ethiopia and the State of Eritrea (April 28, 2004) [hereinafter Partial Award in Ethiopia's Central Front Claims].

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

on February 13, 2004. A hearing was held at the Peace Palace in The Hague in March 2004, in conjunction with a hearing on Ethiopia's related Claim 5.

II. FACTUAL BACKGROUND

6. Eritrea's main claims and Ethiopia's defenses have their origins in the unusual circumstances leading to the emergence of Eritrea as a separate State during the early 1990s. Eritrea was an Italian colony from 1889 until the British defeated the Italian forces there in 1941, early in the Second World War. It then remained under British administration until 1952, when it entered into a federation with the Empire of Ethiopia. The federation lasted until 1962, when the last vestiges of Eritrea's political autonomy ended and Eritrea became a part of Ethiopia. In 1991, following the success of their long and bitter struggle against the Mengistu regime in Ethiopia, the successful revolutionary movements that had assumed power in Addis Ababa and Asmara agreed that "the people of Eritrea have the right to determine their own future by themselves and … that the future status of Eritrea should be decided by the Eritrean people in a referendum…."[4]

7. Organizing the Referendum was a large and complex task undertaken by the Referendum Commission of Eritrea ("RCE") appointed in April 1992. A Referendum Proclamation issued on April 7, 1992 established detailed procedures and limited participation to persons over 18 "having Eritrean citizenship." (The Referendum Proclamation and the associated Citizenship Proclamation are discussed below.) The RCE and the Provisional Government of Eritrea emphasized registration of potential voters outside of Eritrea, where over a million Eritreans lived. According to a report by the International Organization for Migration, 66,022 persons in Ethiopia registered to vote in the Referendum. The Referendum was successfully held on 23–25 April 1993, with extremely high participation and almost 99% of voters voting for Eritrea's independence. On May 4, 1993, Ethiopia's Ministry of Foreign Affairs recognized Eritrea's sovereignty and independence. Eritrea became a member of the United Nations on May 28, 1993.

8. During the decades when Eritrea did not exist as a separate political entity, there was extensive movement of population both into and out of the area of present-day Eritrea. These population movements were compounded by tumult and displacement from decades of bitter internal conflict within Ethiopia. Many Ethiopians of Eritrean ancestry knew only Ethiopia as their home. Many thousands of persons who were born or whose parents were born within the present-day boundaries of Eritrea came to reside as Ethiopian citizens in Addis Ababa and elsewhere in Ethiopia. The Commission received varying estimates of the numbers involved, but both Parties agreed the population was large. A June 12, 1998 Ethiopian Ministry of Foreign Affairs statement concerning "Precautionary Measures Taken Regarding Eritreans Residing in Ethiopia" referred to 550,000 such persons. Both Parties cited this figure during the proceedings, although Eritrea also referred to other lower estimates.

9. The evidence indicated that many persons with Eritrean antecedents were successful economically, owning property and operating businesses in Ethiopia. The evidence also indicated that there were active political and social organizations involving persons of

[4] Letter from H.E. Meles Zenawi to UN Secretary-General Boutros Boutros-Ghali, Dec. 13, 1991, UN Doc. A/C.3/47/5 (1992).

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Eritrean national origin. The Parties disagreed sharply regarding the character of these organizations and of their activities.

10. The heart of Eritrea's case is its contention that beginning soon after the outbreak of war in May 1998, Ethiopia wrongfully denationalized, expelled, mistreated and deprived of property tens of thousands of Ethiopian citizens of Eritrean origin in violation of multiple international legal obligations. Eritrea cited evidence it believed established that at least 75,000 persons were so expelled from Ethiopia, but contended that the actual numbers were larger, because some groups, particularly displaced rural Eritreans, were difficult to count. Eritrea also alleged mistreatment of other groups, including civilians alleged to have been wrongfully detained as prisoners of war and otherwise.

11. Ethiopia acknowledged that it expelled thousands of persons during this period, although it maintained that there were far fewer than claimed by Eritrea. Ethiopia contended that, pursuant to its law, the Ethiopian nationality of all Ethiopians who had obtained Eritrean nationality had been terminated and that those expelled were Eritrean nationals, and hence nationals of an enemy State in a time of international armed conflict. It contended that all of those expelled had acquired Eritrean nationality, most by qualifying to participate in the 1993 Referendum. Ethiopia further contended that its security services identified each expellee as having belonged to certain organizations or engaged in certain types of activities that justified regarding the person as a threat to Ethiopia's security. Ethiopia distinguished between the approximately 15,475 persons who it claimed were expelled as threats to security, and an additional number of family members said voluntarily to have elected to accompany or follow them. Ethiopia contended that 21,905 family members left with the expellees on transport provided by Ethiopia and that an unknown number of others left Ethiopia by other means.

III. JURISDICTION

12. Article 5, paragraph 1, of the December 2000 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 or its nationals 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."

13. Subject Matter Jurisdiction: Relation to the Conflict. Eritrea alleges that Ethiopia's treatment of civilians during the conflict and its aftermath was related to the conflict and violated numerous rules of international law. Eritrea seeks relief on account of injuries suffered both by Eritrean nationals and by others it regards as Ethiopian nationals. (The jurisdictional aspects of this latter group will be discussed *infra* in light of the unusual terms of Article 5 of the December 2000 Agreement.) The Commission agrees that one Party's treatment of civilians during and in the wake of the international armed conflict between them in the circumstances involved here clearly relates to that conflict. Claims that such treatment violates international law fall within the Commission's subject matter jurisdiction under Article 5 of the Agreement.

14. Temporal Jurisdiction. Under Article 5 of the December 2000 Agreement, the Commission's jurisdiction extends to claims "related to the conflict that was the subject" of

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

certain agreements between the Parties. The Commission held in Decision No. 1[5] that the central reference point for determining its jurisdiction is the armed conflict between the Parties. However, jurisdiction also extends to claims involving subsequent events arising as a result of the armed conflict or occurring in the course of measures to disengage contending forces or otherwise end the military confrontation.

15. This is in harmony with important international humanitarian law principles, which continue to provide protection throughout the complex process of disengaging forces and addressing the immediate aftermath of armed conflict. In this respect, under Article 6, paragraph 2, of Geneva Convention IV,[6] application of the Convention in the territory of a Party to the conflict "shall cease on the general close of military operations." However, under Article 6, paragraph 4, "[p]rotected persons whose release, repatriation or reestablishment may take place after [this date]. . . shall meanwhile continue to benefit by the present Convention." Further, Article 3 of the Protocol Additional to the Geneva Conventions of Aug. 12, 1949[7] ("Protocol I") provides in part that:

> the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.

16. Eritrea made claims regarding events that occurred after the conflict formally ended in December 2000, in particular regarding the alleged forcible expulsion from Ethiopia of 722 persons in July 2001. However, the record did not establish that this event was related to the disengagement of forces or otherwise fell within the scope of the Commission's jurisdiction pursuant to Decision No. 1. Accordingly, claims regarding the departure of these persons from Ethiopia are outside the Commission's jurisdiction.

17. <u>The Commission's Jurisdiction to Hear Claims of Persons Not Nationals of the Claiming State</u>. Article 5, paragraph 9, of the December 2000 Agreement significantly differs from general international practice, which typically limits claims procedures to claims involving the claiming party's nationals. Article 5, paragraph 9, provides that "in appropriate cases, each party may file claims *on behalf of persons* of Eritrean or Ethiopian origin who may not be its nationals. Such claims shall be considered by the Commission on the same basis as claims submitted on behalf of that party's nationals" (emphasis added). Thus, the December 2000 Agreement creates a *lex specialis* authorizing the Parties to present claims on behalf of certain non-nationals, and giving the Commission jurisdiction to consider those claims.

---

[5] Commission Decision No. 1: The Commission's Mandate/Temporal Scope of Jurisdiction, issued July 24, 2001.

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

[7] Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. p. 3 [hereinafter Protocol I].

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

18. Ethiopia objected to certain Eritrean claims involving persons who were not Eritrean nationals, contending that they did not fall within this unusual grant of jurisdiction. The Statements of Claim in Eritrea's Claims 15, 16 and 23 all state that the claim "is made by the State of Eritrea *on behalf of itself*, by virtue of injuries and losses suffered by the State of Eritrea and its nationals (and individuals of Eritrean origin as designated in Article 5, Paragraph 9)…." (emphasis added). By contrast, Eritrea's Claims 27 to 32, six separate individual claims filed by Eritrea being considered by the Commission in these proceedings, are explicitly and consistently phrased as being brought "on behalf of" the named claimant.[8]

19. Thus, Eritrea did not file Claims 15, 16 and 23 "on behalf of" affected individuals who were not its nationals. It instead chose to regard claims for those persons' injuries as the State of Eritrea's own claims. This is not the structure created by Article 5, paragraph 9. The difference is not a mere matter of form. Article 5, paragraph 9, creates an exceptional procedure empowering the Commission to decide claims for the benefit of persons of Eritrean origin who are not Eritrean nationals. The wording "on behalf of" indicates that the claim remains the property of the individual and that any eventual recovery of damages should accrue to that person. However, Eritrea's Statements of Claim in its Claims 15, 16 and 23 present the claims for injuries and losses suffered by its nationals and by Ethiopians of Eritrean origin as its own. Such claims based on injuries to non-nationals made for Eritrea's own account, and not on behalf of the affected individuals, are outside the Commission's jurisdiction.

20. Consequently, at the subsequent damages portion of the Commission's claims process, there may be situations where the scope of potential recoveries for damages will be limited because the underlying claims include only the claims of the Government of Eritrea for its own direct injuries resulting from the treatment of Ethiopians of Eritrean origin, for example the costs of resettlement, and do not include claims on behalf of the affected individuals themselves.

21. Ethiopia disputes Eritrea's right to claim monetary damages for persons remaining in Ethiopia. Claims with respect to Ethiopian nationals remaining in Ethiopia are addressed in the preceding paragraphs. Eritrea's claims regarding possible future injuries to dual nationals are discussed below. The availability of a monetary remedy for Eritrea for any past damages to Eritrean nationals remaining in Ethiopia is reserved for the subsequent damages phase of these proceedings. Ethiopia also contended that some of Eritrea's claims amounted to claims for violations of Ethiopian law. Claims for violations of national law would indeed be outside the Commission's jurisdiction, but the Commission does not understand Eritrea to have presented any such claims. Eritrea also advanced certain claims related to pensions. The Commission will address all claims related to pensions in connection with its hearings of all remaining claims in April 2005. Accordingly, pension claims are not admissible in this proceeding.

[8] *See* Eritrea's Statements of Claim, Claim 27 (Hiwot Nemariam); Claim 28 (Belay Redda); Claim 29 (Sertzu Gebre Meskel); Claim 30 (Fekadu Andemeskal); Claim 31 (Mebrahtu Gebremedhim) and Claim 32 (Mebrat Gebreamlak), filed by Eritrea on December 12, 2001.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

22. Ethiopia also urged that several other claims reflected in Eritrea's Memorial were not contained in its Statements of Claim. These include claims for breaches of various instruments not cited in the Statements of Claim. Ethiopia also challenged references to new legal theories not present there, particularly assertions that the expulsions violated international law because they were discriminatory. However, the Commission does not regard references to additional international legal authorities or legal arguments to support a claim presented in the Statements of Claim as constituting impermissible new claims. The Commission also finds that Eritrea's arguments of wrongful discrimination were presented in the Statements of Claim in sufficient specificity and detail to put Ethiopia on notice that they were matters to which it should respond.

23. Eritrea's Request for Additional Remedies. Eritrea asked the Commission to order a variety of remedies. *Inter alia*, Eritrea requested that the Commission order the reinstatement of the Ethiopian nationality of tens of thousands of people, that many thousands of persons of Eritrean heritage be allowed to exercise civil rights in Ethiopia, that detained Eritreans be freed from prison, that persons be restored to their property, and that numerous economic transactions be voided.

24. In its Decision No. 3 of July 24, 2001, the Commission decided that "in principle, the appropriate remedy for valid claims . . . should be monetary compensation."[9] The Commission did not foreclose the possibility of providing other types of remedies in appropriate cases, "if the particular remedy can be shown to be in accordance with international practice, and if the Tribunal determines that a particular remedy would be reasonable and appropriate in the circumstances." However, there was no showing that the additional remedies requested met the requirements of Decision No. 3, and the Commission is not prepared to grant them.

25. Eritrea also asked that the Commission provide relief for a group of "hundreds of thousands" of persons of Eritrean "descent, blood or affiliation" who have not yet experienced injuries. Counsel for Eritrea described these as persons "to which Ethiopia has not taken hostile action, but may very well." Eritrea asked that the Commission render "a declaration that they are Ethiopian citizens." Such a remedy relating to speculative future harm is outside the Commission's jurisdiction, which is limited to claims related to the 1998–2000 conflict and embraces events after December 2000 only to the limited extent indicated in Commission Decision No. 1.

IV. APPLICABLE LAW

26. Under Article 5, paragraph 13, of the December 2000 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. The Rule directs the Commission to look to:

[9] Commission Decision No. 3: Remedies, issued July 24, 2001.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

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.

27. Eritrea's analysis of the applicable international law reflected the fact that some of its claims involved injuries suffered by persons Eritrea viewed as Ethiopian nationals at the relevant time. With respect to these, Eritrea invoked numerous human rights instruments regulating relations between States and their nationals. However, many of the cited instruments were not in force between Eritrea and Ethiopia at the relevant times, and Ethiopia denied their applicability. The contents of potentially relevant customary norms were not addressed in detail during the proceedings. Eritrea did cite two instruments that were in force at some relevant times: the Convention on the Rights of the Child,[10] which entered into force between the Parties in 1994, and the African Charter on Human and People's Rights ("the African Charter"), which became binding between Eritrea and Ethiopia on April 14, 1999.[11] The Commission has taken these into account as appropriate.

28. In the Commission's view, customary international humanitarian law was the most significant legal component in the Parties' relationship when many of these events took place. In its Partial Awards on Prisoners of War and the Central Front, the Commission held that the law applicable to those claims before August 14, 2000 (when Eritrea acceded to the four Geneva Conventions of 1949[12]) was customary international humanitarian law.[13] The Commission held further 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 the four Geneva Conventions. Those holdings apply as well here and, indeed, to all the claims before the Commission. Hence, Ethiopia's treatment of Eritrean nationals was subject to the relevant principles articulated in Geneva Convention IV in addition to other potentially relevant norms.

29. Aspects of Protocol I are also relevant. While portions of Protocol I reflect progressive development of the law, throughout these proceedings, both Parties treated core Protocol I provisions governing the protection of civilians as reflecting binding customary rules. The Commission agrees, and recalls its earlier holding that, during the armed conflict between the

[10] Convention on the Rights of the Child, Nov. 20, 1989, DOC A/RES/44/25, 28 I.L.M. p. 1448 (1994).
[11] African Charter of Human & People's Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5; 21 I.L.M. p. 58 (1982). Ethiopia signed the African Charter on June 15, 1998 and ratified it on June 22, 1998. Eritrea signed on January 14, 1999 and ratified on March 15, 1999.
[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 IV, *supra* note 6.
[13] *See* Partial Award in Eritrea's POW Claims, *supra* note 2, at para. 38; Partial Award in Ethiopia's POW Claims, *supra* note 2, at para. 29; Partial Award in Eritrea's Central Front Claims, *supra* note 3, at para. 21; Partial Award in Ethiopia's Central Front Claims, *supra* note 3, at para. 15.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Parties, most of the provisions of Protocol I expressed customary international humanitarian law.[14]

30. The Commission views Article 75 of Protocol I as reflecting particularly important customary principles. Article 75 articulates fundamental guarantees applicable to all "persons who are in the power of a Party to the conflict who do not benefit from more favorable treatment under the Conventions or under this Protocol." It thus applies even to a Party's treatment of its own nationals. These guarantees distill basic human rights most important in wartime.[15] Given their fundamental humanitarian nature and their correspondence with generally accepted human rights principles, the Commission views these rules as part of customary international humanitarian law.

31. Article 75 of Protocol I "acts as a 'legal safety net' guaranteeing a minimum standard of human rights for all persons who do not have protection on other grounds."[16] It confirms their right to be "treated humanely in all circumstances . . . without any adverse distinction based upon . . . national . . . origin . . . or on any other similar criteria." The Article further affirms important procedural rights of persons subjected to arrest, detainment or internment. They must be promptly informed why these measures have been taken; they must then be released "with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist."

V. EVIDENCE

32. As in the Parties' prior cases, there are deep and wide-ranging conflicts in the evidence. The hundreds of sworn declarations submitted by the two Parties contained disagreements on many key facts. There are sharp conflicts regarding matters as fundamental as the numbers of persons who left Ethiopia (Eritrea's evidence indicating at least twice the numbers indicated by Ethiopia's); the treatment of expellees' family members; the role of the International Committee of the Red Cross ("ICRC"); the treatment of expellees' property; and other basic issues. These massive conflicts in the evidence again show the difficulty of determining the truth in the aftermath of a bitter armed conflict. In such circumstances, as the Commission has noted before, there can indeed be "nationalization of the truth."[17] However, this situation posed significant difficulties for the Commission.

33. Both Parties were mindful of the extensive conflicts in the evidence and of the frequent disputes about witnesses' accuracy and credibility. Both accordingly drew to the Commission's attention in support of their positions the reports of outside observers such as the ICRC, United Nations bodies, the British Home Office, the United States Department of State and international human rights non-governmental organizations.

---

[14] *See* Partial Award in Eritrea's Central Front Claims, *supra* note 3, at para. 23; Partial Award in Ethiopia's Central Front Claims, *supra* note 3, at para. 17.
[15] THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS p. 233 (Dieter Fleck ed., 1995) [hereinafter HANDBOOK OF HUMANITARIAN LAW].
[16] *Id.* p. 281.
[17] JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT pp. 321–323 (1954).

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

34. However, the Parties also noted the potential pitfalls and limitations of uncritical reliance on such materials, which were not prepared as evidence in legal proceedings. The Commission is mindful of these concerns. Third-party reports may indeed be based on incomplete or inaccurate information that the reporting entity cannot test or verify, including information provided by one or the other of the Parties. Such reports may reflect the interests or agendas of the reporters or those who provided them with information. However, given the extensive conflicts in the Parties' evidence, and both Parties' reference to materials from various outside observers, the Commission has also drawn upon such materials in seeking to resolve conflicts, although it has been mindful of such materials' potential limitations.

35. As in the Parties' prior cases, the Commission has required proof of liability by clear and convincing evidence. Thus, conflicting, yet credible, evidence has perhaps resulted in fewer findings of unlawful acts than either Party might have expected. The Commission again has taken its fundamental responsibility to be to concentrate on persistent and widespread patterns of misconduct, rather than individual acts.

36. At the hearing, the Commission heard the following witnesses:

For Eritrea:

Ms. Aida Mohammed Hagos
Mr. Seyoum Woldu
Mr. Abraha Yohannes Haile

For Ethiopia:

Mr. Woldeselassie Woldemichael
Mr. Girmay Kebede

VI. ERITREA'S CLAIMS: INTRODUCTORY OBSERVATIONS

37. Eritrea's Memorial and presentations at the hearing alleged five major substantive breaches of international law, and the Commission has structured its analysis correspondingly:

(A) Mass Expulsion;

(B) Denationalization;

(C) Detention Without Due Process;

(D) Deprivation of Property; and

(F) Forcible Family Separation.

Eritrea also contended that Ethiopian actions often reflected legally prohibited discrimination, notably discrimination against those of Eritrean heritage. However, the Commission

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

understands those arguments to have been offered as an additional ground for the illegality of challenged conduct, not as a separate head of claim.

38. Intersecting Legal Regimes. At the outset, the Commission notes the challenges involved in determining whether or how several potentially relevant bodies of international law might apply in the very unusual – indeed, perhaps unique – wartime factual circumstances presented here. Both Parties referred to rules of international law generally regulating the acquisition and loss of nationality and the expulsion of persons by a State, but these rules did not stand in isolation. Other significant factors also shaped the legal situation. First, the Parties were involved in a far-reaching legal and political transformation. The new State of Eritrea had emerged from the territory of Ethiopia a few years before the war began, and important questions of individual status and other matters were not yet settled between the two. More importantly, the Parties' bitter international armed conflict fundamentally changed the nature of their relationship and brought international humanitarian law into operation. The Commission's challenge was to assess a situation influenced by several bodies of international law rules.

39. The 1993 Referendum and its Legal Consequences. Key issues in this claim are rooted in the emergence of the new State of Eritrea, particularly the April 1993 Referendum on Eritrean independence. In brief, Eritrea claimed that, after the war began, Ethiopia wrongly deprived thousands of Ethiopian citizens of Eritrean origin of their Ethiopian citizenship and expelled them, all contrary to international law. Ethiopia responded that the expellees had voluntarily acquired Eritrean nationality, most by qualifying to participate in the 1993 Referendum, and in doing so had foregone their Ethiopian nationality under Ethiopian law. Ethiopia further maintained that all those expelled had also committed other acts justifying viewing them as threats to Ethiopia's security.

40. Because of the importance of the Referendum and related events to Eritrea's claims, they are described here in some detail. On April 6, 1992, the Provisional Government of Eritrea issued Proclamation No. 21/1992, spelling out various requirements for acquiring Eritrean citizenship. Persons born to either a mother or a father who resided in Eritrea in 1933 acquired nationality by birth (Article 2); various other groups of persons, including those married to Eritreans, could acquire Eritrean nationality through a naturalization process (Articles 4 and 6).[18] The evidence indicated that Proclamation No. 21/1992 remains the basic legal instrument regulating the acquisition of Eritrean citizenship.

41. The next day, Eritrea's Provisional Government issued Proclamation No. 22/1992, establishing detailed procedures for participating in the Referendum. It expressly limited participation to persons having Eritrean citizenship. Article 24 stated:

> Any person *having Eritrean citizenship pursuant to Proclamation No. 21/1992* on the date of his application for registration and who was of the age of 18 years or older or would attain such age at any time during the registration period, and who further possessed an

[18] Acquisition of nationality by marriage was subject to substantial restrictions. The spouse had to live in Eritrea with the Eritrean spouse for at least three years; renounce foreign nationality; and sign an oath of allegiance. The Eritrean Nationality Proclamation No. 21/1992, Apr. 6, 1992, art. 6.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

> Identification Card issued by the Department of Internal Affairs, shall be qualified for registration.[19]

42. The first step in registering for the Referendum was to obtain an "Eritrean *Nationality* Identity Card" (emphasis added) documenting that the applicant met the nationality requirements of Proclamation No. 22/1992. (This was different from and in addition to a voter identification card used only to take part in the Referendum.) The Eritrean Department of Internal Affairs delivered the Nationality Identity Card after a checking process, in which external voters were held to the same nationality standards as internal voters. Although the nationality cards were issued by the "Provisional Government of Eritrea," they were not "provisional" or limited in duration or effectiveness. The Commission heard testimony that bearers of the cards could use them as travel documents to make border crossings between Ethiopia and Eritrea in the years before the war.[20]

43. The Parties' Contentions. Ethiopia viewed registration as an Eritrean citizen to participate in the Referendum as a matter of free choice, and saw the Eritrean nationality so acquired and documented as genuine and effective. In its view, those who acquired Eritrean nationality thereby lost their Ethiopian nationality by operation of Article 11 of the 1930 Ethiopian nationality law, which provides that Ethiopian nationality is lost when a person acquires another nationality.

44. Eritrea attacked these arguments as *post-hoc* lawyer's rationalizations, contending that acquiring an Eritrean nationality card did not have legal significance because Eritrea was not yet a State capable of conferring nationality. There was only a "provisional" Eritrean Government; the State of Eritrea only came into being after confirmation by the Referendum. Eritrea added that many expellees (particularly those from rural areas) did not participate in the Referendum process, and so could not have acquired Eritrean nationality under Ethiopia's theory. It pointed out that under Article 33 of the Ethiopian Constitution, no Ethiopian citizen could be deprived of citizenship without consent.

45. Ethiopia responded that Eritrea had *de facto* emerged as a State prior to the Referendum, and was capable of conferring nationality that was effective as a matter of international law, even before Eritrea was generally recognized by other States and became a member of the United Nations. In Ethiopia's view, the Provisional Government of Eritrea exercised effective authority over territory and a population and was carrying on important international relations, including substantial negotiations with Ethiopia and with international organizations. Eritrea concluded multiple agreements with Ethiopia, including agreements declaring Assab and Massawa free ports open to Ethiopia, concerning a common currency and establishing the free movement of citizens and trade. Moreover, Eritrea carried out complex and legally sophisticated administrative actions as evidenced by the 1992 Nationality and Referendum Proclamations.

---

[19] The Eritrean Referendum Proclomation No. 22/1992, Apr. 7, 1992 (emphasis added).

[20] Transcript of the Eritrea-Ethiopia Claims Commission Hearings of March 2004, Peace Palace, The Hague, at pp. 631, 645. The Commission considers it relevant that the Eritrean authorities chose to address the question of nationality in a separate and earlier proclamation, not as part of Proclamation No. 22/1992. Incorporating the nationality provisions into the Referendum Proclamation might have indicated that the determination of nationality was for a limited purpose, *i.e.* solely for the Referendum. That was not the course Eritrea chose.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

46. Eritrea also urged that Ethiopia affirmatively encouraged voting in the Referendum without giving any indication that those who voted, many of whom knew only Ethiopia as a home, would lose their Ethiopian nationality by operation of the 1930 law. Indeed, Eritrea presented substantial evidence that Ethiopia did nothing before May 1998 suggesting that it saw persons who qualified to vote in the Referendum as having lost their Ethiopian citizenship. Eritrea's documentary evidence included numerous Ethiopian passports, voter registration cards and other official documents issued or renewed after the Referendum, indicating the bearers' subsequent unimpeded exercise of important attributes of Ethiopian citizenship. Referendum participants also continued to hold immovable property (a right forbidden for foreigners under Article 390 of the Ethiopian Civil Code), to hold business licenses, and to practice professions reserved to Ethiopian nationals.

47. Ethiopia maintained that it continued to issue these passports and other official documents because it and Eritrea had been planning to work out arrangements that would permit the nationals of both countries to trade and invest in either country. It was expected that, when these arrangements were in place, each of those Eritreans who had also been enjoying Ethiopian nationality would have to choose one of those nationalities. Until that time, Ethiopia intended to refrain from implementing its nationality law. However, Ethiopia contended that all of those expectations were destroyed by Eritrea's attack in May 1998 and the ensuing war, and that this fundamental change in circumstances justified the immediate implementation of its nationality law. Ethiopia urged that it should not now be penalized because of actions between 1993 and 1998 that were intended to be helpful for those Ethiopians who had obtained Eritrean nationality.

48. With respect to these arguments, the Commission is not, on the one hand, persuaded by Eritrea's argument that registration as an Eritrean national in order to participate in the 1993 Referendum was without important legal consequences. The governing entity issuing those cards was not yet formally recognized as independent or as a member of the United Nations, but it exercised effective and independent control over a defined territory and a permanent population and carried on effective and substantial relations with the external world, particularly in economic matters. In all these respects, it reflected the characteristics of a State in international law.[21]

49. On the other hand, neither is the Commission persuaded by Ethiopia's argument that the continued issuance of Ethiopian passports and other official documents was not evidence of continued Ethiopian nationality. Passports in particular contain the issuing State's formal representation to other States that the bearer is its national. The decision to issue such a document, intended to be presented to and relied upon by friendly foreign States, is an internationally significant act, not a casual courtesy.

50. The Commission is not insensitive to the human dimensions and costs of the unusual, perhaps unique, puzzle of nationality, deprivation of nationality, and (as addressed separately below) expulsion that it faces. In particular, the Commission is aware from the evidence that

[21] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW pp. 70–72 (6th ed. 2003); AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW pp. 75–81 (Peter Malanczuk, ed., 7th rev. ed. 1997).

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

some proportion of Ethiopian nationals of Eritrean origin who registered to vote in the Referendum, with official encouragement from the Government of Ethiopia, did not intend to abandon or prejudice their Ethiopian nationality, did not foresee the risk to that nationality that would arise in the event of war between Eritrea and Ethiopia, and, had they foreseen it, would not have registered. Much of the conflict, and tragedy, infusing the record in these claims stems from the reality that many Ethiopians of Eritrean origin who registered to vote in the Referendum had no idea of the legal impact of their action and of its potential risks to them. Once the war began in 1998, many declarants who had resided only in Ethiopia and who considered all their important connections to be in Ethiopia, expressed confusion and shock that their Government – the Government of Ethiopia – had deprived them of their Ethiopian nationality and treated them as nationals of an enemy State – Eritrea.

51. Nonetheless, nationality is ultimately a legal status. Taking into account the unusual transitional circumstances associated with the creation of the new State of Eritrea and both Parties' conduct before and after the 1993 Referendum, the Commission concludes that those who qualified to participate in the Referendum in fact acquired dual nationality. They became citizens of the new State of Eritrea pursuant to Eritrea's Proclamation No. 21/1992, but at the same time, Ethiopia continued to regard them as its own nationals.

52. The Commission's conclusion is reinforced by an important undertaking by the Parties suggesting that those who acquired Eritrean nationality retained their Ethiopian nationality. In 1996, senior officials of both Parties signed a formal Agreed Minute stating that

> [o]n the question of nationality it was agreed that Eritreans who have so far been enjoying Ethiopian citizenship should be made to choose and abide by their choice. It was decided that the implementation of this agreement should await, however, decision on granting the freedom to trade and to invest in either country for both nationals of Ethiopia and Eritrea.[22]

53. Whether the 1996 Agreed Minute was a treaty binding under the international law of treaties was discussed inconclusively at the hearing. While the Commission sees the Agreed Minute as having important attributes of an internationally binding legal instrument, its legal status need not be decided. Whatever its status, the document indicates both Parties' awareness of the citizenship issues resulting from the separation of Eritrea and their determination to resolve them through an orderly, mandatory future choice of either Ethiopian or Eritrean nationality by affected individuals. However, that choice would only be required after the Parties set the ground rules governing their future economic relations.

54. It was urged that the Agreed Minute addressed only a narrow group composed of Ethiopians who were not yet Eritrean nationals but who were entitled to acquire Eritrean nationality. The Commission does not find this narrow reading persuasive. It is not consistent with the most natural meaning of the words of the text. Moreover, any individual's entitlement to opt for Eritrean nationality at some future time would not depend on an agreement between States but on Eritrean nationality law.

[22] Agreed Minutes of the Fourth Ethio-Eritrean Joint High Commission Meeting (August 1996), para. 4.3.4.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

55. The advent of the war did not *per se* end these people's dual nationality, but it fundamentally changed their circumstances and placed them in an unusual and potentially difficult position. In wartime, a State may lawfully assign significant and sometimes painful consequences to either of a dual national's nationalities, leaving such persons potentially subject to heavy burdens flowing from both nationalities:

> [I]f he is both a citizen . . . and an enemy national, he is, as a matter of law, liable to the military and other obligations of such citizens and in his latter capacity to internment and similar measures . . .
> Dual nationality is not half one nationality and half another, but two complete nationalities and in time of war verily a *damnosa hereditas*. As Ridly J. said in *Ex parte* Freyberger [cite omitted], 'such a person is not half a subject of one State and half of another State . . . he is completely a subject of each State.'[23]

56. Eritrea's Memorial presented its mass expulsion claims first, followed by its claims for wrongful deprivation of nationality and other matters. While the Commission would normally consider claims in the sequence presented by the Parties, these two claims are closely intertwined legally and factually. To facilitate its analysis, the Commission will begin with Eritrea's claims for deprivation of nationality.

VII. ERITREA'S CLAIM FOR DEPRIVATION OF NATIONALITY

57. Neither international humanitarian law nor any treaty applicable between the Parties during the war addresses the loss of nationality or the situation of dual nationals in wartime. With respect to customary international law, Ethiopia contended that customary international law gives a State discretion to deprive its nationals of its nationality if they acquire a second nationality. For its part, Eritrea emphasized everyone's right to a nationality, as expressed in Article 15 of the Universal Declaration of Human Rights,[24] particularly the right not to be arbitrarily deprived of one's nationality. Eritrea maintained that those expelled had not acquired Eritrean nationality, and so were unlawfully rendered stateless by Ethiopia's actions.

58. The Commission agrees with both Parties regarding the relevance of the customary law rules they cited. The problem remains, however, to apply them in the circumstances here. The question before the Commission is whether Ethiopia's actions were unlawful in the unusual circumstances of the creation of the new State of Eritrea followed by the outbreak of war between Eritrea and Ethiopia.

59. With respect to Ethiopia's contention, the Commission recognizes that some States permit their nationals to possess another nationality while others do not. International law prohibits neither position. Accordingly, international law would have allowed Ethiopia to take appropriate measures to implement its 1930 nationality law at the time of the 1993 Referendum as to persons who acquired Eritrean nationality then. For reasons that appear to have been quite commendable, Ethiopia did not do so. It instead allowed Ethiopians who had also acquired Eritrean nationality to continue to exercise their Ethiopian nationality, while

[23] LORD MCNAIR & ARTHUR D. WATTS, THE LEGAL EFFECTS OF WAR p. 70 (4th ed. 1966).
[24] Universal Declaration on Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

agreeing with Eritrea that these people would have to choose one nationality or the other at some future time. The war came before these matters were resolved.

60. With respect to Eritrea's contention, the Commission also recognizes that international law limits States' power to deprive persons of their nationality. In this regard, the Commission attaches particular importance to the principle expressed in Article 15, paragraph 2, of the Universal Declaration of Human Rights, that "no one shall be arbitrarily deprived of his nationality." In assessing whether deprivation of nationality was arbitrary, the Commission considered several factors, including whether the action had a basis in law; whether it resulted in persons being rendered stateless; and whether there were legitimate reasons for it to be taken given the totality of the circumstances.

61. As to the legal basis of Ethiopia's action, there was no proclamation or similar document in the record recording the decision to terminate the affected persons' Ethiopian nationality, but counsel indicated that this was done pursuant to Ethiopia's 1930 nationality law, a law of long standing comparable to laws of many other countries, which provides that Ethiopian nationality is lost when an Ethiopian acquires another nationality.[25] Neither Party has pointed to any other Ethiopian law that could have been a basis for the termination by Ethiopia of the nationality of any Ethiopians. Consequently, the Commission accepts that all terminations of Ethiopian nationality for which Eritrea is claiming were made on the basis of that law.

62. If Ethiopia's nationality law were properly implemented in accordance with its terms, only dual nationals could be affected, and that law, by itself, could not result in making any person stateless. Given the fact, however, that Ethiopia did not implement that law until sometime in 1998 with respect to its nationals who had acquired Eritrean nationality between 1993 and 1998, the possibility could not be excluded that some persons who had acquired Eritrean nationality had subsequently lost it and thus were made stateless by Ethiopia's action. Perhaps more likely, statelessness would result if Ethiopia erroneously determined that one of its nationals had acquired Eritrean nationality when, in fact, he or she had not done so. Such an unfortunate result might be most likely to occur with respect to Ethiopian nationals not resident in Ethiopia, but it could occur even with respect to Ethiopians resident in Ethiopia. The evidence indicates that Ethiopia appears to have made at least a few errors in this process. While Eritrea cannot claim for the loss suffered by the persons who were the victims of those errors, Ethiopia is liable to Eritrea for any damages caused to it by those errors.

63. It remains for the Commission to consider the grounds for Ethiopia's actions as they affected dual nationals in light of the factual circumstances of the emergence of the new State of Eritrea and of the armed conflict between the two. Ethiopia contended that it cannot be arbitrary and unlawful in time of war for it to have terminated the Ethiopian nationality of anyone who, within the past five years, had chosen to obtain the nationality of the enemy State. Eritrea contended that those deprived of their Ethiopian nationality had not been shown

[25] Ethiopia's subsequent call for registration of Eritrean nationals in August 1999, *infra* at para. 74, clearly refers to persons acquiring Eritrean nationality in connection with participation in the Referendum. This is at odds with Eritrea's claim that Ethiopia's position regarding the loss of Ethiopian nationality was devised after-the-fact for purposes of legal argument.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

to threaten Ethiopia's security, and that it was arbitrary for Ethiopia, which had encouraged people to participate in the Referendum without notice of the potential impact on their Ethiopian nationality, to deprive them of Ethiopian nationality for doing so.

64. The Commission will examine separately Eritrea's claims regarding several groups deprived of their Ethiopian nationality.

65. Dual Nationals Deprived of their Ethiopian Nationality and Expelled for Security Reasons. Ethiopia contended that when the war broke out, its duration and extent could not be foreseen. Ethiopian security officials were said to be deeply concerned about the potential security threats posed by over 66,000 Ethiopian residents who had shown a significant attachment to the now-enemy State by acquiring Eritrean nationality in order to register for the Referendum or otherwise.

66. Ethiopia insisted that it did not view Eritrean nationality alone as sufficient to deem anyone a security threat subject to loss of nationality and expulsion. For that, additional ties or actions indicating a possible threat to Ethiopia's security were required. The principal indicators were raising money on behalf of Eritrea or participating in organizations promoting Eritrean Government interests or encouraging closer links between expatriate Eritreans and Eritrea. Involvement in two organizations drew particular scrutiny.

67. The first was the Popular Front for Democracy and Justice ("PFDJ"). The evidence showed that the PFDJ was the ruling political party in Eritrea, but it was more than a western-style political party. It was more akin to a national movement, constituting a significant element in Eritrea's machinery of government. The evidence showed that the PFDJ maintained a structure of local groups at numerous locations in Ethiopia, which were used to promote the interests of Eritrea.

68. Ethiopia's screening process also focused on persons active in the Eritrean Community Associations. The Community Associations were less overtly political than the PFDJ. Nevertheless, the evidence showed that they raised funds to support Eritrea and promoted nationalistic solidarity among their members.

69. The evidence indicated that the overall structure and direction of the security effort was the responsibility of Ethiopia's national security agency, "SIRAA." Persons were identified through a decentralized structure implementing guidance from the central authorities. Ethiopia's evidence portrayed a complex process by which a tier of security committees, including committees at the wereda, tabia and kebele level, identified persons meeting the criteria as potential security threats. SIRAA officials apparently reviewed recommendations and controlled this process.

70. Persons identified through this process were then individually detained, brought to collection centers and then expelled, usually within a few days. Expellees' passports and other documents indicating Ethiopian nationality were confiscated, and Ethiopia subsequently treated them as having lost their Ethiopian nationality. Eritrea's evidence was consistent with Ethiopia's claim that the process involved deliberation and selection of individuals. Eritrean witnesses regularly described Ethiopian security personnel coming to their residences or places of work seeking them individually by name.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

71. Deprivation of nationality is a serious matter with important and lasting consequences for those affected. In principle, it should follow procedures in which affected persons are adequately informed regarding the proceedings, can present their cases to an objective decision maker, and can seek objective outside review. Ethiopia's process often fell short of this. The process was hurried. Detainees received no written notification, and some claimed they were never told what was happening. Ethiopia contended that detainees could orally apply to security officials seeking release. The record includes some declarations of persons who were released, but it also includes senior Ethiopian witnesses' statements suggesting that there were few appeals. Some declarants claim that they were deprived of Ethiopian nationality and expelled even though they did not qualify to vote in the Referendum or meet Ethiopia's other selection criteria.

72. Notwithstanding the limitations of the process, the record also shows that Ethiopia faced an exceptional situation. It was at war with Eritrea. Thousands of Ethiopians with personal and ethnic ties to Eritrea had taken steps to acquire Eritrean nationality. Some of these participated in groups that supported the Eritrean Government and often acted on its behalf. In response, Ethiopia devised and implemented a system applying reasonable criteria to identify individual dual nationals thought to pose threats to its wartime security. Given the exceptional wartime circumstances, the Commission finds that the loss of Ethiopian nationality after being identified through this process was not arbitrary and contrary to international law. Eritrea's claims in this regard are rejected.

73. Dual Nationals Who Chose to Leave Ethiopia and Go to Eritrea. There were many dual nationals who decided to leave Ethiopia during the war and go to Eritrea. The total number is uncertain. Ethiopia counted 21,905 family members who accompanied those who were expelled for security reasons. Others left by aircraft or other means. While many, but not all, of these were relatives of those who were expelled for security reasons, the Commission recognizes that, whatever their individual motives may have been, it was a serious act that could not be without consequences for any dual national of two hostile belligerents to choose to leave one for the other while they were at war with each other. The Commission decides that the termination of the Ethiopian nationality of these persons was not arbitrary and was not in violation of international law.

74. Dual Nationals Remaining in Ethiopia: "Yellow-Card People." It is undisputed that a considerable number of other dual nationals remained in Ethiopia during the war, that Ethiopia deprived them of their Ethiopian nationality and, in August 1999, required them to present themselves and register as aliens and obtain a residence permit. The August 1999 call for registration ordered that "any Eritrean of eighteen years of age and over, who has acquired Eritrean nationality taking part in the Eritrean independence referendum or thereafter" must report and be registered. Those who did not comply "will be considered an illegal person who has unlawfully entered the country and shall be treated as such according to the law."

75. Those who registered received distinctive yellow alien identity cards, and were referred to at the hearing as "yellow-card people." The numbers affected were disputed. Counsel for Eritrea estimated that about 50,000 persons were affected. Ethiopia stated that a much smaller group – about 24,000 persons – registered and obtained the yellow identity cards. Eritrea contended that persons in this group were wrongly deprived of their Ethiopian

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

nationality. Whatever the numbers affected, there was no evidence indicating that the dual nationals in this group threatened Ethiopian security or suggesting other reasons for taking away their Ethiopian nationality. There was no process to identify individuals warranting special consideration and no apparent possibility of review or appeal. Considering that rights to such benefits as land ownership and business licenses, as well as passports and other travel documents were at stake, the Commission finds that this wide-scale deprivation of Ethiopian nationality of persons remaining in Ethiopia was, under the circumstances, arbitrary and contrary to international law.

76. Dual Nationals Who Were in Third Countries or Who Left Ethiopia To Go to Third Countries. Eritrea also contended that an undetermined number of the persons found by the Commission to have been dual nationals were present in other countries when Ethiopia determined that they would no longer be accepted as Ethiopian nationals. As with the "yellow-card people," there is no evidence indicating that these people, by their mere presence in third countries could reasonably be presumed to be security threats or that they were found to be potential threats through any individualized assessment process. Moreover, the only means by which they could contest their treatment was to approach Ethiopian diplomatic or consular establishments abroad, and the evidence showed that those who did so to seek clarification or assistance were sent away. The Commission finds that the members of this group were also arbitrarily deprived of their Ethiopian citizenship in violation of international law.

77. Dual Nationals Who Were in Eritrea. The record does not indicate how many dual nationals were in Eritrea when the war began in May 1998 and soon thereafter, when Ethiopia terminated the Ethiopian nationality of Eritrea-Ethiopia dual nationals, but the Commission must assume that some were there. While it could not fairly be assumed that mere presence in Eritrea was proof that such dual-nationals were security risks, the Commission finds that the evident risks and the inability to contact them under wartime conditions made such termination not arbitrary or otherwise unlawful.

78. Dual Nationals Expelled for Other Reasons. While Ethiopia asserted that no one was expelled except for holders of Eritrean nationality found to be security risks through the process previously described, the evidence shows that an unknown, but considerable, number of dual nationals were expelled without having been subject to this process. Particularly in smaller towns and in agricultural areas near the border, most or all dual nationals were sometimes rounded up by local authorities and forced into Eritrea for reasons that cannot be established. There is also evidence to suggest that these expulsions included some dual national relatives of persons who had been expelled as security risks and may have included some dual nationals who were expelled against their will. The Commission holds that the termination of the Ethiopian nationality of all such persons was arbitrary and unlawful.

VIII. ERITREA'S CLAIM FOR EXPULSION

79. Eritrea alleged that Ethiopia violated international law by engaging in a mass expulsion of Ethiopian nationals of Eritrean origin, contending that Ethiopia's actions amounted to "ethnic cleansing." Ethiopia denied that it engaged in any mass expulsion or, indeed, any expulsion of its own nationals, and denied the allegation of ethnic cleansing. Ethiopia maintained that it expelled to Eritrea only persons of Eritrean nationality, and that

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

international humanitarian law recognizes the right of a belligerent to require nationals of the enemy State to return to the State of their nationality. Both Parties suggested that the mass expulsion of all nationals of an enemy State at the beginning of a war might be inconsistent with the law, but Ethiopia denied having done this. It asserted that it had expelled only selected Eritrean nationals for security reasons based on individual investigation and determination.

80. The Commission will initially address Eritrea's allegations that Ethiopia engaged in prohibited ethnically based mass expulsions or ethnic cleansing. Ethiopia maintained that 15,475 persons with Eritrean nationality were individually identified through its security process and then deprived of Ethiopian nationality and expelled. This is a large group, but it is less than 25% of the more than 66,000 persons in Ethiopia who qualified to vote for the Referendum. It is 3% of the more than 500,000 persons in Ethiopia both Parties cited as having Eritrean antecedents. Eritrea disputed Ethiopia's figure, but even if the total were much higher, the record indicates an expulsion process involving deliberation and selection, not indiscriminate round-ups and expulsions based on ethnicity. Eritrea's claims that Ethiopia engaged in indiscriminate mass expulsions based on ethnicity or in ethnic cleansing are rejected for lack of proof.

81. International humanitarian law gives belligerents broad powers to expel nationals of the enemy State from their territory during a conflict. The Commission notes in this regard the following statement of the relevant international law by a leading treatise:[26]

> The right of states to expel aliens is generally recognized. It matters not whether the alien is on a temporary visit or has settled down for professional, business or other purposes on its territory, having established his domicile there. On the other hand, while a state has a broad discretion in exercising its right to expel an alien, its discretion is not absolute. Thus, by customary international law it must not abuse its right by acting arbitrarily in taking its decision to expel an alien, and it must act reasonably in the manner in which it effects an expulsion. Beyond this, however, customary international law provides no detailed rules regarding expulsion and everything accordingly depends upon the merits of the individual case. Theory and practice correctly make a distinction between expulsion in time of hostilities and in time of peace. A belligerent may consider it convenient to expel all hostile nationals residing, or temporarily staying, within its territory: although such a measure may be very hard on individual aliens, it is generally accepted that such expulsion is justifiable.[27]

[26] I OPPENHEIM'S INTERNATIONAL LAW § 413, pp. 940–941 (Sir Robert Jennings & Sir Arthur Watts eds., 1996).
[27] Writers on international humanitarian law are to the same effect. *See, e.g.*, Karl Doehring, *Aliens, Expulsion and Deportation*, *in* 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW p. 16 (1985) ("[A] State may nonetheless be justified in expelling such a group without regard to the individual behaviour of its members, if the security and existence of the expelling State would otherwise be seriously endangered, for example . . . during a state of war."); GERALD DRAPER, THE RED CROSS CONVENTIONS pp. 36–37 (1958), *quoted in* 10 DIGEST OF INTERNATIONAL LAW p. 274 (Marjorie Whiteman ed., 1968) (citing "the customary right of a state to expel all enemy aliens at the outset of a conflict"); HANDBOOK OF HUMANITARIAN LAW, *supra* note 15, at § 589(5), p. 287

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

82. The Commission concluded above that Ethiopia lawfully deprived a substantial number of dual nationals of their Ethiopian nationality following identification through Ethiopia's security committee process. Ethiopia could lawfully expel these persons as nationals of an enemy belligerent, although it was bound to ensure them the protections required by Geneva Convention IV and other applicable international humanitarian law. Eritrea's claim that this group was unlawfully expelled is rejected.

83. However, Eritrea also contended that some expellees did not participate in the Referendum process and could not have acquired Eritrean nationality in that way, so that their expulsion violated the international law rule barring States from expelling their own nationals. Ethiopia denied these contentions. Two groups were emphasized.

84. Rural Expellees. In addition to the dual nationals from rural areas referred to above in the section dealing with nationality, the evidence indicates that many other persons were forced out of rural areas near the border into Eritrea. Eritrea contended that several thousand persons with Eritrean antecedents in rural areas, particularly in Tigray Province, were forcibly rounded up by local security forces and collectively expelled. Eritrea indicated that the numbers affected were uncertain because of the remote areas involved. Considering the declarations of camp administrators who assisted these people in Eritrea, Eritrea estimated that 10,000 to 15,000 rural people were forcibly expelled. There is no firm evidence as to their nationality, but Eritrea contended that because of the remote areas involved, few if any of these expellees were likely to have participated in the 1993 Referendum process or to have acquired Eritrean nationality in other ways. From the small number of declarations by rural expellees, the Commission believes that most of these persons had been in Ethiopia for a number of years.

85. Ethiopia responded that Eritrea failed to prove that these events occurred. It also argued that any displacements that might have occurred were probably the unavoidable result of military operations.

86. Eritrea's evidence included first-hand accounts of forced roundups during the war of persons of Eritrean background in rural areas and of their subsequent expulsions, as well as statements by camp administrators involved in receiving and attempting to resettle these expellees in Eritrea.[28] The evidence showed that the roundups and expulsions were not the unavoidable result of combat operations, but were forced by local people and crowds, including local officials. There was no evidence that they were organized or directed by central government authorities. These rural expulsions often involved harsh journeys to reach the border, sometimes on foot.

(forced "repatriation [of nationals of an enemy state] must be considered as permissible"); McNAIR & WATTS, *supra* note 23, at p. 76 ("There is no rule which requires a belligerent to allow enemy subjects to remain in his territory and he is entitled to expel them if he chooses"). Geneva Convention IV does not explicitly address expulsion of nationals of the enemy state or other aliens, instead emphasizing the right of aliens who wish to leave the territory of a belligerent to do so. *See* Art. 35.

[28] Eritrea's evidence also included several declarations from rural people forcibly expelled from Tigray in mid-2001 and evidence of international protests by the UN Secretary-General and others regarding the 2001 expulsions. However, as indicated *supra*, at para. 16, claims for the 2001 expulsions are outside the Commission's temporal jurisdiction.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

87. The evidence concerning forced rural expulsions prior to the December 2000 Agreement is not as extensive as that concerning some of Eritrea's other claims. However, the Commission finds it sufficient to prove Eritrea's claim that these events occurred, and that Ethiopia failed to rebut that evidence.

88. Given the remote locations and the nature of the populations affected, the Commission finds it unlikely that many, if any, of the rural expellees participated in the Referendum process and so acquired dual nationality. There was no evidence that they constituted a threat to Ethiopia's national security. Instead, those expelled appear to have been largely, if not exclusively, Ethiopian nationals rounded up and forcibly expelled from Ethiopia because of their Eritrean ethnicity.

89. The forcible expulsion of these rural people, particularly if based on ethnicity as apparently happened here, clearly violates international law. There was no evidence that these expulsions resulted from any national policy, and they appear to have been carried out by local farmers, militia or police. Nevertheless, the State of Ethiopia remains responsible to Eritrea under international law for any damages and losses to Eritrea caused by these actions, as they occurred in its sovereign territory and involved state agents whose misconduct Ethiopia did not prevent.

90. The Commission held earlier that, even under the unusual jurisdictional provisions of Article 5 of the December 2000 Agreement, the State of Eritrea could not claim for injuries to itself based upon injuries suffered by persons who were solely Ethiopian nationals when they were injured.[29] Most if not all of the persons covered by this portion of Eritrea's claim were nationals of Ethiopia and only of Ethiopia when they were expelled. Accordingly, in the subsequent damages portion of the Commission's proceedings, it will not be open to Eritrea to claim damages in respect of their individual injuries. However, Eritrea can seek to prove any monetary damages it may have incurred as a result of these events.

91. Family Members. A second major group of deportees raised during the proceedings involves the family members of persons who were expelled after being identified through Ethiopia's security process. The Parties agree that many thousands of expellees' family members left Ethiopia, including spouses, children, dependent siblings, and parents, but the numbers affected and the circumstances of their departures are disputed. Ethiopia contended that over 20,000 family members left Ethiopia voluntarily to join Eritrean expellees. Eritrea maintained that the number was far larger and that many left under physical compulsion or because Ethiopia fostered hostile conditions for family members in Ethiopia, often women whose husbands had been expelled earlier, leaving them no practical choice but to follow.

92. The Commission noted above that international law allows a belligerent to expel the nationals of the enemy State during wartime. Thus, to the extent that those expelled were Eritrean nationals, their expulsion was lawful, even if harsh for the individuals affected.

[29] *See* paras. 19 and 20 *supra*.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

93. However, the evidence is not clear regarding the nationality of many family members, and the matter was not clarified during the proceedings.[30] The principal evidence available to the Commission is Eritrea's Nationality Proclamation No. 21/1992.[31] Article 6 of that Proclamation does not automatically confer Eritrean nationality on Eritrean nationals' spouses, instead requiring a naturalization process including three years of residence in Eritrea. Moreover, it is unclear whether children of Eritreans are Eritrean nationals by birth, as indicated in Article 2, or whether Article 4 applies to them and further action is required. The evidence does not show the extent to which these legal requirements were complied with so that the Ethiopian spouses and offspring of Eritrean nationals also became Eritrean nationals.

94. The evidence is also mixed regarding the circumstances of family members' departures. It indicates that family members left under varying circumstances, with members of a single family sometimes leaving under quite different conditions. The evidence does not permit judgments as to the frequency or extent of varying types of departures. The following situations appear to have occurred frequently:

- Family members chose (or were selected by the family) to accompany a person being expelled on security grounds at the time of deportation. Many expellees were accompanied by their minor children, and some were accompanied by spouses or other adult family members;

- Family members decided to leave Ethiopia after the expulsion of a family member, and did so utilizing normal emigration and travel procedures or the assistance of the ICRC. Such departures involved varying means of transportation and various destinations.

95. The Commission does not regard Ethiopia as having any liability for departures in these situations, where departures resulted from choices made by the affected individuals or their families. As a belligerent can lawfully expel a national of the enemy State, family members' decisions to accompany the expellee, either at the initial expulsion or thereafter, are lawful as well.

96. However, the evidence also indicates that some family members were forcibly expelled. Many Eritrean declarants speak broadly of their family members being expelled or deported following the declarant's expulsion. It often is not clear whether the words "expelled" or "deported" are used in a technical way and whether these departures in fact resulted from compulsion by Ethiopian officials. Nevertheless, some declarations clearly describe direct coercion being used to detain and forcibly expel family members, including wives and young children.

[30] Eritrea maintained throughout that only Ethiopian nationals were expelled. Ethiopia maintained that it only expelled Eritrean nationals "who had been individually determined to be Eritrean nationals (as well as threats to Ethiopia's national security.") (Ethiopia's Counter-Memorial, filed by Ethiopia on Jan. 15, 2004, p. 109, para. 6.85.)
[31] *See* para. 40 *supra*.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

97. To the extent that family members who did not hold Eritrean nationality were expelled, the expulsion was contrary to international law. Given the limitations of the evidence, the Commission cannot determine the extent to which this occurred. As with the rural expellees, this finding is subject to the Commission's earlier finding that Eritrea cannot claim for injuries to itself based upon injuries suffered by persons who were solely Ethiopian nationals when they were injured.[32] In the subsequent damages portion of the Commission's proceedings, Eritrea cannot claim damages in respect of their individual injuries, but it can seek to prove any monetary damages it may have incurred as a result of Ethiopia's treatment of these persons.

98. Other Dual Nationals. As discussed in paragraph 78 above, in addition to rural residents, the evidence shows that an unknown, but considerable, number of dual nationals, including some relatives of dual nationals previously expelled as security risks, were rounded up by local authorities and forced into Eritrea for reasons that cannot be established. The Commission has held that the termination of their Ethiopian nationality was arbitrary and consequently unlawful and that Ethiopia is liable for permitting it to occur. As the Commission indicated in paragraph 92 above, the right to expel the nationals of the enemy State in wartime is a right of a belligerent, and it can be exercised lawfully only by a belligerent. Ethiopia, the belligerent, did not conduct, authorize, or ratify these expulsions. Consequently, they were unlawful under applicable international law, and Ethiopia is liable for permitting them to occur.

99. Physical Conditions of Expulsion. Eritrea also claimed that the physical conditions under which persons were expelled from Ethiopia were inhumane and unsafe. International humanitarian law requires that all departures, whether lawful or not, be conducted humanely, "in satisfactory conditions as regards safety, hygiene, sanitation and food."[33] Eritrea contended that these conditions were not met; Ethiopia contended that they were. The two sides presented extensive and sharply conflicting evidence.

100. Expellees generally described their experiences in similar terms. Ethiopian security personnel, often accompanied by armed police or militia, took expellees into custody individually at their homes or workplaces and then took them to an assembly facility. They were held there with other detainees, generally for a brief period of three to five days, while a sufficient number of detainees was collected. Many assembly facilities, particularly in smaller towns, were improvised and lacked adequate sanitary or cooking facilities; expellees often received food from their families. Expellees were kept under armed guard. While there were accounts of verbal harassment, physical abuse does not appear to have been common.

101. When a "critical mass" of several hundred expellees was collected, they were loaded onto a convoy of buses; armed guards usually rode on each bus. The convoys were crowded and uncomfortable, and the journey was typically long, hot, and unpleasant. Stops were infrequent and closely guarded. Some detainees reported spending the night on the floors of schools or other facilities en route; others described being held overnight on sealed and hot buses, particularly as convoys neared the border.

---

[32] *Supra* paras. 19 and 20.
[33] Geneva Convention IV, *supra* note 6, at art. 36(1); Protocol I, *supra* note 7, at art. 75.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

102. The Parties disputed the adequacy of the food and water provided, but the weight of the evidence indicates that they generally were inadequate. Numerous declarations described wholly insufficient food and water. The details of these statements vary somewhat, suggesting that conditions varied from one trip and place to another, but the prevailing picture is not favorable.

103. Eritrea contended that many expulsion convoys unnecessarily utilized desert routes subjecting expellees to extreme heat, and that expellees were forced to leave the buses near the front lines and to cross on foot, exposed to landmine hazards and without coordination with Eritrean forces on the other side. Eritrea cited the reports of international observers, including the ICRC and UNICEF, critical of the conditions of particular transports.

104. Several declarants referred to the curtains and windows of the buses being closed while travelling and while detainees remained in them overnight. It was not apparent whether this was done to prevent escapes or for other reasons. Ethiopia contended that the curtains were drawn only when required for security, as when buses were passing through military zones, but the evidence does not support this contention. Combined with crowded conditions and Ethiopian summer heat, the closed curtains and windows would have greatly increased the passengers' suffering.

105. Ethiopia countered Eritrea's allegations by contending that the ICRC was frequently involved in the transports, providing an important safeguard against abuses. The evidence indicates that the ICRC did facilitate some border crossings, but it does not indicate consistent ICRC involvement in movements to the border. It appears that many transports were not notified to the ICRC or for other reasons did not have ICRC involvement.

106. Based on the totality of the record, the Commission concludes that, despite some efforts to provide for expellees during some transports, the physical conditions frequently failed to comply with international law requirements of humane and safe treatment.

IX. DETENTION WITHOUT DUE PROCESS

107. Introduction. Eritrea's third major claim is that Ethiopia wrongfully detained large numbers of civilians under harsh conditions contrary to international law. This claim involves separate groups, including (a) persons held pending their expulsion, often for brief periods and in temporary facilities; (b) those held in jails or prisons for longer periods, many based on suspicions that the detainee was a spy or otherwise actively assisted the Eritrean war effort; and (c) civilians claimed to be wrongly detained and then wrongly confined together with prisoners of war.[34] This last category included a group of Eritrean university students detained by Ethiopia at the outbreak of the war. For each group, Eritrea contended both that the initial detentions were illegal and that the detainees were held in poor and abusive conditions that did not satisfy legal requirements.

[34] *See* Partial Award in Eritrea's POW Claims, *supra* note 2, at paras. 24 and 28.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

108. Applicable law. The applicable law depended upon the status or nationality of those involved. Some were Eritrean nationals protected by international humanitarian law applicable in international armed conflicts. As to Ethiopian nationals, international human rights law provided relevant rules. In cases of uncertainty regarding persons' status, the "safety net" provisions of Article 75 of Protocol I provided protection. However, all potentially applicable legal rules required humane treatment and provided broadly similar protection.

109. Persons Detained Short-Term. This group primarily involved persons held for short periods pending their expulsion from Ethiopia. Many Eritrean witness accounts describe uncomfortable but short-term detention as groups of expellees were assembled, often in temporary facilities, for transport to the border. There was conflicting evidence regarding the availability of food, water and bedding; conditions may have varied by location and over time. There were few allegations of physical abuse, but allegations of verbal abuse were more common.

110. While the Commission believes that the physical circumstances of persons being held pending deportation were often austere and uncomfortable, the periods involved were generally short, and there were few allegations of physical abuse. The Commission finds that the evidence is insufficient to show a widespread or significant failure by Ethiopia to provide internationally required standards of treatment for persons held in short-term detention prior to their expulsion.

111. Persons Detained in Prisons or Jails. The second group involves persons taken into custody by the Ethiopian security forces and then held, often for long periods, in Ethiopian prisons or jails. These prisoners' accounts suggest that many were detained on suspicion of espionage or other offenses against Ethiopian state security. The numbers involved are not clear. The ICRC reported registering 664 civilian detainees in Ethiopia, and the U.S. State Department estimated 1,200. However, these figures do not distinguish between those held in jails and prisons on security grounds and those held for other reasons or under less harsh conditions. In addition, the evidence included several prisoner accounts of being shifted between places of detention; the declarants maintained this was done to prevent the ICRC from identifying and registering them.

112. The accounts of those imprisoned on security-related suspicions or charges consistently describe very harsh conditions, with crowded and unsanitary living arrangements and limited and poor food. There were frequent, recurring allegations of beatings and other brutal physical abuse. Most prisoners were held without being formally charged or brought before a judge. None mentions access to legal counsel or other outside advisers.

113. The Commission concludes on the basis of the evidence that those detained in prisons and jails on security-related charges, Ethiopians and Eritreans alike, were held in harsh and unsanitary conditions and subjected to physical abuse, contrary to international law.

114. Other Civilian Internees. Eritrea next contended that Ethiopia wrongfully interned other Eritrean and Ethiopian civilians without proper justification and under unlawful conditions. Eritrea cited Article 42 of Geneva Convention IV, which allows internment or assigned residence "only if the security of the Detaining Power makes it absolutely

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

necessary," and the Convention's detailed requirements for detention facilities. Ethiopia denied Eritrea's claims.

115. The Exchange Students. Eritrea raised the first such group in its Prisoner of War Claim (Eritrea's Claim 17), which cited the allegedly unlawful detention and treatment of about 85 Eritrean university students studying in Ethiopia who were initially detained in June 1998 soon after the war began. The record indicates that their detention became an international *cause celèbre*, leading to numerous international appeals for their release. They were confined under allegedly harsh conditions for varying lengths of time; some were released early in 1999 while others were held much longer. In its Partial Award in Eritrea's POW Claim 17, the Commission deferred decision regarding the students, finding that "all mistreatment of civilians is the subject of other claims by both Parties, which are to be heard and decided in a separate proceeding."[35]

116. The record indicates that the students were of military age and that some had received military training in Eritrea. Ethiopia contended that their internment was justified under Article 35, paragraph 1, of Geneva Convention IV. Under that provision, nationals of an enemy state have the right to leave a belligerent's territory "unless their departure is contrary to the national interests of the state." "The Handbook of Humanitarian Law" explains that "[t]his reference to the national interest of the state of residence is intended above all to enable the state to prohibit residents suitable for military service from leaving."[36] Leslie Green similarly describes Article 35 as allowing a belligerent to prevent "the departure of those likely to be of assistance to the adverse party in its war efforts."[37]

117. The evidence in this and other claims before the Commission indicates that some movement of civilians between the two countries continued during the war. Ethiopia could reasonably have feared that the students – and other Eritreans of military age, particularly those with military training – might have returned to Eritrea and joined the Eritrean forces if left at large. Their internment was consistent with Article 35, paragraph 1, of Geneva Convention IV. Further, while the conditions in which they were detained may have been difficult and austere, particularly in comparison to those they previously experienced in Ethiopia, the record does not establish a substantial or widespread failure to meet Geneva Convention requirements with respect to their treatment.

118. It is not apparent from the record whether the students had individual opportunities to appeal either their confinement, as provided in Article 43 of Geneva Convention IV, or Ethiopia's refusal to allow them to leave, as provided in Article 35. Given the paucity of the record and the requirement for clear and convincing evidence, the Commission cannot find any liability concerning this aspect of their treatment.

119. Civilians allegedly confined with POWS. Eritrea also alleged in its Prisoner of War Claim that Eritrean civilians were wrongly classified and held as prisoners of war, and were

[35] Partial Award in Eritrea's POW Claims, *supra* note 2, at para. 28.
[36] HANDBOOK OF HUMANITARIAN LAW, *supra* note 15, at § 583 (p. 281).
[37] LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT p. 89 (2d ed. 2000).

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

badly mistreated while so held. The Commission's Partial Award in Eritrea's Prisoner of War Claims also deferred these claims to be considered in the context of the present proceeding.[38]

120. Eritrea's prisoner of war evidence includes multiple accounts of Eritrean farmers and other local residents living close to the military fronts who were taken prisoner by the Ethiopian Army and then held as prisoners of war, sometimes for years. These individuals maintained that they were not soldiers and took no part in military operations. Some were in their early teens; others were older men, some well above military age. Eritrea also presented evidence of other Eritrean civilians living far from the fronts who were similarly detained and held as prisoners of war.

121. Ethiopia did not rebut the evidence that Eritrean civilians, including both civilians living close to the front and others from elsewhere in Ethiopia, were detained and then held as prisoners of war. While international law allows the internment of civilian nationals of an enemy State under specified conditions and appropriate safeguards, the record did not show that these requirements were met.[39] Accordingly, their continued detention was contrary to international law. In addition, under Article 84 of Geneva Convention IV, prisoners of war must be held separately from civilians. Ethiopia did not rebut Eritrea's evidence showing that Eritrean civilians were wrongly held as prisoners of war in breach of these requirements.

122. Conditions of treatment. These civilians were held in Dedessa and other Ethiopian camps as to which the Commission made findings in its Partial Award on Eritrea's Prisoner of War Claims.[40] While they were not legally entitled to the same treatment as prisoners of war in all respects, Ethiopia was legally required in all instances to accord them humane treatment.[41] The Commission's findings in its earlier Partial Award regarding Ethiopia's failures to provide adequate diet and care for prisoners in its prisoner of war camps are likewise applicable to these individuals.

X. DEPRIVATION OF PROPERTY

123. Eritrea alleged that Ethiopia implemented a widespread program aimed at unlawfully seizing Eritrean private assets, including assets of expellees and of other persons outside of Ethiopia, and of transferring those assets to Ethiopian governmental or private interests. Ethiopia denied that it took any such actions. It contended that any losses resulted from the lawful enforcement of private parties' contract rights, or the nondiscriminatory application of legitimate Ethiopian tax or other laws and regulations.

124. Both Parties' arguments emphasized the customary international law rules limiting States' rights to take aliens' property in peacetime; both agreed that peacetime rules barring expropriation continued to apply. However, the events at issue largely occurred during an international armed conflict. Thus, it is also necessary to address the role of the *jus in bello*, which gives belligerents substantial latitude to place freezes or other discriminatory controls

[38] Partial Award in Eritrea's POW Claims, *supra* note 2, at para. 28.
[39] As noted above, under Article 35 of Geneva Convention IV, a belligerent can prevent nationals of an enemy belligerent from leaving its territory if they may assist the opposing war effort. Such persons can also be assigned residence or interned if the requirements of Article 41 are met.
[40] Partial Award in Eritrea's POW Claims, *supra* note 2, at Part V.D.
[41] *See* Geneva Convention IV, *supra* note 6, at art. 27; Protocol I, *supra* note 7, at art. 27.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

on the property of nationals of the enemy State or otherwise to act in ways contrary to international law in time of peace. For example, under the *jus in bello*, the deliberate destruction of aliens' property in combat operations may be perfectly legal, while similar conduct in peacetime would result in State responsibility.

125. The status of the property of nationals of an enemy belligerent under the *jus in bello* has evolved. Until the nineteenth century, no distinction was drawn between the private and public property of the enemy, and both were subject to expropriation by a belligerent.[42] However, attitudes changed; as early as 1794, the Jay Treaty[43] bound the United States and the United Kingdom not to confiscate the other's nationals' property even in wartime. This attitude came to prevail; the 1907 Hague Regulations[44] reflect a determination to have war affect private citizens and their property as little as possible.[45]

126. The modern *jus in bello* thus contains important protections of aliens' property, beginning with the fundamental rules of discrimination and proportionality in combat operations, which protect both lives and property. Article 23, paragraph (g), of the Hague Regulations similarly forbids destruction or seizure of the enemy's property unless "imperatively demanded by the necessities of war." Article 33 of Geneva Convention IV prohibits pillage[46] and reprisals against protected persons' property, both in occupied territory and in the Parties' territory.[47] Article 38 of Geneva Convention IV is also relevant. It establishes that, except for measures of internment and assigned residence or other exceptional measures authorized by Article 27, "the situation of protected persons shall continue to be regulated, in principle, by the provisions governing aliens in time of peace."

127. However, these safeguards operate in the context of another broad and sometimes competing body of belligerent rights to freeze or otherwise control or restrict the resources of enemy nationals so as to deny them to the enemy State. Throughout the twentieth century, important States including France, Germany, the United Kingdom, and the United States have frozen "enemy" property, including property of civilians, sometimes vesting it for the vesting State's benefit. As Rousseau summarizes:

---

[42] II INTERNATIONAL LAW: A TREATISE: DISPUTES, WAR AND NEUTRALITY p. 326 (H. Lauterpacht ed., 7th ed. 1952) [hereinafter DISPUTES, WAR AND NEUTRALITY]. There was a major case of confiscation of private enemy property in 1793, at the outbreak of war between France and Germany. *Id.*

[43] Treaty of Amity, Commerce and Navigation between Great Britain and the United States, Nov. 19, 1794, 52 Consol. T.S. p. 243.

[44] 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].

[45] GEORGE SCHWARZENBERGER, II INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS – THE LAW OF ARMED CONFLICT p. 259 (1968).

[46] Canada's law of armed conflict manual defines pillage as "the violent acquisition of property for private purposes . . . . Pillage is theft . . . ." Office of the Judge Advocate General, The Law of Armed Conflict at the Operational and Tactical Level, B-GG-005-027/AF-021, p. 6-6.

[47] Property in occupied territory receives special protection. Article 53 of Geneva Convention IV, *supra* note 6, prohibits destruction of private property there except where "rendered absolutely necessary by military operations." Article 47 of the Hague Regulations, *supra* note 44, forbids pillage in occupied territory. Other relevant provisions include Articles 49, 51 and 52 (limiting levies, contributions and requisitions in occupied territory) and Article 53 (allowing occupying forces to take possession only of State property) of the Hague Regulations.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

> *Durant la guerre de 1914, presque tous les Etats belligérents … ont pris des measures restrictives très rigoreuses, allant du simple séquestre (France) à la liquidation et à la vente des biens des sujets ennemis (Grande-Bretagne, Allemagne). . . . [Durant la guerre de 1939]: 'Un régime analogue á celui de 1914 – construit autour des trois idées de contrôle, de séquestre et de liquidation – fut appliqué par tous les belligerents.'*[48]

Such control measures have been judged necessary to deny the enemy access to economic resources otherwise potentially available to support its conduct of the war.

128. States have not consistently frozen and vested enemy private property. In practice, States vesting the assets of enemy nationals have done so under controlled conditions, and for reasons directly tied to higher state interests; commentators emphasize these limitations.[49] The post-war disposition of controlled property has often been the subject of agreements between the former belligerents. These authorize the use of controlled or vested assets for post-war reparations or claims settlements, thereby maintaining at least the appearance of consent for the taking. This occurred both in the Versailles Treaty after World War I[50] and in peace treaties after World War II.[51]

129. Eritrea did not contend that Ethiopia directly froze or expropriated expellees' property. Instead, it claimed that Ethiopia designed and carried out a body of interconnected discriminatory measures to transfer the property of expelled Eritreans to Ethiopian hands. These included:

- Preventing expellees from taking effective steps to preserve their property;
- Forcing sales of immovable property;
- Auctioning of expellees' property to pay overdue taxes; and
- Auctioning of expellees' mortgaged assets to recover loan arrears.

Eritrea asserts that the cumulative effect of these measures was to open up Eritrean private wealth for legalized looting by Ethiopians.

130. Preservation of Property – Powers of Attorney. The principal means by which expellees sought to safeguard their property was by appointing agents by means of powers of attorney. Eritrea claimed numerous deficiencies in this process, contending that many persons in pre-expulsion detention could not execute effective powers of attorney. Several detainees

---

[48] Ch. Rousseau, *droit international public*, pp. 346–347 (*septième*, 1973). ("During the First World War, almost all belligerent States . . . took very rigorous restrictive measures, ranging from simple freezing (France) to the liquidation and sale of the assets of enemy subjects (Great Britain, Germany). . . . [During the Second World War]: a regime analogous to that of 1914 – constructed around the three ideas of control, freezing and liquidation – was applied by all belligerents.")

[49] BROWNLIE, *supra* note 21, at p. 514; DISPUTES, WAR AND NEUTRALITY, *supra* note 42, at pp. 326–331.

[50] Treaty of Peace at Versailles, June 28, 1919, 225 Consol. T.S. p. 188. On the liquidation of German-owned private property by the Allied and Associated Powers under the Treaty of Versailles, *see* SCHWARZENBERGER, *supra* note 45, at pp. 84–88.

[51] Treaty of Peace with Italy (art. 79), with Bulgaria (art. 25), and with Hungary (art. 29).

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

alleged that they had no opportunity to appoint an agent. Others who were abroad could not make effective appointments because Ethiopian consular officials would not provide consular formalities.

131. Eritrea argued that detainees had too little time to identify a suitable agent, execute a power of attorney and otherwise arrange their affairs. (As noted above, the period between arrest and expulsion was often just a few days.) Some powers of attorney were not signed in the agents' presence, leaving the agent to guess about the action required. Some appointments were never delivered, or agents lacked the knowledge or expertise to perform required functions, or were themselves imprisoned or expelled. Such circumstances were said to lead to mismanagement, spoilage or loss of expellees' property for which Ethiopia was claimed to be responsible.

132. Ethiopia responded that it provided expellees with adequate means to appoint representatives to protect their interests. Its evidence detailed special procedures created to allow detainees to execute legally effective powers of attorney while in detention. The capacity to authenticate powers of attorney was exceptionally delegated by the Addis Ababa City "Acts and Civil Status Documentation Services" to police officers. They would sign the document, and the agent would go to the responsible office to have it authenticated and registered based on a sample of the police officer's signature kept on file. Counsel for Ethiopia represented that this system was applied in the whole country, and Ethiopia submitted evidence of agents able to use a power of attorney created utilizing this procedure.

133. The Commission recognizes the enormous stresses and difficulties besetting those facing expulsion. There surely were property losses related to imperfectly executed or poorly administered powers of attorney. However, particularly in these wartime circumstances, where the evidence shows Ethiopian efforts to create special procedures to facilitate powers of attorney by detainees, the shortcomings of the system of powers of attorney standing alone do not establish liability.

134. Compulsory sale of immovable property. Eritrea next asserted Ethiopia's responsibility for expellees' losses caused by forced sales resulting from enforcement of prohibitions on alien ownership of immovable property under Ethiopia's 1960 Law on Foreign Ownership of Property. The evidence indicated that if the deportee had an Ethiopian spouse, covered property could be transferred to the spouse. If there was no Ethiopian spouse, the expellee's agent could sell the property. Otherwise, the Ethiopian authorities sold it at auction. The evidence showed that Ethiopia created a special institution, the "Eritrean Property Handling Committee," to oversee sale of Eritrean expellees' property.

135. Prohibiting real property ownership by aliens is not barred by general international law; many countries have such laws. The Commission accepts that dual nationals deprived of their Ethiopian nationality and expelled pursuant to Ethiopia's security screening process could properly be regarded as Eritreans for purposes of applying this legislation. Further, Ethiopia is not internationally responsible for losses resulting from sale prices depressed because of general economic circumstances related to the war or other similar factors.

136. Nevertheless, the Commission has serious reservations regarding the manner in which the prohibition on alien ownership was implemented. The evidence showed that the Ethiopian

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Government shortened the period for mandatory sale of deportees' assets from the six months available to other aliens to a single month. This was not sufficient to allow an orderly and beneficial sale, particularly for valuable or unusual properties. Although requiring Eritrean nationals to divest themselves of real property was not contrary to international law, Ethiopia acted arbitrarily, discriminatorily, and in breach of international law in drastically limiting the period available for sale.

137. The Location Value Tax. Eritrea next contended that Ethiopia unlawfully appropriated a significant portion of the value of expellees' property by imposing a "100% location value" tax on forced real estate sales. The evidence indicated that in mid-2000 the Addis Ababa City Finance Bureau issued a "Directive for the Procedure of Transfer of Land Holdings and Houses of Eritreans Deported Because of National Security." This document referred to a federal directive by the Ethiopian Economic Affairs Office regarding transactions between deportees and Ethiopians, but it was not in the record.

138. The Directive required that for sales by alien vendors before the war began in May 1998, a 30% "capital gain tax" was to be applied. (Small sales were exempted.) For forced sales thereafter, the tax on the added value on the house remained at 30%, but another 100% tax was applied to the "location value," *i.e.*, the value of the land. The evidence included official documents showing this tax being applied to 100% of the value of expellees' real properties.

139. Ethiopia contended that this Directive reflected an erroneous local policy. The tax was also defended on the basis that persons who acquired land in the course of privatization after the fall of the Mengistu regime in 1991 did not pay for it and so should not benefit from its sale. However, the evidence indicated that the tax was not generally applied to all sales of real property, as this rationale would require. Sample sales documents showed the tax was not mentioned on the forms normally used to record taxes on real estate transactions, and was instead written in by hand in sales of expellees' property. The evidence also showed that the 100% location tax was not imposed on sales by banks collecting on loans to expellees.

140. The Commission concludes that the 100% "location tax" was not a tax generally imposed, but was instead imposed only on certain forced sales of expellees' property. Such a discriminatory and confiscatory taxation measure was contrary to international law.

141. Foreclosures of Expellees' Loans. Eritrea next contended that Ethiopia wrongfully facilitated or participated in the process of collecting expellees' bank loans through enforced sales of collateral. The principal actor in such sales was the Commercial Bank of Ethiopia. The collection process was described in the Bank's January 2001 "General Report on Eritrean Expellees Bank Loan Collection Process and Its Results":

> After receiving a list of Eritreans *who left the country* from the Government, the Bank has been engaged in the task of identifying their loans and collecting on their debts [. . .] If they failed to pay their debts in full within 30 days, it is requested in writing that the Registrar Bureau (Addis Ababa Administration Works and Urban Development Bureau), which was established to execute the Foreclosure Law, assist in the auctioning of collateral properties.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

A similar process applied to the auctioning of vehicles financed by the Bank.

142. It does not appear that performing loans were accelerated. Instead, loans in default were collected in accordance with their terms and with legislation in force when the war began. While some or all of the other measures discussed in this section may have contributed to expellees' inability to keep their loans current, the record does not show that the measures to collect overdue loans were in themselves contrary to international law. This claim must be dismissed.

143. Tax Collection. Eritrea attacked a special process created by Ethiopia to collect taxes allegedly due from expellees. An official in the Addis Ababa City Administration Finance Bureau ("CAFB") described the process:

> During the conflict with Eritrea, the CAFB was notified of potential expellees and sent written tax assessment notices to those individuals. The notices gave the potential expellees a deadline by which taxes were due and notified them that, if they failed to pay their assessed taxes, their property would be attached and auctioned to satisfy the amount in default. The CAFB used these processes to collect on the lawful debt owed by the taxpayer.

Eritrea contended that this tax assessment and collection process was arbitrary and discriminatory in operation.

144. International law did not prohibit Ethiopia from requiring that expellees settle their tax liabilities, but it required that this be done in a reasonable and principled way. The evidence indicates that it was not. The amount demanded was simply an estimate. There was no effective means for most expellees to review or contest this amount. There was very little time between issuance of the tax notice and deportation (if indeed the notice was issued before the taxpayer was expelled). There was no assurance that expellees or their agents received the notices. If they did, the payment of taxes could be impossible because of bank foreclosure proceedings against assets and the array of other economic misfortunes befalling expellees. Viewed overall, the tax collection process was approximate and arbitrary and failed to meet the minimum standards of fair and reasonable treatment necessary in the circumstances.

145. Restricted Accounts. The evidence suggested that any proceeds remaining to expellees after forced property sales and collection of outstanding loans and taxes could be deposited into an account opened by the Ethiopian authorities in the former owner's name in the Commercial Bank of Ethiopia. These accounts required the owner to come in person with the passbook to access the funds. Eritrea contended that expellees could not access these accounts, either because they did not possess the passbook or could not come in person.

146. There was evidence suggesting that a few account holders or persons authorized to act on their behalf were able to access such accounts. Particularly in light of the rights of belligerents to freeze the assets of persons present in any enemy State and to block transfers of funds there, it was not illegal for Ethiopia to establish these accounts in a way that

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

effectively foreclosed fund transfers abroad. Eritrea's claims with respect to these bank accounts are denied.

147. Horn International Bank. Eritrea made particular reference to the case of Horn International Bank ("HIB"), contending that Ethiopia arbitrarily withdrew the Bank's business licence, destroying the enterprise's value in violation of international law. The record indicated that the Horn International Bank was being organized in Ethiopia in the months prior to the war. The circumstances of its creation are not clear, but it appears that the Bank's organizers included persons prominent in the affairs of the Eritrean community in Ethiopia, and that some start-up funds were provided by the Government of Eritrea through a loan or grant channelled through an official in the Eritrean Embassy in Addis Ababa.

148. The record also shows that Ethiopian banking law (Proclamation 84/94) prohibited foreigners from undertaking banking operations in Ethiopia. The National Bank of Ethiopia ("NBE") initiated an investigation of HIB in December 1997, before the war, and instructed it not to begin operations until further notice. This investigation sought to determine whether the HIB was violating the prohibition on foreign participation in the banking sector. Counsel for Ethiopia represented that the NBE discovered that two of the Bank's founding members had strong connections with Eritrea, that start-up funding was provided by or through the Eritrean Embassy, and that there were questions regarding the shareholders' nationality.

149. Notwithstanding the December NBE directive, the HIB began banking operations. Its assets then were frozen on June 17, 1998, shortly after the war began. An Ethiopian court pronounced the Bank's dissolution on June 1, 2000 on the ground of presentation of false evidence.

150. The record before the Commission indicates that the problems befalling the Horn International Bank resulted from a regulatory proceeding involving application of limits on foreign participation in the banking sector similar to those imposed by many countries. Eritrea's claims of unlawful conduct in relation to the Horn International Bank are dismissed for lack of proof.

151. The Cumulative Weight of Ethiopia's Measures. In addition to its findings above regarding particular Ethiopian economic measures, the Commission believes that the measures' collective impact must be considered. War gives belligerents broad powers to deal with the property of the nationals of their enemies, but these are not unlimited. In the Commission's view, a belligerent is bound to ensure insofar as possible that the property of protected persons and of other enemy nationals are not despoiled and wasted. If private property of enemy nationals is to be frozen or otherwise impaired in wartime, it must be done by the State, and under conditions providing for the property's protection and its eventual disposition by return to the owners or through post-war agreement.[52]

152. The record shows that Ethiopia did not meet these responsibilities. As a result of the cumulative effects of the measures discussed above, many expellees, including some with substantial assets, lost virtually everything they had in Ethiopia. Some of Ethiopia's measures

[52] *See, e.g.*, Article 38 of Geneva Convention IV, requiring that "the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace."

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

were lawful and others were not. However, their cumulative effect was to ensure that few expellees retained any of their property. Expellees had to act through agents (if a reliable agent could be found and instructed), faced rapid forced real estate sales, confiscatory taxes on sale proceeds, vigorous loan collections, expedited and arbitrary collection of other taxes, and other economic woes resulting from measures in which the Government of Ethiopia played a significant role. By creating or facilitating this network of measures, Ethiopia failed in its duty to ensure the protection of aliens' assets.

XI. FAMILY SEPARATION

153. Finally, Eritrea contended that Ethiopia's actions resulted in the separation of families and failures to assure the protection of children contrary to international law. Eritrea alleged that there were many instances in which Ethiopia's detention and expulsion processes led to forcible separation of spouses, forcible separation of children from one or both parents, and children being left without proper care. In its defense, Ethiopia denied that Eritrea had established a *prima facie* case and contended that it had complied with international humanitarian law by taking what steps it could to protect children and the unity of families despite detentions and deportations for national security reasons. Ethiopia noted that many of the departures from Ethiopia cited in Eritrea's claims involved children and other family members who accompanied Eritreans being expelled. It urged that it was unreasonable for Eritrea to claim that Ethiopia had acted illegally both by separating families and by allowing families to leave Ethiopia together.

154. International humanitarian law imposes clear burdens on belligerents with respect to the protection of children and the integrity of families. Article 27 of Geneva Convention IV, for example, provides that all protected persons are entitled in all circumstances to respect for their family rights. However, both international humanitarian law and human rights law, which Eritrea emphasized, also recognize that, regrettably, absolute protection of the family cannot be assured in wartime. While Article 9 of the Convention on the Rights of the Child[53] states that children should not be separated from their parents against their will, it also recognizes separation may result in the course of armed conflict due to detention or deportation of one or both parents. In the face of the realities of war, Article 24 of Geneva Convention IV sets out special protections for children under the age of fifteen who are separated from their families or orphaned:

> The parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances.

Further guidance appears in Article 38 of the Convention on the Rights of the Child, which calls for parties to take "all feasible measures to ensure protection and care of children who are affected by an armed conflict."

[53] *See* para. 27 *supra*.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

155. Eritrea's evidence primarily involved a small number of declarations from alleged victims of family separation, who recounted serious psychological and financial damages as a result. Eritrea's Memorial also cited various articles and reports, including statistics on the number of separated children from a press report describing a UNICEF survey under the title "UNICEF report on situation of deportees."[54] While the statistics reported in that article might be compelling, the Commission cannot accord the survey convincing weight because Eritrea submitted only the press account under an Embassy of Eritrea byline.

156. In addition to challenging Eritrea's failure to make a *prima facie* case, Ethiopia contended that it took feasible measures to avoid separating families by allowing detainees to bring their children into detention with them and by allowing family members of expellees to leave Ethiopia either simultaneously or subsequently. Ethiopia pointed to Eritrean witness statements of expellees who were allowed to bring all members of entire families, some of their children (leaving others with the parent remaining in Ethiopia) and, in the case of mothers who were expelled, their infants and young children in particular. Where families or children could not accompany the expellee, reunions occurred relatively quickly thereafter, often facilitated by the ICRC.

157. The Commission has been concerned with issues of family protection throughout these proceedings, and sought at the hearing to clarify the Parties' positions and the nature and quality of the evidence. Having reviewed the entire record, the Commission is satisfied that Eritrea failed to prove a pattern of frequent instances of forcible family separation or failures to assure the protection of children in connection with Ethiopia's detention and expulsion processes. The record is not devoid of troubling instances of forcible separation of young children from their parents and of entire families separated from the bread-winning parent. Without sanctioning the instances just mentioned, the Commission dismisses Eritrea's family separation claims for failure of proof.

XII. CLAIMS ON BEHALF OF SPECIFIC INDIVIDUALS

158. In addition to Eritrea's claims on its own behalf in Claims 15, 16 and 23, the Commission also had before it in these proceedings Eritrea's Claims 27–32. These are claims brought by Eritrea on behalf of individuals alleging injury resulting from the broader patterns of conduct considered in this Partial Award. Claim 27 (Hiwot Nemariam) alleged that Ms. Hiwot was "a denationalized Ethiopian citizen of Eritrean origin, who was unlawfully arrested, detained and expelled from Ethiopia on July 6, 1998 and whose bank accounts and other property were confiscated by Ethiopia." Claim 28 (Belay Redda, the husband of Ms. Hiwot) is similar.

159. The other four claims in this group (Claim 29, Mr. Sertzu Gebre Meskel; Claim 30, Mr. Fekadu Andemeskal; Claim 31, Mr. Mebrehtu Gebremedhim; and Claim 32, Ms. Mebrat Gebreamlak) each reflect the different factual situations of the individual claimants, but all of them allege injury resulting from Ethiopia's actions involving deprivation of citizenship and expulsion and Ethiopian measures affecting expellees' property.

[54] *UNICEF report on situation of deportees*, Africa News (Aug. 19, 1998).

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

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

XIII. AWARD

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

A. Jurisdiction

1. Eritrea's claims regarding the alleged forcible expulsion from Ethiopia of 722 persons in July 2001 are dismissed for lack of jurisdiction.

2. Eritrea's claims based on injuries to non-nationals made for Eritrea's own account, and not on behalf of the affected individuals, are outside the Commission's jurisdiction.

3. The availability of a monetary remedy for any past damages to persons who remain in Ethiopia is reserved for the subsequent damages phase of these proceedings.

4. Eritrea's requests for remedies other than monetary compensation were not shown to meet the requirements of Commission Decision No. 3 and are denied.

5. Eritrea's request for declaratory relief relating to possible future injuries is outside the Commission's jurisdiction and is denied.

6. Eritrea's claims relating to pensions will be considered by the Commission in subsequent proceedings and are not admissible in this proceeding.

7. 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.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

4. Most of the provisions of Protocol I of 1977 to the Geneva Conventions, including Article 75 thereof, 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 burden of proof would have been on the asserting party, but that did not happen.

5. Customary law concerning the protection of human rights remained in force during the armed conflict between the Parties, with particular relevance in any situations involving persons not fully protected by international humanitarian law.

6. The Agreement of December 12, 2000 was the transition point between the regime of Geneva Convention IV and peacetime rules of international law. However, international humanitarian law protections continued to apply after December 12, 2000 with respect to persons who remained in detention or in the process of repatriation or re-establishment.

C. Evidentiary Issues

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

D. Finding on Dual Nationality

Ethiopian nationals who acquired Eritrean nationality through qualifying to participate in the 1993 Referendum on Eritrean self-determination acquired dual nationality as citizens of both the States of Eritrea and of Ethiopia.

E. Findings on Liability for Violation of International Law

The Respondent is liable to the Claimant for the following violations of international law involving acts or omissions by its civilian officials, military personnel or others for whose conduct it is responsible:

1. For erroneously depriving at least some Ethiopians who were not dual nationals of their Ethiopian nationality;

2. For arbitrarily depriving dual nationals who remained in Ethiopia during the war of their Ethiopian nationality;

3. For arbitrarily depriving dual nationals who were present in third countries during the war of their Ethiopian nationality;

4. For arbitrarily depriving dual nationals who were expelled to Eritrea but who were not screened pursuant to Ethiopia's security review procedure of their Ethiopian nationality;

5. For permitting local farmers, militia or police to forcibly to expel rural people, many or most of whom were solely Ethiopian nationals, from rural areas near the border;

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

6. For permitting the forcible expulsion to Eritrea of some members of expellees' families who did not hold Eritrean nationality;

7. For permitting local authorities to forcibly to expel to Eritrea an unknown, but considerable, number of dual nationals for reasons that cannot be established;

8. For frequently failing to provide humane and safe treatment to persons being expelled to Eritrea from Ethiopia;

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

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

11. For limiting to one month the period available for the compulsory sale of Eritrean expellees' real property;

12. For the discriminatory imposition of a 100% "location tax" on proceeds from some forced sales of Eritrean expellees' real estate;

13. For maintaining a system for collecting taxes from Eritrean expellees that did not meet the required minimum standards of fair and reasonable treatment; and

14. For creating and facilitating a cumulative network of economic measures, some lawful and others not, that collectively resulted in the loss of all or most of the assets in Ethiopia of Eritrean expellees, contrary to Ethiopia's duty to ensure the protection of aliens' assets.

F. Other Findings

All other claims presented in this case are dismissed.

[Remainder of page purposely left blank.]

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

PARTIAL AWARD – CIVILIANS CLAIMS
ERITREA'S CLAIMS 15, 16, 23 & 27–32

Done at The Hague, this 17th day of December, 2004,

President Hans van Houtte

George H. Aldrich

John R. Crook

James C.N. Paul

Lucy Reed

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm