

ERITREA ETHIOPIA CLAIMS COMMISSION

PARTIAL AWARD

**Western Front, Aerial Bombardment
and Related Claims
Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26**

between

The State of Eritrea

and

The Federal Democratic Republic of Ethiopia

The Hague, December 19, 2005

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

Western Front, Aerial Bombardment
and Related Claims
Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26

between

The State of Eritrea

and

The Federal Democratic Republic of Ethiopia

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

**PARTIAL AWARD – Western Front, Aerial Bombardment and Related Claims – Eritrea’s
Claims 1, 3, 5, 9–13, 14, 21, 25 & 26
between the Claimant,
The State of Eritrea, represented by:**

Government of Eritrea

His Excellency, Mohammed Suleiman Ahmed, Ambassador of the State of Eritrea to The Netherlands

Professor Lea Brilmayer, Co-Agent for the Government of Eritrea, 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

Mr. Payam Akhavan

Counsel and Consultants

Ms. Megan Chaney, Esq.

Ms. Michelle Costa

Ms. Anne Eastman

Ms. Julie Frey

Ms. Diane Haar, Esq.

Ms. Amanda Costikyan Jones

Mr. Kevin T. Reed

Mr. Abrham Tesfay Haile, Esq.

Ms. Lori Danielle Tully, Esq.

Ms. Cristina Villarino Villa, Esq.

and the Respondent,

The Federal Democratic Republic of Ethiopia, represented by:

Government of Ethiopia

Ambassador Fisseha Yimer, Permanent Representative of the Federal Democratic Republic of Ethiopia to the United Nations, Geneva, Co-Agent

Mr. Habtom Abraha, Consul General, Ethiopian Mission in The Netherlands

Mr. Ibrahim Idris, Director, Legal Affairs General Directorate, Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia, Addis Ababa

Mr. Reta Alemu, First Secretary, Coordinator, Claims Team, Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia, Addis Ababa

Mr. Yared Getachew, Esq., Legal Advisor; Member of the State Bar of New Jersey

Counsel and Consultants

Mr. B. Donovan Picard, Hunton & Williams 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 School of Law, Washington, D.C.; Member of the State Bar of Maryland

Professor David D. Caron, Boalt Hall School of Law, University of California at Berkeley; Member of the State Bar of California

Mr. John Briscoe, Briscoe Ivester & Bazel LLP; Member of the State Bar of California; Member of the Bar of the Supreme Court of the United States

Mr. Edward B. Rowe, Hunton & Williams LLP, Washington, D.C.; Member of the Bar of the District of Columbia; Member of the State Bar of Colorado

Ms. Virginia C. Dailey, Hunton & Williams LLP, Washington, D.C.; Member of the Bar of the District of Columbia; Member of the State Bar of Florida

Mr. Thomas R. Snider, Hunton & Williams LLP, Washington, D.C.; Member of the Bar of the District of Columbia; Member of the State Bar of Massachusetts

Ms. Anastasia Telesetsky, Consultant, Briscoe Ivester & Bazel LLP (at present); Member of the State Bar of California; Member of the State Bar of Washington

Mr. Amir Shafaie, Consultant

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

TABLE OF CONTENTS

I.	INTRODUCTION	1
	A. Summary of the Positions of the Parties	1
	B. Background and Territorial Scope of the Claims	1
	C. General Comment	2
	D. Award Sections	2
II.	PROCEEDINGS	3
III.	APPLICABLE LAW	3
IV.	THE WESTERN FRONT (ERITREA’S CLAIMS 1, 3, 5 and 9–13).....	6
	A. Jurisdiction.....	6
	B. Evidentiary Issues	6
	C. Introduction.....	7
	D. Claim 3 – Teseney Sub-Zoba.....	8
	E. Claim 13 – Guluj Sub-Zoba.....	10
	F. Claim 9 – Barentu Sub-Zoba	12
	G. Claim 12 – Shambuko Sub-Zoba.....	14
	H. Claim 5 – Lalaigash Sub-Zoba	15
	I. Claim 10 – Haykota Sub-Zoba	17
	J. Claim 1 – Molki Sub-Zoba	18
	K. Claim 11 – Gogne Sub-Zoba	19
	L. Allegations of Rape.....	20
	M. Award.....	23
V.	UNLAWFUL AERIAL BOMBARDMENT (ERITREA’S CLAIM 26).....	24
	A. Jurisdiction.....	24
	B. Evidentiary Issues	25
	C. The Merits	25
	D. Award.....	30
VI.	AERIAL BOMBARDMENT OF HIRGIGO POWER STATION (ERITREA’S CLAIM 25).....	31
	A. Jurisdiction.....	31
	B. Evidentiary Issues	31
	C. The Merits	32
	D. Award.....	36
VII.	PREVENTING DISPLACED PERSONS FROM RETURNING (ERITREA’S CLAIM 14).....	36
	A. Introduction.....	36
	B. Evidentiary Issues	36
	C. Jurisdiction.....	37
	D. The Merits	38
	E. Award.....	38

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

VIII.	DISPLACEMENT OF CIVILIANS (ERITREA’S CLAIM 21)	39
	A. Introduction	39
	B. Evidentiary Issues	39
	C. Indirect Displacement	39
	D. Direct Displacement.....	41
IX.	COMBINED AWARD SECTIONS.....	44
	A. Award in Eritrea’s Claims 1, 3, 5 and 9–13: Western Front	44
	B. Award in Eritrea’s Claim 26: Unlawful Aerial Bombardment	45
	C. Award in Eritrea’s Claim 25: Aerial Bombardment of Hirgigo Power Station	46
	D. Award in Eritrea’s Claim 14: Preventing Displaced Persons from Returning	46
	E. Award in Eritrea’s Claim 21: Displacement of Civilians	46

ATTACHMENT:

Separate Opinion of the President relating to Eritrea’s Claim 25

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

I. INTRODUCTION

A. Summary of the Positions of the Parties

1. The Claims decided in this Partial Award fall into three categories: claims relating to the Western Front (Eritrea’s Claims 1, 3, 5 and 9–13), claims relating to aerial bombardment at various places in Eritrea (Claims 25 and 26), and claims relating to the displacement of Eritrean civilians, including in areas to which Ethiopian armed forces withdrew following the end of the war (Claims 14 and 21). All of these Claims have been brought to the Commission by the Claimant, the State of Eritrea (“Eritrea”), against the Respondent, the Federal Democratic Republic of Ethiopia (“Ethiopia”), pursuant to Article 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of December 12, 2000 (“the Agreement”). Eritrea asks the Commission to find Ethiopia liable for loss, damage and injury suffered by the Claimant, including loss, damage and injury suffered by Eritrean nationals and persons of Eritrean national origin and agents, as a result of alleged infractions of international law occurring during the 1998–2000 international armed conflict between the Parties. The Claimant requests monetary compensation. These Claims do not include any claims set forth in separate cases by the Claimant, such as those for mistreatment of prisoners of war (“POWs”) (Eritrea’s Claim 17), those claims relating to the Central Front (Eritrea’s Claims 2, 4, 6, 7, 8 and 22) or for mistreatment of other Eritrean nationals in areas of Ethiopia not directly affected by the armed conflict (Eritrea’s Claims 15, 16, 23 and 27–32).

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

B. Background and Territorial Scope of the Claims

3. Between 1998 and 2000, the Parties waged a costly, large-scale international armed conflict along several areas of their common frontier. This Partial Award, like the corresponding Partial Award issued today in Ethiopia’s Claim 1 for the Western Front (“Ethiopia’s Western Front Claims”), addresses allegations of illegal conduct related to military operations on the Western Front of that conflict, as well as allegations of illegal conduct in the course of Ethiopia’s aerial bombardment at various places in Eritrea, including but not limited to the Western Front, and allegations of illegal displacements of Eritreans, including but not limited to the Western Front.

4. For purposes of these Claims, the Western Front encompassed the area of eight sub-zobas in southern Eritrea: Teseney, Guluj, Barentu, Lalaigash, Shambuko, Molki, Haykota and Gogne Sub-Zobas. Eritrea’s western zone contains much of its agricultural territory and commercial centers for cross-border trade with Ethiopia and Sudan. The major towns of Barentu, Teseney and Omhajer are located there, as are the six smaller towns of Tokombia, Shambuko, Guluj, Gogne, Haykota and Molki. According to Eritrea, the three largest

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

economic infrastructure projects in the region were the Alighidir cotton-processing plant in Teseney Sub-Zoba, the Rothman tobacco-processing plant in Tokombia town, and the Gash-Setit Hotel and Conference Center in Barentu town.

C. General Comment

5. As the findings in this Partial Award and in the related Partial Award in Ethiopia’s Claim 1 describe, the allegations and the supporting evidence presented by the Parties frequently indicate diametrically opposed accounts of the same events. Such clashing views of the relevant facts may not be surprising in light of the fog of war accompanying military operations, intensified by the polarizing effects of warfare. As the Commission has noted in its earlier Partial Awards, these effects have long been seen in warfare and they create obvious difficulties for the Commission, which is confronted with large numbers of sworn declarations by witnesses on each side asserting facts that are mutually contradictory.

6. In these unhappy circumstances, in seeking to determine the truth, the Commission has done its best to assess the credibility of much conflicting evidence. Considerations of time and expense have prevented the Parties from bringing more than a few witnesses to The Hague to testify before the Commission. The Commission thus has had to judge the credibility of particular declarations, not by observing and questioning the declarants, but rather on the basis of all the relevant evidence before it, which may or may not include evidence from persons or parties not directly involved in the conflict. In that connection, the Commission recalls its holding in its earlier Partial Awards on the required standard of proof: “Particularly in light of the gravity of some of the claims advanced, the Commission will require clear and convincing evidence in support of its findings.”¹ The Commission applies the same standard in the Claims addressed in this Partial Award.

7. As in its earlier Partial Awards, the Commission recognizes that the standard of proof it must apply to the volume of sharply conflicting evidence likely results in fewer findings of liability than either Party anticipated. The Partial Awards in these Claims must be understood in that unavoidable context.

D. Award Sections

8. As several of Eritrea’s Claims are decided in this Partial Award, the Commission has included an Award section at the end of each Claim (with all of the Western Front Claims handled together in Section IV) and repeated those sections at the end of the Partial Award.

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

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

II. PROCEEDINGS

9. The Commission informed the Parties on August 29, 2001 that it intended to conduct proceedings in Government-to-Government claims in two stages, first concerning liability, and second, if liability is found, concerning damages. Eritrea filed these Claims on December 12, 2001; Ethiopia filed its Statements of Defense to Claims 1, 3, 5 and 9–13 on June 17, 2002, and to Claims 14, 21, 25 and 26 on August 15, 2002; Eritrea filed its Memorial on November 1, 2004; and Ethiopia its Counter-Memorial on January 17, 2005. Both Parties filed Replies on March 10, 2005. A hearing on liability was held at the Peace Palace during the week of April 4–8, 2005, in conjunction with a hearing on several other claims by both Parties, including Ethiopia’s related Claim 1, which was heard during the week of April 11–15, 2005.

III. APPLICABLE LAW

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

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

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

12. In its Partial Awards in the Parties’ Prisoners of War, Central Front and Civilians Claims, the Commission held that the law applicable to those claims prior to August 14, 2000, when Eritrea acceded to the four Geneva Conventions of 1949,² was customary

² 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 [hereinafter Geneva Convention III]; Geneva Convention Relative to the

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

international humanitarian law.³ In those same Partial Awards, the Commission also held that those Conventions have largely become expressions of customary international humanitarian law and, consequently, that the law applicable to those Claims was customary international humanitarian law as exemplified by the relevant parts of those Conventions.⁴ Those holdings apply as well to all the Claims addressed in this Partial Award and, indeed, to all the claims submitted to the Commission.

13. The Parties have identified no other potentially relevant treaties to which both Eritrea and Ethiopia were parties during the armed conflict. As the claims presented for decision in the present Partial Award arise from military combat and from belligerent occupation of territory, the Commission makes the same holdings with respect to the customary status of the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 and its annexed Regulations (“Hague Regulations”)⁵ as those it has made with respect to the Geneva Conventions of 1949.⁶ The customary law status of the Hague Regulations has been recognized for more than 50 years.⁷ Had either Party asserted that a particular provision of those Conventions and Regulations should not be considered part of customary international humanitarian law at the relevant time, the Commission would have decided that question, with the burden of proof on the asserting Party. In the event, however, neither Party contested their status as accurate reflections of customary law.

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].

³ Partial Award in Eritrea’s POW Claim, *supra* note 1, at para. 38; Partial Award in Ethiopia’s POW Claim, *supra* note 1, at para. 29; 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), para. 21 [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), para. 15 [hereinafter Partial Award in Ethiopia’s Central Front Claims]; Partial Award in Eritrea’s Claims 15, 16, 23 & 27–32 Between the State of Eritrea and the Federal Democratic Republic of Ethiopia, para. 28 (December 17, 2004) [hereinafter Partial Award in Eritrea’s Civilians Claims]; Partial Award in Ethiopia’s Claim 5 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea, para. 24 (December 17, 2004) [hereinafter Partial Award in Ethiopia’s Civilians Claims].

⁴ Partial Award in Eritrea’s POW Claim, *supra* note 1, at paras. 40–41; Partial Award in Ethiopia’s POW Claim, *supra* note 1, at paras. 31–32; 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; Partial Award in Eritrea’s Civilians Claims, *supra* note 3, at para. 28; Partial Award in Ethiopia’s Civilians Claims, *supra* note 3, at para. 24.

⁵ 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.

⁶ See Partial Award in Eritrea’s Central Front Claims, *supra* note 3, at para. 22; Partial Award in Ethiopia’s Central Front Claims, *supra* note 3, at para. 16.

⁷ International Military Tribunal, Trial of the Major War Criminals by the International Military Tribunal pp. 253–254 (1947); United States v. Von Leeb [High Command Case], 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 p. 462 (1950); Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808, Annex, at p. 9, U.N. Doc. S/25704 (1993); see also VOL. II, OPPENHEIM’S INTERNATIONAL LAW pp. 234–236 (Hersch Lauterpacht ed., Longmans, 7th ed. 1952); Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. p. 971 (1986).

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

14. Both Parties also relied extensively in their written and oral pleadings on provisions contained in Additional Protocol I of 1977 to the Geneva Conventions (“Geneva Protocol I”).⁸ Although portions of Geneva Protocol I involve elements of progressive development of the law, both Parties, with one exception, treated key provisions governing the conduct of attacks and other relevant matters in the claims decided by this Partial Award as reflecting customary rules binding between them. The Commission agrees and further holds that, during the armed conflict between the Parties, most of the provisions of Geneva Protocol I were expressions of customary international humanitarian law. As set out below, when in Eritrea’s Claim 26 one Party suggests that a particular provision of that Protocol should not be considered part of customary international humanitarian law at the relevant time, the Commission decides that question as a matter of law.

15. Both Parties presented numerous claims alleging improper use of anti-personnel landmines and booby traps, but there was limited discussion of the law relevant to the use of those weapons in international armed conflict. The Commission notes that the efforts to develop law dealing specifically with such weapons has resulted in the following treaties: the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects,⁹ the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (“Protocol II of 1980”),¹⁰ that Protocol as amended on May 3, 1996,¹¹ and the Convention on the Prohibition of the Use, Stockpiling Production and Transfer of Anti-Personnel Mines and on Their Destruction.¹² None of these instruments was in force between the Parties during the conflict. The Commission holds that customary international humanitarian law is the law applicable to these claims. In that connection, the Commission considers that the treaties just listed have been concluded so recently and the practice of States has been so varied and episodic that it is impossible to hold that any of the resulting treaties in and of itself constituted an expression of customary international humanitarian law applicable during the armed conflict between the Parties. Nevertheless, there are elements in Protocol II of 1980, such as those concerning recording of mine fields and prohibition of indiscriminate use, that express customary international humanitarian law. Those rules reflect fundamental humanitarian law obligations of discrimination and protection of civilians.

⁸ 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 Geneva Protocol I].

⁹ U.N. Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. p. 137, *reprinted in* 19 I.L.M. p. 1523 (1980).

¹⁰ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Oct. 10, 1980, 1342 U.N.T.S. 168, *reprinted in* 19 I.L.M. p. 1529 (1980).

¹¹ *Id.*, as amended at Geneva, May 3, 1996, *reprinted in* 35 I.L.M. p. 1209 (1996).

¹² Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. p. 1507 (1997).

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

IV. THE WESTERN FRONT (ERITREA’S CLAIMS 1, 3, 5 and 9–13)

A. Jurisdiction

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

17. In these Claims, as in Ethiopia’s Claim 1, the Claimant alleges that the Respondent’s conduct related to military operations on the Western Front violated numerous rules of international humanitarian law. Ethiopia has not contested the Commission’s jurisdiction over the claims asserted by Eritrea and the Commission is aware of no jurisdictional impediments. Thus, the claims fall directly within the scope of the Commission’s jurisdiction.

B. Evidentiary Issues

1. Question of Proof Required

18. As discussed above, the Commission requires clear and convincing evidence in support of its findings.

2. Evidence Presented

19. In support of its Western Front Claims, Eritrea presented more than 250 sworn witness declarations and reports from five experts. Eritrea also submitted photographs and satellite images in hard copy and electronic format, video footage, press reports, including from journalists embedded with Ethiopian as well as Eritrean troops, and reports by international organizations, United Nations agencies, third-State government agencies and non-governmental organizations (“NGOs”). In its defense, Ethiopia submitted 19 witness declarations, most from military officers and other personnel, as well as maps, photographs and satellite images.

20. At the hearing, the following witnesses were presented:

By Eritrea:

Major (Ret.) Jake Bell – Expert and Fact Witness
Captain (Ret.) Marlene Unrau – Expert and Fact Witness
Major (Ret.) Paul Noack – Expert Witness

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

By Ethiopia:

Asayas Dagnev – Fact and Expert Witness
Brigadier General Adem Mohammed – Fact Witness

3. Estimation of Liability

21. As was the case in the Parties’ Central Front Claims,¹³ the Western Front Claims involve complex events unfolding over time. In certain situations, the Commission has concluded that damage in particular locations resulted from multiple causes operating at different times, including causes for which there was State responsibility and other causes for which there was not. In these situations, the evidence does not permit exact apportionment of damage to the different causes. Accordingly, the Commission has indicated the percentage of the loss, damage or injury concerned for which it believes the Respondent is legally responsible, based upon its best assessment of the evidence presented by both Parties.

C. Introduction

22. In May and June of 2000, Ethiopia launched a major offensive on the Western Front. It began on May 12 with attacks including against the Eritrean trench lines before Shambuko and Shelalo in the center of the Western Front with the objective of breaking through those lines and moving on to Tokombia and ultimately Barentu. Ethiopia asserted that its strategic objective in launching its offensive on the Western Front was to induce Eritrea to move substantial Eritrean forces west from the Central Front in order to facilitate subsequent Ethiopian attacks around Zalemessa and elsewhere on the Central Front. Ethiopia contended that success on the Central Front was necessary to drive the remaining Eritrean forces out of Ethiopian territory and to compel Eritrea to agree to a cessation of hostilities. The Ethiopian offensive on the Western Front was successful in breaking through the defensive lines of Eritrea and reaching Tokombia by May 15 as well as Bishuka, Mailem and Molki. Fighting was evidently intense near Shambuko and Bimbina, but Ethiopian forces succeeded in entering Barentu on May 18 after heavy fighting.

23. After the capture of Barentu, Ethiopia began to redeploy several of the divisions used in these attacks, some of them eastward toward Mai Dima and Mendefera and others back to Ethiopia. Also, on May 24, Ethiopia sent the 15th Division west from Barentu toward Teseney along the east-west road corridor connecting those two towns. That division engaged in combat on route at Gogne on May 26 and at Haykota on May 27 before reaching Teseney and the neighboring village of Alighidir on May 28. Fresh Eritrean forces arriving from the north engaged the 15th Division in combat outside of Teseney on June 4, following which the 15th Division withdrew to the south toward the border town of Omhajer and the Setit River.

¹³ Partial Award in Eritrea’s Central Front Claims, *supra* note 3, at para. 29; Partial Award in Ethiopia’s Central Front Claims, *supra* note 3, at para. 23.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

24. In the process of that withdrawal, on June 5, Ethiopian commanders reported a significant battle with Eritrean forces near the town of Guluj. After the Ethiopian forces were augmented by three other divisions, they moved back north on May 12, recapturing Guluj on June 12 and Teseney and Alighidir on June 14. On June 18, Eritrea and Ethiopia signed a cease-fire agreement. The following day, the Ethiopian forces left Teseney and Alighidir and withdrew to Ethiopia. Other Ethiopian forces remained north of Omhajer before withdrawing to Ethiopia on June 28, and one Ethiopian division remained in Eritrea at Omhajer until it returned to Ethiopia in September 2000.

25. As a result of these events, Eritrea has submitted eight separate Claims, one for each of the affected sub-zobas on the Western Front in Eritrea. All of these Claims allege abuse of civilians, looting and loss of property. The Commission addresses each of these Claims, in the geographical order – starting the farthest west – used by Eritrea.

D. Claim 3 – Teseney Sub-Zoba

26. Teseney is a frontier town with a reported population of about 30,000 located in the extreme western part of Ethiopia near the border with Sudan. Eritrea claims that, during the two brief Ethiopian occupations of the sub-zoba in late May and June 2000, Ethiopian armed forces abused civilians, looted and destroyed property, including water supply systems, and laid landmines in central areas of Teseney town, thus endangering civilians. At the outset, the Commission takes note of clear and convincing evidence that most of the residents of both the town of Teseney and the nearby village of Alighidir fled on the approach of the Ethiopian troops. Consequently, those towns contained only a few inhabitants during the two periods of Ethiopian control. Ethiopia argued that it did not “occupy” this sub-zoba (or others) in May and June 2000, as its forces were fighting and moving too quickly to make Ethiopia an “occupying power” as that term is used in Geneva Convention IV.

27. The Commission agrees that the Ethiopian military presence was more transitory in most towns and villages on the Western Front than it was on the Central Front, where the Commission found Ethiopia to be an occupying power. The Commission also recognizes that not all of the obligations of Section III of Part III of Geneva Convention IV (the section that deals with occupied territories) can reasonably be applied to an armed force anticipating combat and present in an area for only a few days. Nevertheless, a State is obligated by the remainder of that Convention and by customary international humanitarian law to take appropriate measures to protect enemy civilians and civilian property present within areas under the control of its armed forces. Even in areas where combat is occurring, civilians and civilian objects cannot lawfully be made objects of attack.

28. Abuse of Civilians: Eritrea’s claim concerning the abuse of civilians in Teseney Sub-Zoba is not supported by much evidence. There are several witness declarations referring to beatings of civilians, but those declarants did not purport to have been eyewitnesses to the beatings. However, there are two statements by persons who testify to having seen the

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

shooting of some civilians, not in the towns, but in the fields. All of those shot allegedly were young, and some were said to have been trying to protect their animals from being killed by Ethiopian soldiers. One declarant who recounted seeing the shooting deaths of six people on the evening of May 29 also asserted that the Ethiopian forces left Teseney that same evening; this clearly was not correct, and the witness must be confused about the dates. The other witness did not give a date but indicated that two young men were shot, one of whom died, when the Ethiopians arrived at Teseney the second time on June 14. While these two declarations are deeply troubling, they do not establish a pattern of frequent or pervasive shooting of civilians. The claim of abuse of civilians fails for lack of proof.

29. Property Loss: With respect to claims of property loss, there is an abundance of clear and convincing evidence of violations. First, with respect to Teseney, this evidence indicates that, during the first occupation, the town did not suffer much damage, although Ethiopian troops looted large stocks of sugar that had been stored there and stole flour from at least one bakery. In comparison, during the second occupation, looting and burning of homes and shops were widespread, and a commercial bank, hospital and two grain warehouses were also looted and burned. This evidence also indicates that both Ethiopian soldiers and civilians were involved in the looting and that much of the looted property was taken to Ethiopia by truck. There was also clear and convincing evidence, not just in the form of witness declarations but also in international organization and press reports, of wholesale theft and destruction of domestic animals by Ethiopian troops as they withdrew from Teseney and other locations. The Commission was struck by the extensive evidence of this gratuitous, and patently unlawful, slaughter and burning of the goats, sheep, donkeys and cattle so critical to the survival of rural civilians.

30. In its defense, Ethiopia alleged that either Eritrea stripped Teseney and detonated and burned several buildings in the course of denial operations or the town was heavily damaged by artillery fire during combat, but neither defense was proved. Similarly, Ethiopia also alleged that it had taken measures to prevent Ethiopian civilians from entering Eritrea, but the evidence indicates that those measures were not always sufficient. Therefore, the Commission finds that Ethiopia, in violation of its obligations under applicable international humanitarian law, permitted widespread and severe looting and burning of Teseney by its soldiers and civilians and consequently is liable to compensate Eritrea for the damage caused by those acts.

31. Second, with respect to Alighidir, there is also clear and convincing evidence of the unlawful destruction of property during the times when Ethiopian armed forces were present. Declarants consistently attested to seeing Ethiopian soldiers looting and burning houses and animals in the village during the second occupation. Several of these declarants attested to seeing, at a distance, Ethiopian soldiers at the large new cotton-processing plant when the plant and its stores of cotton were detonated and burned. In its defense, Ethiopia alleged that Eritrea had stored weapons in the plant and destroyed it in a denial operation, but that allegation was contradicted in several witness statements by persons who worked at the plant

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

and is inconsistent with eyewitness evidence. Therefore, the Commission finds that Ethiopia, in violation of its obligations under applicable international humanitarian law, permitted the widespread and severe looting and burning in the village of Alighidir and the burning and detonating of the nearby cotton factory and its stored cotton. Consequently, Ethiopia is liable to compensate Eritrea for the damage caused by those acts.

32. All other claims concerning Teseney Sub-Zoba fail for lack of proof.

E. Claim 13 – Guluj Sub-Zoba

33. Guluj Sub-Zoba comprises the southwestern area of Eritrea between Teseney Sub-Zoba and the border with Ethiopia at the Setit River. There are two towns and two villages within the sub-zoba for which Eritrea claims damages: the towns of Guluj in the north and Omhajer in the south and the villages of Tabaldia and Gergef, both of which lie between those towns. As noted in the summary comments on the Western Front Claims, above, the corridor between Teseney and the high ground north of Omhajer was a war zone in late May and early June 2000. Combat occurred near Guluj on June 5 as Eritrean armed forces were pursuing the Ethiopian forces south from Teseney, although the Parties disagreed regarding its extent. After heavy fighting at Mealuba, south of Guluj, the strengthened Ethiopian forces moved north, but combat with the retreating Eritrean forces evidently continued at various places. One place was the village of Tabaldia. Ethiopia submitted witness declarations from several of its military officers asserting that fighting took place all the way from Mealuba to Guluj. Both of Eritrea’s two witness declarations relating to Tabaldia acknowledged that Eritrean armed forces were in Tabaldia when the Ethiopians arrived and that a two-hour battle occurred in and around the village. While neither of those witnesses referred to battle damage in the village, the Commission must assume that there was such damage.

34. It is also clear that there had been fighting in and around Omhajer in mid-May. Two of Eritrea’s declarants affirmed that heavy fighting took place there, one said on May 20 and the other said from May 17 to 21. With respect to Guluj, there is a conflict of evidence. The Ethiopian declarants asserted that, prior to the recapture of Guluj by Ethiopian forces in mid-June, fighting occurred in and around Guluj, where the Eritreans had a command post and several divisions. Only one of the many Eritrean witness declarations related to Guluj referred to any combat (aside from one aerial bombing) occurring in the town, and that reference was limited to two incidents of shelling. The Commission concludes that the fighting in mid-June must have been largely around Guluj, rather than in it.

35. Abuse of Civilians: There is relatively little evidence of abuse of civilians in this sub-zoba. One witness declaration referred to a Sudanese man who was shot from a distance while walking along a street in Guluj, but the declaration does not indicate who shot him or when this incident occurred. More troubling is another declaration asserting that, in the mountains northeast of Guluj, some Ethiopian soldiers fired “indiscriminately” and wounded six civilians, three of whom died. There are two witness declarations by civilians who alleged

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

being beaten when they tried to prevent the looting of their property and one witness declaration that described seeing two persons being beaten while being questioned. There are also several declarants who referred to finding burned corpses in burned buildings in Guluj, but there is no evidence as to when or how death occurred. As these fortunately appear to be isolated incidents, the claim of abuse of civilians fails for lack of proof.

36. Property Loss: The many witness declarations submitted by Eritrea set out a consistent and convincing case that Ethiopian military and civilian personnel looted the shops and houses of Guluj, and military personnel then destroyed domestic animals and burned the structures until there was little left in the town. One estimate by an Eritrean declarant was that eighty percent of the buildings in Guluj were destroyed. That Ethiopia did not prevent Ethiopian civilians from entering Eritrea from Humera (the Ethiopian town directly across the river from Omhajer) was asserted by many declarants, including two who identified the leader of the civilian looters by name and gave his official position as an administrator in Humera. In light of that evidence, the assertions by several Ethiopian officers that Eritrean soldiers looted the town and then burned it as part of a denial operation are not persuasive. Consequently, the Commission finds that Ethiopia unlawfully permitted the looting and burning of structures and destruction of livestock in Guluj. Nevertheless, given the conclusion of the Commission that there was some collateral damage in Guluj from combat action, for which there is no liability, the Commission must apportion Ethiopia’s liability for the loss of and damage to property in Guluj during May and June 2000. Considering all the evidence, the Commission finds Ethiopia liable to Eritrea for ninety percent of that loss and damage.

37. With respect to the village of Tabaldia, Eritrea submitted only two witness declarations. That is not surprising, as most of the population evidently fled before the Ethiopian forces arrived. Both of these declarants stated that Eritrean forces were in the village when the Ethiopians arrived from the south and that a two-hour battle ensued in the village. One of them reported that “around thirty-three houses were destroyed in the battle.” Following the battle and the departure of the Eritrean forces and most of the Ethiopian forces, that declarant recounted seeing the remaining Ethiopian soldiers looting goods from shops; appliances, beds and medicines from the medical clinic; and desks and chairs from the elementary school. The other declarant was an eyewitness to such events and also added, although apparently not from personal observation, that the Ethiopian soldiers also took one water pump and destroyed another. There is no evidence of burning or other deliberate destruction of property. In light of this evidence, the Commission finds Ethiopia liable for unlawfully permitting looting by Ethiopian soldiers in Tabaldia in June 2000. All other claims, including claims for damage or destruction of property, fail for lack of proof. There is, of course, no liability for damage and destruction caused by combat.

38. With respect to the village of Gergef, Eritrea submitted only three witness declarations but, again, that is not surprising as most of the village evidently fled before the Ethiopian forces arrived. Those three declarations, however, which were by villagers who

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

remained in the village during at least part of the time that Ethiopian troops were present, contained consistent descriptions of Ethiopian soldiers looting government buildings, including the medical clinic, shops and some houses. There was no evidence of burning or other destruction of property, except for a non-eyewitness account of the destruction of one water pump. Consequently, the Commission finds Ethiopia liable for permitting looting in the village of Gergef in June 2000 and finds that the claim for the destruction of property fails for lack of proof.

39. With respect to the border town of Omhajer, the town administrator submitted a witness declaration in which he stated that the evacuation of civilians from the town was ordered on May 16 and that battles occurred there from May 17 to 21. The fact of heavy fighting in and around Omhajer was verified by a second Eritrean witness declaration. Curiously, Eritrea also submitted an inconsistent – and, the Commission finds, not credible – declaration by a town security officer who said that the evacuation was ordered on May 21 and that, at that time, the town was intact. He asserted that, while five shells had hit, there was no damage and the town was taken by Ethiopian forces without any fighting. The only other evidence relevant to Omhajer is of the nature and extent of damage found after Ethiopian forces left the town in September 2000. That evidence suggests that virtually all buildings had lost their roofs and windows and were largely empty of contents. One of Eritrea’s military experts testified at the hearing that there was substantial looted building material for sale across the river in Humera. In effect, it appears that the town had been looted and stripped of anything of value, and domestic animals destroyed. Consequently, Ethiopia, as the occupying power, is liable for unlawfully permitting such property destruction. As evidence is lacking as to the extent of damage that resulted from the battle there from May 17–21, the Commission must make a judgment concerning the proper apportionment of liability. Considering the apparent nature of much of the damage, which suggests stripping, the Commission finds Ethiopia liable to Eritrea for seventy-five percent of the damage suffered by Omhajer from May 16, 2000, until Ethiopian armed forces left in September 2000.

40. All other claims concerning Guluj Sub-Zoba fail for lack of proof.

F. Claim 9 – Barentu Sub-Zoba

41. Barentu is the capital of Gash-Barka Zoba of southwestern Eritrea. Barentu was a significant military base for Eritrea, although it appears that most of the military warehouses, garages, barracks and related storage and training areas were located outside the town itself. In the town, there were military offices at the hilltop called “Forto.” After three days of heavy fighting, the Ethiopian forces coming from Shambuko and Tokombia reached Barentu on May 18, 2000. There is evidence that, during those three days, Ethiopian aircraft bombed Barentu, hitting the Asmara Hotel, and that artillery shelling also hit the town. Nevertheless, it seems that most combat damage occurred outside of town where most of the military objectives were to be found. Most of the residents of Barentu fled to the north before the

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

arrival of the Ethiopian forces and their witness declarations, as well as those by Eritrean soldiers who left Barentu by May 17, were consistent that, except for that limited artillery and bomb damage, the town was intact at that time.

42. Several Ethiopian officers asserted that the situation was quite different. Their declarations recited that Eritrean forces had destroyed buildings in the town in the course of denial operations and that it was Eritrean soldiers who looted shops and houses on their way through the town. Many Eritrean declarants denied those assertions.

43. The Commission has carefully examined this conflicting evidence and concludes that, while some looting and denial operations by Eritrean forces probably occurred, the weight of credible evidence places the reality closer to the circumstances described by the Eritrean declarants.

44. For eight days from May 18 until May 26, 2000, Ethiopian armed forces were in uncontested control of the town of Barentu, which was largely, although not entirely, deserted by its inhabitants. In that sense, the situation in Barentu was more analogous to that in the towns in the Central Front than most other towns in the Western Front.

45. Abuse of Civilians: Aside from allegations of rape, which the Commission deals with separately below, there was relatively little evidence of abuse in Barentu Sub-Zoba. Even accepting that the few troubling allegations of beating are accurate, they are insufficient to support a finding of a pattern of frequent or pervasive abuse. Consequently, the claim of abuse fails for lack of proof.

46. Property Loss: As noted, there was a very substantial body of evidence that indicates that Barentu was almost deserted when it was entered by Ethiopian troops and that most residences, shops and government buildings were closed and locked, often with chains. Some Ethiopian military officers testified in their declarations that they warned their soldiers to stay away from locked buildings because of the risk that they had been booby trapped, but there is no evidence that anyone was killed or injured by booby traps. The witness declarations by those residents who remained during the Ethiopian occupation were detailed and consistent, however, in stating that many locked buildings were forced open by Ethiopian soldiers, and that those soldiers, aided by Ethiopian civilians, looted those buildings. Those residents asserted that those Ethiopian civilians, some of whom were recognized as people who had once worked in Barentu, arrived in buses and were accompanied by trucks, which were used to carry away the loot. Those residents also consistently affirmed that shops and houses where residents remained were not subject to being forced open or looted. There is also credible evidence that the local hospital, which had been evacuated, was looted and part of it damaged by fire and that two warehouses belonging to the Ministry of Agriculture were looted and one of them burned. The Commission concludes that there was widespread breaking, entering and looting of houses, business establishments, and government buildings

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

in Barentu during the Ethiopian occupation and that Ethiopia, as the occupying power, is liable for unlawfully permitting those acts.

47. With respect to property destruction, Barentu seems to have been spared the stripping of roofs, doors and windows of the kind seen in other towns closer to the border, such as Tserona and Omhajer. Eritrea claimed that Ethiopian forces destroyed by detonation a number of buildings in Barentu. Ethiopia denied any destruction and alleged that these buildings were destroyed either by Eritrea in denial operations or through combat action, but it did not prove that allegation. The evidence is inadequate for the Commission to determine liability for certain buildings, but there is clear and convincing evidence that at least four significant buildings in Barentu were destroyed during the occupation by detonation, the use of tracked vehicles, or a combination thereof. These buildings are the police station, the courthouse, the Gash-Setit Hotel and Conference Center, and a bakery. The evidence as a whole convinces the Commission that those four significant structures were intact when the occupation began and had been destroyed by explosives and other forceful destructive measures, similar to those used on the Central Front,¹⁴ by the time the occupation ended. Accordingly, as was the case with certain structures in Senafe town in the Central Front, in these circumstances the burden is on Ethiopia to prove that the damage was caused by others or is otherwise not attributable to Ethiopia. As Ethiopia has not proved how the destruction was caused, the Commission holds Ethiopia, as the occupying power, liable for the damage to these buildings.

48. All other claims concerning Barentu Sub-Zoba fail for lack of proof.

G. Claim 12 – Shambuko Sub-Zoba

49. In Claim 12, Eritrea asserts that Eritrean soldiers abused civilians and looted and destroyed buildings in Shambuko Sub-Zoba during Ethiopia’s offensive in May 2000. Eritrea’s evidence related to one town, Shambuko, and two villages, Bishuka and Bimbina. That evidence made clear that the civilian population was almost entirely evacuated in February 1999 as a result of Ethiopia’s Operation Sunset and did not return until after the close of hostilities in 2000. Some witness declarations were from persons who did not return to the sub-zoba until June or July 2001. Several Eritrean declarants affirmed that Shambuko and Bishuka were damaged in fighting in February 1999 and that many houses were destroyed at that time, and some referred to shelling and bombing in May 2000; others asserted that there was no fighting in those places in May 2000. Ethiopia’s witness declarations painted a different picture, asserting that those places from which civilians had been evacuated in 1999 were subsequently militarized by Eritrean armed forces in May 2000 and that Shambuko Sub-Zoba was the scene of intense battles. They also alleged that, when those Eritrean forces retreated from Shambuko, Bishuka and Bimbina, they blew up buildings in which ammunition was stored.

¹⁴ Partial Award in Eritrea’s Central Front Claims, *supra* note 3, at paras. 62, 63, 85, 92 and 103.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

50. Balancing the limited and conflicting evidence, the Commission concludes that Shambuko, Bishuka and Bimbina suffered significant damage from combat actions in 1999 and 2000. The evidence indicated that, following that combat, the Ethiopian forces moved through the area and toward Barentu. The available evidence did not make clear whether any Ethiopian soldiers remained in these places after May 16, 2000.

51. Abuse of Civilians: In an area from which civilians had largely been evacuated, it is perhaps not surprising that Eritrea presented little evidence of civilian abuse. In fact, only one of Eritrea’s witness declarations referred to such abuse, which would be serious if confirmed; it was a non-eyewitness report that one woman who had remained in Bishuka was shot and killed by Ethiopian soldiers when she protested the theft of her property. Overall, the claim that Ethiopian soldiers abused civilians in Shambuko Sub-Zoba fails for lack of proof.

52. Property Loss: The declarations submitted by Eritrea indicated that, when the witnesses returned to Shambuko, Bishuka and Bimbina, mostly in the first half of 2001, they found extensive loss of property and destruction of buildings. One witness, for example, estimated that approximately seventy-five percent of the houses in Shambuko had been severely damaged, and were missing doors, windows, roofs and furnishings. Other witnesses simply said that virtually everything had been looted and destroyed. The one eyewitness declaration came from a man who claimed that he left Bishuka on May 13, returned on May 15, and left again the following day; while he was there, he saw Ethiopian soldiers taking goods from his shop and they refused his request to stop. He also stated that he observed soldiers looting and burning the school and detonating the administration building.

53. The Commission takes note of Eritrea’s witness declarations that referred to reports the witnesses claimed to have heard from shepherds and elderly residents who had remained at Shambuko, Bishuka and Bimbina and had observed looting and destruction by Ethiopian soldiers. The Commission notes, however, that Eritrea’s evidence included no witness declarations by these shepherds or elderly people themselves. On balance, although the evidence made clear that Shambuko, Bishuka and Bimbina suffered severe damage between February 1999 and the end of the war in December 2000, the evidence was inadequate to prove that Ethiopia was liable for that damage. Therefore, this claim fails for lack of proof.

54. All other claims concerning Shambuko Sub-Zoba fail for lack of proof.

H. Claim 5 – Lalaigash Sub-Zoba

55. Lalaigash Sub-Zoba is adjacent to that part of Ethiopia that was retaken by Ethiopia in February 1999 in Operation Sunset, and was the site of the strong Ethiopian attacks on May 12, 2000, against the Eritrean trench lines protecting the principal town in the sub-zoba, Tokombia. At least from May 12 to May 15, 2000, this area was a war zone where Ethiopia carried out attacks against heavily defended Eritrean positions. The evidence submitted by Eritrea in support of this Claim included witness declarations from residents of many

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

different villages in the sub-zoba, but, except for the town of Tokombia, they are insufficient to permit firm conclusions about the alleged unlawful acts affecting individual villages. With only one or two exceptions, the declarants had fled their villages when shelling began and before Ethiopian forces arrived and so they provided evidence only of damage found when they returned rather than accounts of how that damage occurred. With respect to the town of Tokombia, however, the evidence of Ethiopian responsibility is substantial, in part because Ethiopia occupied it at least until May 29.

56. Abuse of Civilians: The evidence of abuse is limited to five witness declarations. The first declarant, a resident of the village of Aditsetser, said that he and one of his sons were suspected of being spies and were beaten twice while jailed, along with 60 other people, before they were sent to Tokombia and released. The second, a farmer at Tokombia, stated that he saw a shepherd beaten while trying to prevent his cattle from being stolen by Ethiopian soldiers. The third, a farmer in the village of Mochiti, stated that he helped bury the body of a shepherd whom he was told had been shot and killed by Ethiopian soldiers. The fourth, a Tokombia resident, stated that he protected his daughter from being abducted by Ethiopian soldiers by telling them, falsely, that she was afflicted with a sexual disease. The fifth, another Mochiti resident, said that when he and several other civilians were trying to return to their village after having fled a week earlier, Ethiopian soldiers ordered them not to enter the village and that one of his group was shot and killed when he nevertheless continued toward the village. While concerned by these reports, the Commission concludes that this evidence is more indicative of isolated incidents than a pattern of frequent or pervasive unlawful abuse of civilians in the sub-zoba. Consequently, Eritrea’s claim of unlawful abuse of civilians fails for lack of proof.

57. Property Loss: With respect to the town of Tokombia, Eritrea asserts that there was no fighting and Ethiopia asserts that there was some fighting. The Commission notes that in one of the witness declarations submitted by Eritrea, the declarant described finding six dead Ethiopian soldiers in his house. From its examination of all the relevant evidence, the Commission finds that there was fighting in the vicinity and shelling damage in the town itself, so not all damage to the town can be assumed to have occurred during the occupation. Nevertheless, in addition to combat damage, there is considerable evidence of looting and destruction of some buildings by Ethiopian soldiers. In particular, there is consistent eyewitness testimony in several witness declarations that Ethiopian soldiers deliberately detonated the large Rothman tobacco plant and warehouses just outside Tokombia and the police station in Tokombia. While several Ethiopian military officer declarants alleged that the tobacco plant had been used by Eritrea for military purposes and was detonated by Eritrean troops in a denial operation, that evidence was countered by credible and consistent witness declarations from persons who worked in or near the plant denying military use and civilians who gave eyewitness descriptions of its detonation by Ethiopian soldiers. In any event, the Commission is satisfied that there is clear and convincing evidence that the tobacco plant and the police station were intact when Ethiopian forces entered Tokombia and that they were destroyed during Ethiopia’s occupation. Consequently, Ethiopia, as the occupying

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

power, is liable for unlawfully permitting the destruction of the tobacco plant and police station and for unlawfully permitting the looting of other buildings in Tokombia.

58. With respect to the villages in Lalaigash Sub-Zoba, there are many witness declarations by residents who returned to their villages after the end of the war stating that they found their homes damaged or destroyed and all or most of the contents missing. The villages for which witness statements were submitted include Adi Maalel, Aditsetser, Hadamu, Mochiti, Shelalo, Sheshebit, Tselale, Tselim Kalai and Tselim Russo. In a few cases, declarants stated that their property had been stolen by neighbors who had not fled, but generally they either stated or assumed that it was Ethiopian soldiers and Ethiopian civilians, who had been bused in for the purpose, who looted the missing property. Given the evidence relating to Tokombia and other areas, that is an understandable assumption, but it is not a basis on which the Commission can find liability. The Commission notes that the entire area saw heavy combat and so, even if Ethiopia occupied all of Lailagash Sub-Zoba, it could not be posited that Ethiopia was liable for all damage that occurred in villages. Ethiopia also asserted that its armed forces moved quickly through this area and did not set up an occupation regime for the area. Although the evidence indicated that Ethiopian soldiers remained at least for a few days in some of those villages, evidence is lacking that Ethiopian forces remained anywhere in the sub-zoba, except in the town of Tokombia, long enough for the Commission to hold Ethiopia responsible as an occupying power for any property losses that occurred. Moreover, direct evidence of looting or property destruction by Ethiopian soldiers outside of Tokombia is almost entirely lacking. Consequently, the claims for property losses in those villages and all other claims concerning Lalaigash Sub-Zoba fail for lack of proof.

I. Claim 10 – Haykota Sub-Zoba

59. Eritrea claimed for alleged abuse of civilians and for looting and property destruction by Ethiopian soldiers in Haykota Sub-Zoba. It is undisputed that the Ethiopian military presence in this sub-zoba was brief but contested by Eritrean armed forces. Ethiopian forces traversed this sub-zoba on their advance from Barentu to Teseney, experiencing some fighting with Eritrean forces along the way. Ethiopian commander declarants referred specifically to a battle a few kilometers east of Haykota town with Eritrean forces that had come south from Akordat. The commander of the 15th Division stated that when his division passed through Haykota town on May 27, 2000, considerable damage had been done to some buildings in the town, and he opined that the departing Eritrean soldiers were cut off from their logistic bases in Barentu and Dasse and were dependent upon what they could obtain in the towns and villages through which they passed. In particular, he asserted that they had emptied Haykota town of medical supplies. Although those Ethiopian commanders did not mention the neighboring town of Alabo, apparently the Ethiopian forces also passed through it on their route west.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

60. Eritrea submitted eight witness declarations relevant to this sub-zoba. Three of these were made by residents who returned to their towns only after the Ethiopian forces had passed through, and two others were made by administrative officials, one of the sub-zoba and one of Alabo town. Those statements are relevant primarily for their descriptions of the damage found upon the declarants’ return and for the dates of the partial civilian evacuations and Ethiopian military presence. The statements generally confirm the Ethiopian evidence that Ethiopian soldiers began arriving at Haykota town on May 27 and that the last of them left the next morning. They also confirm that Ethiopian soldiers began arriving at Alabo town late on May 28 and the last of them left the following afternoon. The other three witness statements are by residents who claim to have been eyewitnesses to looting by Ethiopian soldiers. One was from Haykota, where he had a grocery, and another was from Alabo. The third stated that he had taken refuge on a mountain about two kilometers south of Haykota, from which point he saw looting in the town. As a result, he said that he went to the town and complained about the looting to an Ethiopian officer, who allegedly told him to concentrate on guarding his own property. He said that he then went to his bakery shop and succeeded in protecting it, but he asserted that his paint plant in Alabo was looted and damaged.

61. Abuse of Civilians: The only evidence of abuse is an allegation in one witness declaration that ten young shepherds were abducted by Ethiopian soldiers and that only eight of them returned. This evidence, which was not based on an eyewitness account or corroborated, is insufficient to prove a pattern of frequent or pervasive abuse of civilians. Consequently, this claim fails for lack of proof.

62. Property Loss: Given that Ethiopian soldiers passed quickly through the sub-zoba, fought with Eritrean soldiers also passing through the sub-zoba during the same time period, and that only three witness statements contain evidence of looting by Ethiopia soldiers, the Commission finds that Eritrea failed to establish a pattern of misconduct by Ethiopian soldiers, and the claim must be rejected for lack of proof.

63. All other claims concerning Haykota Sub-Zoba fail for lack of proof.

J. Claim 1 – Molki Sub-Zoba

64. In Claim 1, Eritrea claimed for abuse of civilians and property loss through looting and destruction by Ethiopian forces in Molki Sub-Zoba. This sub-zoba was the scene of bitter fighting on May 14 and 15, 2000, and the Ethiopian commanders involved asserted that there was considerable damage to the town of Molki from artillery and from ground combat. One asserted that they captured five Eritrean tanks in the town. They also stated that the streets were littered with both military and civilian items, suggesting that Eritrean troops had been foraging there.

65. Abuse of Civilians: There were only three witness declarations supporting abuse of civilians. One declarant asserted, without detail, that when she returned to Molki town for

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

food she observed five instances of Ethiopian soldiers beating people who were objecting to looting. Another witness reported an attempted rape. The third reference to abuse was in the declaration by a priest who said that he had heard of several people who were shot while running away after failing to stop when ordered to do so. While five incidents of beatings in one town would suggest a pattern of abuse justifying a finding of liability, the fact remains that no details were given by the one witness who allegedly saw them, and there was no corroboration of the incidents. Given the limited evidence, the claim of abuse of civilians fails for lack of proof.

66. Property Loss: In comparison, Eritrea’s evidence is substantial with respect to its claim of looting in Molki Sub-Zoba, but not with respect to its claim of building destruction. Seven of its eleven witness declarations contained eyewitness accounts of looting by Ethiopian soldiers and, in several of them, by Ethiopian civilians as well. This evidence, as a whole, is too substantial to be overcome by the testimony of Ethiopian Major General Yohannes Gebremeskel, in his witness declaration, that he was “extremely surprised” by the allegation that [his] troops engaged in looting on the Western Front.¹⁵ Consequently, the Commission finds Ethiopia liable for permitting the looting of buildings in Molki Sub-Zoba. As for destruction of buildings, while there is some evidence that a building belonging to the Ministry of Agriculture burned soon after it was looted by Ethiopian soldiers, it is unclear what caused the fire. Eritrea’s claim for deliberate destruction of property in a town already badly damaged by combat fails for lack of proof.

67. All other claims concerning Molki Sub-Zoba fail for lack of proof.

K. Claim 11 – Gogne Sub-Zoba

68. This sub-zoba, which is located between Barentu and Haykota, was traversed by the Ethiopia 15th Division near the beginning of its march to Teseney. Eritrea claims that, during their time in the sub-zoba, Ethiopian soldiers abused civilians, looted public and private property and destroyed both public and private buildings. The evidence falls well short of that required to prove the claim.

69. Abuse of Civilians: The evidence of abuse of civilians consists essentially of one witness declaration asserting that the witness had heard of one rape and two killings. This claim fails for lack of proof.

70. Property Loss: Eritrea’s evidence of looting and property destruction by Ethiopian soldiers consisted of six witness declarations concerning the town of Gogne and one concerning the village of Fode. Three declarants were not in either town while Ethiopian soldiers were allegedly present. One was an Eritrean soldier who did not return until October

¹⁵ Ethiopia’s Counter-Memorial to Eritrea’s Claims 1, 3, 5 & 9–13, filed by Ethiopia on January 17, 2005, Documentary Annexes, Vol. II, at A-3.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

2000. The second asserted that he watched Fode from a mountain and saw buildings burning and goods being carried away on donkeys and horses. The third, who stated that he was the head administrator of the sub-zoba and returned to Gogne in early June, said that he stayed away from Gogne and sent “children and very old people” to Gogne to see what was happening and report to him. Those statements are not of significant evidentiary value for this claim.

71. One of the other four declarations was by a person who fled to a mountain but, he asserted, went back to Gogne several times and tried, with limited success, to save items from a friend’s shop. Another was by a pharmacist who also fled to a mountain when the Ethiopians arrived on May 19 but, he asserted, returned to Gogne to remonstrate against Ethiopian soldiers breaking in doors and then stayed in his house to protect his property. He also asserted that, at 8 o’clock p.m. on the last evening that the Ethiopians were present, he heard an explosion, saw two soldiers rush into a neighboring house, and then heard another explosion. He said that those explosions destroyed the nearby administration building. The third declarant said that he had left the town on May 16 and returned on May 19 when Ethiopian soldiers arrived and started breaking into houses and looting. He stated that the soldiers stayed in Gogne for four days and that he heard explosions at 8 o’clock p.m. on the last day that destroyed the administration building. The fourth declaration, by a shop owner who remained in Gogne, stated that the Ethiopians arrived on May 26 and stayed for eight days. He claimed that he saw Ethiopian soldiers steal goods from his own shop and house and loot the mosque. He also asserted that he heard two explosions at 8 o’clock p.m. on the evening before the Ethiopians left town, and saw the next day that the administration building had been destroyed.

72. These declarations, while detailed, were inconsistent regarding dates and the duration of Ethiopia’s presence. Even taken together, the Commission finds the declarations too frail a basis on which to find clear and convincing evidence for this claim. Consequently, Eritrea’s claim for looting and property destruction in Gogne Sub-Zoba fails for lack of proof.

73. All other claims concerning Gogne Sub-Zoba fail for lack of proof.

L. Allegations of Rape

74. As in the Partial Awards in the Parties’ Central Front Claims, the Commission considers that allegations of rape deserve separate general comment. Despite the great suffering inflicted upon Eritrean and Ethiopian civilians alike in the course of this armed conflict, the Commission is gratified that there was no suggestion, much less evidence, that either Ethiopia or Eritrea used rape, forced pregnancy or other sexual violence as an instrument of war. Neither side alleged strategically systematic sexual violence against civilians in the course of the armed conflict in the Western Front areas. Each side did, however, allege some degree of rape of its women civilians by the other’s soldiers.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

75. The Parties agree that rape of civilians by opposing or occupying forces is a violation of customary international law, as reflected in the Geneva Conventions. Under Common Article 3, paragraph 1, States are obliged to ensure that women civilians are granted fundamental guarantees, including the prohibition against “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture ... outrages on personal dignity, in particular humiliating and degrading treatment.” Article 27 of Geneva Convention IV provides (emphasis added):

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

76. Article 76, paragraph 1, of Geneva Protocol I adds: “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”

77. Both Parties have explained in the course of the proceedings that rape is such a sensitive matter in their culture that victims are extremely unlikely to come forward; and when they or other witnesses do present testimony, the evidence available is likely to be far less detailed and explicit than for non-sexual offenses. The Commission accepts this, and has taken it into account in evaluating the evidence.¹⁶ To do otherwise would be to subscribe to the school of thought, now fortunately eroding, that rape is inevitable collateral damage in armed conflict.

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

The Commission does not see its task to be the determination of liability of a Party for each individual incident of illegality suggested by the evidence. Rather, it is to determine liability for serious violations of the law by the

¹⁶ See Partial Award in Eritrea’s POW Claim, *supra* note 1, at paras. 139–142; Partial Award in Eritrea’s Central Front Claims, *supra* note 3, at paras. 36–41; Partial Award in Ethiopia’s Central Front Claims, *supra* note 3, at paras. 34–40.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

Parties, which are *usually* illegal acts or omissions that were frequent or pervasive and consequently affected significant numbers of victims.¹⁷

79. Rape, which by definition involves intentional and grievous harm to an individual civilian victim, is an illegal act that need not be frequent to support State responsibility. This is not to say that the Commission, which is not a criminal tribunal, could or has assessed government liability for isolated individual rapes or on the basis of entirely hearsay accounts. What the Commission has done is look for clear and convincing evidence of several rapes in specific geographic areas under specific circumstances.

80. Eritrea’s evidence of alleged rape in the Western Front areas is relatively circumscribed, consisting primarily of 27 witness declarations, three of which describe interviews under the auspices of the Eritrean Ministry of Information of alleged rape victims, and video footage from those interviews (which were done in groups and individually) and from a documentary for Australian television.

81. Of the 27 declarations (out of the total of 191 witness declarations submitted by Eritrea with its Memorial), none was from a rape victim and only two were from eyewitnesses to rape or attempted rape. One eyewitness described Ethiopian soldiers repeatedly raping a woman in her shop in Teseney, the other an Ethiopian soldier dragging a woman away from Tokombia before being stopped by other soldiers. Two doctors, whose testimony the Commission finds detailed and credible, described treating some six women in Teseney and Barentu who said they had been raped by Ethiopian soldiers; both doctors stated they assumed many more unreported rapes. One of the doctors, who has testified personally before the Commission in a previous case, treated a Barentu woman known to be mentally ill and found her medical condition consistent with her report of repeated rape. One other declarant from Barentu testified that he had personal knowledge of the rape of the mentally ill woman. The other declarations largely contain second and third hand information about rape across the Western Front.

82. The Australian television documentary contains interviews with ten women from Teseney, eight of whom said they were rape or attempted rape victims. The Women’s Association Office and Eritrean Ministry of Information interviewed some ten women, from Barentu, Adikeshi and Asheshi, who said they were victims of rape or attempted rape or familiar with incidents of rape. Particularly troubling was the story told by one father who had retrieved his daughter after she was abducted and gang-raped by Ethiopian soldiers.

83. It is the task of the Commission to take this evidence into account, in particular to balance the obvious difficulties posed by third-party and interview testimony against the natural inclination of victims (and even witnesses) not to speak publicly about rape. The

¹⁷ Partial Award in Ethiopia’s POW Claim, *supra* note 1, at para. 54; Partial Award in Eritrea’s POW Claim, *supra* note 1, at para. 56.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

Commission is satisfied that there is clear and convincing evidence of several incidents of rape of Eritrean civilian women by Ethiopian soldiers in Barentu and Teseney, which evidence has gone unrebutted by Ethiopia. The Commission finds that Ethiopia failed to impose effective measures on its troops, as required by international humanitarian law, to prevent rape of civilian women in Barentu and Teseney.

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

M. Award

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

1. Jurisdiction

All claims asserted in these Western Front Claims are within the jurisdiction of the Commission.

2. Findings of Liability for Violations of International Law

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

- a. For permitting looting and burning of buildings and destruction of livestock in the town of Teseney during May and June 2000;
- b. For permitting looting and burning of houses and destruction of livestock in the village of Alighidir and the burning and detonation of the nearby cotton factory and its stored cotton during May and June 2000;
- c. For permitting looting and burning of structures and destruction of livestock in the town of Guluj during May and June 2000, Ethiopia is liable for 90% (ninety percent) of the total loss and damage to property in Guluj during that time;
- d. For permitting looting in the village of Talbadia during June 2000;
- e. For permitting looting in the village of Gergef during June 2000;
- f. For permitting looting and stripping of buildings and destruction of livestock in Omhajer from May 16, 2000 until the departure of the last Ethiopian forces

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

in September 2000, Ethiopia is liable for 75% (seventy-five percent) of the total property damage in Omhajer during that time;

- g. For permitting breaking, entering and looting of houses, business establishments and government buildings in the town of Barentu during its occupation from May 18 to 26, 2000;
- h. For the destruction of the police station, the courthouse, the Gash-Setit Hotel and Conference Center, and a bakery in the town of Barentu during its occupation;
- i. For permitting looting of buildings and destruction of the police station in the town of Tokombia, and the destruction of the nearby Rothman tobacco plant, during its occupation in May 2000;
- j. For permitting looting of buildings in Molki Sub-Zoba on May 15 to 16, 2000; and
- k. For failure to take effective measures to prevent the rape of women in the towns of Barentu and Teseney.
- l. All other claims presented in the Western Front Claims are dismissed.

V. UNLAWFUL AERIAL BOMBARDMENT (ERITREA’S CLAIM 26)

A. Jurisdiction

85. This claim, as filed on December 12, 2001, was a claim for the allegedly unlawful aerial bombardment of civilian targets in six named places. These were Asmara, Assab, Adi Keih, Mendefera, Forto and Massawa. When Eritrea filed its Memorial on this Claim on November 1, 2004, however, the Claim was restated as a claim that Ethiopia had conducted an illegally disproportionate and indiscriminate air campaign. Moreover, in its Memorial and in the accompanying evidence, reference was made to many alleged aerial bombardments affecting civilians, including the bombing of churches, other than those referred to in the Statement of Claim.

86. Ethiopia challenged the Commission’s jurisdiction over claims relating to these additional incidents. Article 5, paragraph 8, of the Agreement states that any claims that could have been filed by December 12, 2001 but were not filed by that date were extinguished and cannot be considered by the Commission. Eritrea responded that many aerial bombing claims were made as part of other claims, specifically the Western and Central Front Claims, as well as Claim 21 on internally displaced persons.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

87. The Commission agrees that some aerial bombardment claims were mentioned in some of the Western Front Claims, as well as in Claim 21, which concerns displaced persons. The references to aerial bombardment in these Claims were considerably narrower than in Claim 26, as restated in the Memorial. Nevertheless, the Commission is prepared to permit those claims that were sufficiently clearly identified in other Statements of Claim filed on December 12, 2001, to be dealt with in Claim 26 instead of the Claims in which they were filed, excluding, of course, Central Front Claims previously resolved in the Commission’s Partial Award in Eritrea’s Central Front Claims. Moreover, the Commission holds that Claim 26, as thus expanded, provides an adequate jurisdictional basis for the Claim as restated in the Memorial. Consequently, the Commission has jurisdiction over Claim 26.

B. Evidentiary Issues

1. Question of Proof Required

88. As discussed above, the Commission requires clear and convincing evidence in support of its findings.

2. Evidence Presented

89. In support of its aerial bombardment claims, Eritrea presented over 90 sworn witness declarations, reports from two experts, and several press reports. In its defense, Ethiopia presented eight sworn witness declarations, most from military officers, as well as maps and government press statements.

90. At the hearing, the following witnesses were presented:

By Eritrea:

Maj. (Ret.) Paul Noack – Expert Witness

By Ethiopia:

Brigadier General Adem Mohammed – Fact Witness

C. The Merits

91. Claim 26, as thus restructured, is basically (with one exception discussed below) not a series of claims for each of the separate alleged incidents, but rather a claim that Ethiopia carried out a pattern of indiscriminate aerial bombardments that caused civilian casualties and property losses at a number of different places. This reorientation of these claims, apart from the jurisdictional problems it brings, is consistent with the Commission’s general approach, which is to find liability for frequent or pervasive violations of international law. It has been

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

the Commission’s general practice to rule on an individual incident only when that incident was unusually serious as evidenced by large numbers of victims or potential victims or a very serious violation of applicable international law. This reorientation of Eritrea’s aerial bombing claims is also sensible because, like the claims for artillery shelling, neither Party is likely to be able to prove, incident-by-incident, whether each alleged bombing incident was lawful or not.

92. The difficulties of such incident-by-incident analysis become clear when one considers that it would be necessary for the Commission to consider, *inter alia*, the following questions in relation to each event cited by Eritrea:

What target or targets were authorized to be attacked?

On what basis was each target selected?

How much care was used in that selection?

How well trained were the pilots to minimize error?

How close to legitimate military objectives were any civilian victims?

Did the Ethiopian commanders know, or should they have known, that civilians or civilian objects were located where they were, in fact, located?

Did the relevant Eritrean authorities take all feasible precautionary measures as required by Article 58 of Geneva Protocol I to protect civilians against the effects of attack as, for example, by ensuring that internally displaced persons (“IDP”) camps were not located close to military objectives?

And did the Ethiopian commanders and pilots take all feasible measures to prevent errors in these attacks?

It seems probable that the necessary information relevant to each bombing claim would rarely be available to the Parties and hence to the Commission.

93. Thus, except with respect to the Harsile water reservoir, which is considered separately below, the Commission will decide all the other aerial bombing allegations over which the Commission has jurisdiction as a claim that Ethiopia conducted an indiscriminate and disproportionate bombing campaign. In support of this claim, Eritrea cited evidence that civilians were killed and injured and civilian objects were destroyed or damaged in a number of towns, villages and IDP camps during the armed conflict. Eritrea alleged that these losses occurred because the Ethiopian Air Force did not comply with the obligations of international humanitarian law to distinguish between military objectives and civilians and civilian objects

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

and to avoid disproportionate civilian losses. Eritrea relied particularly upon those rules of law found in Articles 48, 51, 52 and 57 of Geneva Protocol I.

94. Ethiopia, in response, denied that its preparations for and conduct of its aerial bombings failed to comply with relevant legal obligations. Ethiopia also accused Eritrea of failing to comply with the obligations required by Article 58 of Geneva Protocol I, to take appropriate measures to separate civilians and civilian objects from military objectives to the maximum extent feasible.

95. The provisions of Geneva Protocol I cited by the Parties represent the best and most recent efforts of the international community to state the law on the protection of the civilian population against the effects of hostilities. The Commission believes that those provisions reflect a generally shared view that some of the practices of the Second World War, such as target area bombing of cities, should be outlawed for the future, and the Commission considers them to express customary international humanitarian law. Those provisions may be summarized as follows: they emphasize the importance of distinguishing between civilians and combatants and between civilian objects and military objectives;¹⁸ they prohibit targeting civilians¹⁹ or civilian objects;²⁰ they prohibit indiscriminate attacks, including attacks that may be expected to produce civilian losses that would be disproportionate to the anticipated military advantage;²¹ and they require both attacker and defender to take all feasible precautions to those ends.²²

96. Considering the evidence submitted by both Parties, the Commission notes that the Ethiopian aerial bombardment campaign was a limited one. Aside from close air support missions, which required the presence of a forward air controller, Ethiopia estimated that interdiction missions, which are the ones that could have given rise to Eritrea’s claims, numbered only in the twenties during the whole war. Eritrea did not dispute these figures or offer conflicting evidence. Except for a brief period at the outset of the war and during the Ethiopian offensives in February 1999 and May and June 2000, there were long periods when an aerial warfare moratorium pressed by the United Nations was respected. As always in aerial bombing, there were some regrettable errors of targeting and of delivery by the Ethiopian Air Force, and some civilian casualties and property losses were caused by those errors. Also, there were casualties and losses that probably could have been avoided if Eritrea had done more to keep civilians and military objectives further apart. It also appears that Ethiopia may not have responded to Eritrean allegations that civilians had been hit by Ethiopian bombardment as it should have done by sending reconnaissance missions to verify what happened.

¹⁸ Geneva Protocol I, *supra* note 8, art. 48.

¹⁹ *Id.* art. 51(2).

²⁰ *Id.* art. 52.

²¹ *Id.* art. 51(4) & (5).

²² *Id.* arts. 57 & 58.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

97. All of these casualties and losses were regrettable and tragic consequences of the war, but they do not in themselves establish liability for this claim under international law. After careful consideration of all the evidence, including the testimony at the hearing by the military expert presented by Eritrea and by a senior Ethiopian Air Force officer, the Commission concludes that Eritrea has not proved its claim that Ethiopia’s aerial bombing was indiscriminate or was disproportionate in that it would be expected to cause civilian losses which, in the words of Article 51 of Geneva Protocol I, “would be excessive in relation to the concrete and direct military advantage anticipated.” Consequently, Claim 26, except for that part relating to the Harsile water reservoir, fails for lack of proof.

98. Harsile Water Reservoir: Ethiopia acknowledges that it made several air strikes on the water reservoir located at the village of Harsile, which is located in a harsh desert region about 17 kilometers from the large port city of Assab. Bombs were dropped on three days in February 1999 and once in June 2000, but the reservoir either was not damaged or any damage was quickly repaired. Ethiopia’s senior Air Force officer who testified at the hearing indicated that the reservoir was targeted because Ethiopia believed that the loss of that supply of drinking water would have restricted Eritrea’s military capacity on the Eastern Front, and he identified a few Eritrean military units that Ethiopia believed obtained their water from the reservoir. However, in response to a question, he acknowledged that it was possible that water from the reservoir was used by civilians.

99. Eritrea submitted witness statements indicating, first, that the reservoir served only civilians and was the sole source of drinking water for the town of Assab and, second, that the Eritrean armed forces in that area had their own wells and underground storage tanks. Eritrea claimed that these attacks on the reservoir were illegal under Article 54 of Geneva Protocol I, which prohibits attacks on objects indispensable to the survival of the civilian population.

100. Based on the evidence in the record, the Commission has no doubt that the Government of Ethiopia knew that the reservoir was a vital source of water for the city of Assab. Thus, it seems clear that Ethiopia’s purpose in targeting the reservoir was to deprive Eritrea of the sustenance value of its water, and that Ethiopia did not do so on an erroneous assumption that the reservoir provided water only to the Eritrean armed forces.

101. As the area around Assab is extremely harsh, hot and dry, the Commission considers it very fortunate that the water in the reservoir was not lost or made unavailable by those air strikes. Neither, apparently, was a nearby refugee camp damaged by the strikes, but the absence of significant damage would not justify a failure by the Commission to decide the legality of those attacks.

102. The Parties do not disagree that an attack on the reservoir would be prohibited by Article 54 of Geneva Protocol I, were that provision to apply between them. In relevant part, it provides:

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

2. It is prohibited to attack ... objects indispensable to the survival of the civilian population, such as ... drinking water installations and supplies ... for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive ...
3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:
 - (a) as sustenance solely for the members of its armed forces ...

103. In its defense, Ethiopia asserted that destruction of the Harsile water reservoir would have limited significantly Eritrea’s ability to conduct military operations on the Eastern Front and, consequently, that the reservoir was a legitimate military objective under the applicable customary international humanitarian law. Ethiopia further maintained that Article 54 of Geneva Protocol I was a new development in 1977 that had not become a part of customary international humanitarian law by the 1998–2000 war.

104. The Commission recognizes the difficulty it faces in deciding this question, as there have been less than three decades for State practice relating to Article 54 to develop since its adoption in 1977. Article 54 represented a significant advance in the prior law when it was included in the Protocol in 1977, so it cannot be presumed that it had become part of customary international humanitarian law more than 20 years later. However, the Commission also notes the compelling humanitarian nature of that limited prohibition, as well as States’ increased emphasis on avoiding unnecessary injury and suffering by civilians resulting from armed conflict. The Commission also considers highly significant the fact that none of the 160 States that have become Parties to the Protocol has made any reservation or statement of interpretation rejecting or limiting the binding nature of that prohibition. Only two of those statements relate to the scope of the prohibition. One, by the United Kingdom, merely emphasizes what paragraph 2 of Article 54 says, i.e., that it prohibits only attacks that have the specific purpose of denying sustenance to the civilian population or the adverse Party. The other, by France, preserves a right to attack objects used solely for the sustenance of members of the armed forces. All other statements referring to Article 54 also refer to other articles, and relate solely to the thorny issue of the right of reprisal. The United States has not yet ratified Geneva Protocol I, but the Commission notes with interest that the United States Annotated Supplement (1997) to its Naval Handbook (1995) makes the significant comment that the rule prohibiting the intentional destruction of objects indispensable to the survival of the civilian population for the specific purpose of denying the civilian population of their use is a “customary rule” accepted by the United States and codified by Article 54, paragraph 2, of Protocol I.

105. While the Protocol had not attained universal acceptance by the time these attacks occurred in 1999 and 2000, it had been very widely accepted. The Commission believes that,

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

in those circumstances, a treaty provision of a compelling humanitarian nature that has not been questioned by any statements of reservation or interpretation and is not inconsistent with general State practice in the two decades since the conclusion of the treaty may reasonably be considered to have come to reflect customary international humanitarian law.²³ Recalling the purpose of Article 54, the Commission concludes that the provisions of Article 54 that prohibit attack against drinking water installations and supplies that are indispensable to the survival of the civilian population for the specific purpose of denying them for their sustenance value to the adverse Party had become part of customary international humanitarian law by 1999 and, consequently was applicable to Ethiopia’s attacks on the Harsile reservoir in February 1999 and June 2000. Therefore, those aerial bombardments, which fortunately failed to damage the reservoir, were in violation of applicable international humanitarian law. As no damage has been shown, that finding, by itself, shall be satisfaction to Eritrea for that violation.

D. Award

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

1. Jurisdiction

- a. Claims of unlawful aerial bombardment that were timely filed by the Claimant in other Claims submitted to the Commission that have not previously been decided by the Commission will be admitted in this Claim to the exclusion of the Claims in which they were filed.
- b. This claim, as thus expanded and restated by the Claimant as a claim that the Respondent conducted an unlawful, indiscriminate and disproportionate bombing campaign, is within the jurisdiction of the Commission.

2. Findings of Liability for Violations of International Law

- a. The provisions of Geneva Protocol I relevant to this Claim, which are found in Articles 48, 51, 52, 57 and 58 of that Protocol, expressed customary international humanitarian law during the 1998–2000 armed conflict between the Parties.

²³ The Commission notes with appreciation the new, exhaustive study of customary law by the ICRC, JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Cambridge University Press 2005). That study concludes that a broader prohibition than the one stated in Article 54(2) has become customary law. The Commission need not, and does not, endorse the study’s broader conclusion.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

- b. The claim that Ethiopia conducted an indiscriminate and disproportionate bombing campaign in violation of the relevant provisions of customary international humanitarian law fails for lack of proof.
- c. The provisions of Article 54 of Geneva Protocol I that prohibit attack against drinking water installations and supplies that are indispensable to the survival of the civilian population for the specific purpose of denying them for their sustenance value to the adverse Party had become customary international humanitarian law by 1999.
- d. The aerial bombing attacks by the Respondent in February 1999 and June 2000 against the Harsile water reservoir were in violation of customary international humanitarian law.
- e. As no damage to the Harsile water reservoir has been shown, the finding of violation of law, by itself, shall represent satisfaction to the Claimant.
- f. All other claims presented in this Claim are dismissed.

VI. AERIAL BOMBARDMENT OF HIRGIGO POWER STATION (ERITREA’S CLAIM 25)

A. Jurisdiction

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

107. In this Claim, the Claimant alleged that the Respondent’s aerial bombardment of the Claimant’s power station at Hircigo violated rules of international law. Ethiopia did not contest the Commission’s jurisdiction over the claims asserted by Eritrea and the Commission is aware of no jurisdictional impediments. Thus, the Claim falls directly within the scope of the Commission’s jurisdiction.

B. Evidentiary Issues

1. Question of Proof Required

108. As discussed above, the Commission requires clear and convincing evidence in support of its findings.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

2. Evidence Presented

109. In support of its Claim on the bombing of Hirgigo Power Station, Eritrea presented over 20 sworn witness declarations, one of which was an expert statement. In its defense, Ethiopia presented seven sworn witness declarations, six from military officers, and several government press statements.

110. At the hearing, the following witnesses were presented:

By Eritrea:

Maj. (Ret.) Paul Noack – Expert Witness

By Ethiopia:

Brigadier General Adem Mohammed – Fact Witness

C. The Merits

111. On May 28, 2000, two Ethiopian jet aircraft dropped seven bombs that hit and seriously damaged the Hirgigo Power Station, which is located about ten kilometers from the port city of Massawa. At that time, construction was complete, and the power station was in the testing and commissioning phase. While not yet fully operational, the power station had successfully supplied some power briefly to Asmara and Mendefera. Eritrea asserted that the bombing of the plant was unlawful because the plant was not a legitimate military objective, and it requested that the Commission hold Ethiopia liable to compensate Eritrea for the damage caused to Eritrea by that violation of international humanitarian law.

112. With respect to the applicable law, Eritrea pointed to Article 52, paragraph 2, of Geneva Protocol I, which defines the objects that are legitimate military objectives as follows:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

113. This provision was not applicable as part of a treaty binding on both Parties to the conflict, but it is widely accepted as an expression of customary international law, and Ethiopia did not contend otherwise. The Commission notes that none of the 160 Parties to that Protocol has attached to its signature or instrument of ratification a reservation or

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

statement of interpretation that would indicate disagreement with that definition.²⁴ The Commission is of the view that the term “military advantage” can only properly be understood in the context of the military operations between the Parties taken as a whole, not simply in the context of a specific attack.²⁵ Thus, with respect to the present claim, whether the attack on the power station offered a definite military advantage must be considered in the context of its relation to the armed conflict as a whole at the time of the attack. The Commission finds that Article 52, paragraph 2, of Geneva Protocol I is a statement of customary international humanitarian law and, as such, was applicable to the conflict between the two Parties.²⁶

114. Before considering the question whether the power station at Hirgigo was a military objective as so defined, the Commission must first address a factual dispute. In its Statement of Defense, Ethiopia simply denied that it had targeted a non-military objective. However, in its Memorial and consistently thereafter, including by testimony at the hearing by a senior Ethiopian Air Force officer, Ethiopia maintained that, although the power plant qualified as a legitimate military objective, its objective on May 28 was not the power plant, but rather anti-aircraft missile launchers located at Hirgigo. Ethiopia alleged that the two aircraft in question had been assigned, as their primary objective, the port of Massawa. It further alleged that, as the aircraft approached that area, they detected either the launching of an anti-aircraft missile or their own detection by missile control radar (the evidence was inconsistent on that point) from an anti-aircraft installation within the perimeter of the plant at Hirgigo. Ethiopia further alleged that the pilots immediately sought and obtained instructions to switch targets and attack the anti-aircraft defenses at the power plant. Consequently, Ethiopia asserted that it did not make the power plant its objective.

115. Eritrea disputed that explanation, pointing to the proximity of Hirgigo to Massawa, to the fact that the aircraft were flying very low at a speed of perhaps eight kilometers per minute, to the evidence from those on the ground that the aircraft were seen and heard only just prior to the release of their bombs on the plant, and to the impossibility of direct radio communication between such low flying aircraft and their base in distant Mekele. Ethiopia responded to the last point by alleging that the communications were relayed through another aircraft that circled high enough to maintain radio contact between the attacking aircraft and the airbase at Mekele.

116. If the Commission were to accept the Ethiopian explanation, then the question whether the power plant was a legitimate military objective, as defined in Article 52, paragraph 2, of Geneva Protocol I, would not be relevant. The Commission recognizes the

²⁴ The Commission is aware that there has been criticism of Article 52(2) on grounds that it is too restrictive. See, e.g., W. Hays Parks, *Air Law and the Law of War*, 32 AIR FORCE LAW REVIEW pp. 137–144 (1990).

²⁵ See, e.g., THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT p. 162 (Dieter Fleck ed., Oxford University Press 1995) [hereinafter FLECK].

²⁶ See, e.g., THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW p. 64 (Clarendon Press 1989) and CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 23, at pp. 29–32.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

serious practical difficulties with that explanation to which Eritrea has pointed, and it is not satisfied that Ethiopia has adequately responded to them. Moreover, the Commission notes that the evidence indicated that, while Eritrea did have anti-aircraft guns located near the site of the plant, but not at the plant site itself, the attacking aircraft dropped seven bombs directly on the plant, rather than on those anti-aircraft guns. Further, the evidence indicated that the aircraft had dropped their bombs and were turning away when the first anti-aircraft fire was heard. Considering all the evidence, the Commission concludes that Ethiopia has failed to prove its first defense, that the anti-aircraft weapons were the objective of the attack, rather than the power plant. Consequently, the Commission turns to the allegation of Eritrea that the power plant was not a legitimate military objective.

117. As a first step, the Commission must decide whether the power plant was an object that by its nature, location, purpose or use made an effective contribution to military action at the time it was attacked. The Commission agrees with Ethiopia that electric power stations are generally recognized to be of sufficient importance to a State’s capacity to meet its wartime needs of communication, transport and industry so as usually to qualify as military objectives during armed conflicts. The Commission also recognizes that not all such power stations would qualify as military objectives, for example, power stations that are known, or should be known, to be segregated from a general power grid and are limited to supplying power for humanitarian purposes, such as medical facilities, or other uses that could have no effect on the State’s ability to wage war. Eritrea asserted that, in May 2000, the Hirgigo plant was not yet producing power for use in Eritrea and that Eritrea’s military forces had their own electric generating equipment and are not dependent on general power grids in Eritrea. Eritrea also submitted evidence supporting its assertion that its Defense Ministry used no more than four percent of Eritrea’s non-military power supply and that Eritrean manufacturing companies did not produce significant military equipment.

118. The Hirgigo plant had been under construction for a considerable time, and the evidence indicated that much of the related transformer and transmission facilities that would be necessary for it to transmit its power around the country were in place. Also, the Commission notes the witness statement by the head of the Northern Red Sea Region of the Eritrea Electric Authority in which he stated: “Hirgigo was going to be a major asset for us. The plant we were using to supply power to Massawa was in Garar. It was big, but it was old and on its last legs.”

119. In fairness to that witness, it should be acknowledged that he also stated that he thought the reason Ethiopia bombed the power station was its economic importance to Eritrea. Nevertheless, the Commission, by a majority, finds in his reference to the power supply for Massawa being old and on its last legs a suggestive example of the potential value to a country at war of a large, new and nearly completed power station so close as to be visible from Massawa. While the fact that Eritrea placed anti-aircraft guns in the vicinity of the power station does not, by itself, make the power station a military objective, it indicated

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

that Eritrean military authorities themselves viewed the station as having military significance.

120. The Commission, by a majority, has no doubt that the port and naval base at Massawa were military objectives. It follows that the generating facilities providing the electric power needed to operate them were objects that made an effective contribution to military action. The question then is whether the intended replacement for that power generation capacity also made an effective contribution to military action. Ethiopia asserted that a State at war should not be obligated to wait until an object is, in fact, put into use when the purpose of that object is such that it will make an effective contribution to military action once it has been tested, commissioned and put to use. Certainly, as the British Defense Ministry’s Manual of the Law of Armed Conflict makes clear, the word “purpose” in Article 52’s definition of military objectives “means the future intended use of an object.”²⁷ The Commission agrees.²⁸

121. The remaining question is whether the Hirgigo power plant’s “total or partial destruction . . . in the circumstances ruling” in late May 2000 “offer[ed] a definite military advantage.” In general, a large power plant being constructed to provide power for an area including a major port and naval facility certainly would seem to be an object the destruction of which would offer a distinct military advantage.²⁹ Moreover, the fact that the power station was of economic importance to Eritrea is evidence that damage to it, in the circumstances prevailing in late May 2000 when Ethiopia was trying to force Eritrea to agree to end the war, offered a definite advantage.³⁰ “The purpose of any military action must always be to influence the political will of the adversary.”³¹ The evidence does not – and need not – establish whether the damage to the power station was a factor in Eritrea’s decision to accept the Cease-Fire Agreement of June 18, 2000. The infliction of economic losses from attacks against military objectives is a lawful means of achieving a definite military advantage, and there can be few military advantages more evident than effective pressure to end an armed conflict that, each day, added to the number of both civilian and military casualties on both sides of the war. For these reasons, the Commission, by a majority, finds that, in the

²⁷ THE MANUAL OF THE LAW OF ARMED CONFLICT pp. 55 & 56 (U.K. Ministry of Defence, Oxford University Press 2004).

²⁸ Eritrea did not allege that civilian casualties resulted from the air strike, so questions of proportionality in relation to such casualties do not arise. Further, as explained above, the power plant was a military objective, and not a civilian object within the meaning of Article 52. Accordingly, the issue of proportionality likewise does not arise with respect to property damage there.

²⁹ See LESLIE GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT p. 191 (Manchester University Press, 2d ed. 2000); ERIC DAVID, PRINCIPES DE DROIT DES CONFLITS ARMÉS p. 272 (Bruylant, 3rd ed. 2002); and YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT pp. 96–97 (Cambridge University Press 2004).

³⁰ For a recent collection of State practice indicating that many economic installations and, indeed, the economic potential of an enemy State constitute military objectives, see VOL. II CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 23, at pp. 216–222.

³¹ FLECK, *supra* note 25, at p. 157.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

circumstances prevailing on May 28, 2000, the Hirgigo power station was a military objective, as defined in Article 52, paragraph 2, of Geneva Protocol I and that Ethiopia’s aerial bombardment of it was not unlawful. Consequently, this Claim is dismissed on the merits.

D. Award

In view of the foregoing, the Commission, by a majority (the President filing a separate opinion), determines as follows:

1. Jurisdiction

The Commission has jurisdiction over this Claim.

2. Findings of Liability for Violations of International Law

The Claim is dismissed on the merits.

VII. PREVENTING DISPLACED PERSONS FROM RETURNING (ERITREA’S CLAIM 14)

A. Introduction

122. This Claim was styled in the Statement of Claim as a claim for losses and injuries in the areas of Eritrea still occupied by Ethiopia, including from Ethiopia’s forcible prevention of displaced Eritreans returning to their homes, all allegedly in violation of Article 49 of Geneva Convention IV. However, it became clear in the further pleadings that the claim was directed at events that occurred after the conclusion of the Agreement in the Temporary Security Zone and in areas south of that zone that were determined by the Boundary Commission in 2002 to be on the Eritrean side of the border. The Respondent challenged the jurisdiction of the Commission on the grounds that the Statement of Claim, first, was too vague as to both time and place to permit a defense and, second, failed to state a legal or factual claim within the jurisdiction of the Commission. On the merits, the Respondent denied that the claim was valid.

B. Evidentiary Issues

1. Question of Proof Required

123. As discussed above, the Commission requires clear and convincing evidence in support of its findings.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

2. Evidence Presented

124. In support of Claim 14 (and Claim 21, for displacement of civilians), Eritrea presented 57 sworn witness declarations in Annex A to its Memorial, one of which was an expert statement. Eritrea also submitted photographs and satellite images in hard copy and electronic format, video footage, press reports, and reports from international organizations and NGOs. Ethiopia did not submit declarations or other defensive evidence. Neither Party presented witnesses at the hearing.

C. Jurisdiction

125. While the Statement of Claim was certainly lacking in precision, the Commission recognizes that a claim concerning mostly future events could scarcely be precise, and it is reluctant to dismiss the claim on that basis. Upon examination of the Claimant’s evidence, however, the Commission finds that most of it portrays the frustration of Eritreans’ efforts to return to their homes after the conflict was ended definitively on December 12, 2000. The Respondent asserted that the Commission has no jurisdiction over such claims, first, because they do not relate to events that occurred during the conflict, but rather to separate events that allegedly occurred following conclusion of the Agreement, and, second, because, as the Commission held in its Decision Number 1 of July 24, 2001, it has no jurisdiction over claims regarding the interpretation or implementation of the Agreement.

126. The Claimant responded that, since the original displacements occurred during the war, the claims asserted here are based on events “related to the conflict.” In this regard, the Claimant analogized the plight of these civilians to the situation of POWs who were still imprisoned after the conflict was terminated, and referred to the Commission’s Partial Award in Eritrea’s POW Claim finding that Ethiopia had an on-going duty after December 12, 2000, to facilitate the prompt repatriation of all POWs.³²

127. The Commission’s jurisdiction under Article 5, paragraph 1, of the Agreement is limited to claims “related to” the conflict between the Parties. In its Decision Number 1 of July 24, 2001, the Commission decided that it has jurisdiction over a limited body of claims for events occurring after December 2000 if a Party demonstrates that those events “arose as a result of the armed conflict ... or occurred in the course of measures to disengage contending forces or otherwise to end the *military* confrontation between the two sides” (emphasis added).³³ The Commission cannot agree that the present claims meet these requirements of Decision Number 1 or agree with the alleged relevance to the Commission’s Partial Awards relating to prisoners of war. The obligation to repatriate POWs is an explicit element of an integrated body of law, Geneva Convention III of 1949, brought into operation by the war. In specific, the duty to repatriate POWs “without delay after the cessation of

³² Partial Award in Eritrea’s POW Claim, *supra* note 1, para. 146.

³³ Commission Decision No. 1: The Commission’s Mandate/Temporal Scope of Jurisdiction, issued July 24, 2001.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

hostilities” is explicitly established by Articles 118 and 119 of Geneva Convention III. Accordingly, the Parties’ claims for the repatriation of POWs are “related to the conflict” within the scope of Decision Number 1.

128. Geneva Convention IV creates no corresponding duty with respect to the return of displaced civilians. The Commission appreciates the importance of the resettlement of displaced persons after the close of hostilities, but claims relating to these matters fall outside of the restricted temporal scope of its jurisdiction under the Agreement. Indeed, return or resettlement is likely to require considerable time and resources, extending long after the conflict’s end. In that connection, the Commission notes the reference in the Preamble of the Agreement to the commitment of the Organization of African Unity and the United Nations to “work closely with the international community to mobilize resources for the resettlement of displaced persons.” Consequently, any part of this Claim that is based on events subsequent to December 12, 2000 must be dismissed for lack of jurisdiction.

129. Decision Number 1 also established that the Commission does not have supervisory jurisdiction over interpretation or application of the Agreement. This includes the Parties’ obligation under Article 1, paragraph 2, of the Agreement to “respect and fully implement” their earlier Agreement of June 2000 on the Cessation of Hostilities. Insofar as this Claim is based upon conduct within the Temporary Security Zone, which was established pursuant to the June 2000 Agreement on Cessation of Hostilities, it likewise lies outside the Commission’s limited jurisdiction as defined by Decision Number 1.

D. The Merits

130. Article 49 of Geneva Convention IV relates to transfers of protected persons from occupied territory. Among other things, it prohibits “individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power ... regardless of their motive.” The few declarations submitted by Eritrea that may be based on events occurring during the conflict are neither clear as to timing nor sufficiently detailed to warrant a finding of violation of Article 49. To the extent that any part of this Claim may be within the jurisdiction of the Commission, it must be dismissed for lack of proof.

E. Award

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

1. Jurisdiction

All portions of this Claim based on events subsequent to December 12, 2000 and all portions based on acts within the Temporary Security Zone are dismissed for lack of jurisdiction.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

2. Findings of Liability for Violations of International Law

To the extent any part of this Claim involves actions prior to December 12, 2000 outside of the Temporary Security Zone, it is dismissed for failure of proof.

VIII. DISPLACEMENT OF CIVILIANS (ERITREA’S CLAIM 21)

A. Introduction

131. In the Statement of Claim for Claim 21, Eritrea generally sought relief for the injuries and losses caused by the internal displacement of its civilians as a result of shelling, aerial bombardment, explosions and “other conditions that made it impossible for them to remain.”³⁴ However, in its Memorial, Eritrea clearly identified two specific types of displacement for which it claimed. The first was indirect displacement, that is, displacement of civilians caused by their fear of alleged Ethiopian violations of international law in the conduct of military operations. The second was direct displacement, that is, displacement resulting from orders and forceful actions by Ethiopian armed forces designed to compel such displacement. These two types must be considered separately.

B. Evidentiary Issues

1. Question of Proof Required

132. As discussed above, the Commission requires clear and convincing evidence in support of its findings.

2. Evidence Presented

133. In support of Claim 21 (and Claim 14 for preventing displaced persons from returning), Eritrea presented 57 sworn witness declarations in Annex A to its Memorial, one of which was an expert statement. Eritrea also submitted photographs and satellite images in hard copy and electronic format, video footage, press reports, and reports from international organizations and NGOs. Ethiopia did not submit declarations or other defensive evidence. Neither Party presented witnesses at the hearing.

C. Indirect Displacement

134. It is undeniable that many thousands of Eritrean civilians were displaced as a result of Ethiopia’s offensives in 1999 and 2000, particularly on the Western and Central Fronts. The evidence suggested that, as in other wars, many Eritrean civilians fled their homes upon

³⁴ Eritrea’s Claim 21 for Internally Displaced Persons and Refugees, Statement of Claim, filed by Eritrea on December 12, 2001, para. C.2.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

learning that enemy armed forces were advancing in their direction. There was also evidence that in some instances those civilians had been advised or ordered to do so by local Eritrean authorities. Indeed, the internal displacement during the war of both Eritrean and Ethiopian civilians, many of them subsistence farmers and their families, produced tragic economic and social impacts upon the peoples of both countries and their governments. The Commission accordingly has considered this claim, like Claim 14, with great care.

135. However, the jurisdiction of the Commission is limited to claims based on violations of international law, and such displacements standing alone are not evidence of such violations. The Commission referred to this matter in its Partial Award in Ethiopia’s Central Front Claim, in terms that are equally valid for the present claim.

The flight of civilians from the perceived danger of hostilities is a common, and often tragic, occurrence in warfare, but it does not, as such, give rise to liability under international humanitarian law. While Protocol I prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population,” it implicitly recognizes that civilians may, nevertheless, be terrorized because of the hostilities. Moreover, Ethiopia does not allege or prove that Eritrea deliberately tried to cause the civilian inhabitants of the wereda to flee by terrorizing them, let alone that spreading terror was the primary purpose of its acts during the invasion and occupation.³⁵

136. In addition, Claim 21 poses significant questions of admissibility, because it appears to duplicate claims advanced by Eritrea in other cases, in particular the indirect displacement claims asserted in Eritrea’s Central and Western Front Claims. The Commission posed questions bearing on the admissibility of Claim 21 to the Parties before the April hearing, but received no responses. In the absence of further clarification from either Party, the Commission considers that it fully addressed Eritrea’s indirect displacement claims in its prior Partial Award in Eritrea’s Central Front Claims and that it has responded fully to Eritrea’s claims and evidence relevant to such events on the Western Front in the first part of this Partial Award. Consequently, the duplicative indirect displacement claims for the Central and Western Fronts are not admissible in Claim 21. Nevertheless, all evidence submitted in this Claim, including the written declarations in Annex A to the Memorial, remains in the record and may be referred to as appropriate in subsequent proceedings. Eritrea did not file a claim for the Eastern Front as such, so its indirect displacement claims related to that front are within the jurisdiction of the Commission and are admissible. However, they fail for lack of proof of a violation of international law.

³⁵ Partial Award in Ethiopia’s Central Front Claims, *supra* note 3, at para. 53.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

D. Direct Displacement

137. Eritrea also claims that, after Ethiopian armed forces entered Eritrean villages, they frequently ordered and forcibly compelled Eritrean residents to leave. Direct displacement claims are inadmissible to the extent they relate to places within the area administered by Ethiopia prior to the conflict, meaning south of the United Nations Mission in Ethiopia and Eritrea (“UNMEE”) line, because the Commission has already decided such claims in dealing with rural expellees in the Partial Award in Eritrea’s Civilians Claims. At the hearing, Eritrea conceded that its claims for certain of the 23 villages it named as sites of direct displacement fell within this category.

138. Direct displacement claims relating to areas north of the UNMEE line are within the Commission’s jurisdiction and are admissible. However, with respect to all incidents except those involving the village of Awgaro, discussed below, the minimal evidence submitted by Eritrea was neither clear nor convincing. The few witness declarations suffer from one or more defects: they do not provide any basis for the Commission to assess whether the alleged expulsions took place in the course of fighting for control of the village, whether there were military justifications for the actions allegedly causing the displacement, or whether the declarants fled voluntarily to avoid dangers created by the Ethiopian attack and impending occupation.

139. The one exception is with respect to the village of Awgaro, a village of some 600 families located several miles into Eritrea near the Gash River. The evidence of events in Awgaro presented a much more detailed and compelling picture than was provided for other locations. At least twelve declarants described in considerable and consistent detail what happened after the Ethiopian occupation of this undefended village, which had never been the target of a military attack and was fully intact when Ethiopian soldiers arrived in May 2000. The morning after the unresisted occupation, an Ethiopian officer ordered all residents to gather in the marketplace and told them that they must leave before nightfall and proceed directly to relocate themselves north of the Gash River. The evidence indicated that, as a result of that order and the threatened force behind it, the entire population of the village – some several thousand persons, from newborns to elderly – was displaced. The evidence also indicated that the villagers were permitted to take only the personal property they could carry, with some families permitted to use a single donkey. Several witnesses asserted that, later that day, they observed Ethiopian soldiers begin looting and burning homes in the village and confiscating the remaining animals. The Awgaro residents had to make their way, with minimal sustenance, to areas north of the Gash River, where many of them had to stay in the Adi Keshi IDP refugee camp for the remaining period of the conflict. Many declarants described finding Awgaro in ruins when they finally returned to it. Eritrea supported its witness testimony with, among other things, an NGO report of thousands of Eritreans being forcibly expelled in May 2000 from Awgaro and neighboring small towns. Overall, the evidence consistently indicated forced expulsion based solely on ethnicity.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

140. Ethiopia did not present rebuttal evidence. The reasons for the order to leave remain unclear. While the Respondent argued that the order may have been given for legitimate security reasons, it provided no proof of that defense. Ethiopia denied that Awgaro was occupied territory as that term is used in Geneva Convention IV, but essentially conceded that if it were occupied territory then the forced displacement of all the residents of Awgaro would constitute a violation of Article 49 of that Convention. As noted above, Article 49 significantly restricts (although it does not wholly preclude) the right of an occupant to force residents to move from their homes.

141. Although the evidence relevant to the nature and duration of Ethiopia’s occupation of Awgaro is quite limited, the Commission concludes, in particular from the uncontested arrival and presence of Ethiopian forces at the time of the evident expulsion of all resident families, that Awgaro was in occupied territory for purposes of Geneva Convention IV and that Ethiopia’s conduct there was subject to the strictures of Article 49. Consequently, absent any legitimate justification for the expulsion order, the Commission finds that the Awgaro incident was presumptively unlawful.

142. As troubling as the Awgaro incident is, the question remains whether the Commission should hold Ethiopia liable for it. Standing alone, it does not establish a pattern of systematic, frequent or pervasive direct displacements, which is the standard the Commission has generally applied in order to find liability. However, it will be recalled that the standard originally set by the Commission in its Partial Awards in the Parties’ POW Claims, and quoted in paragraph 78 above in discussing Western Front rape allegations, was to establish “liability for serious violations of the law by the Parties,” which are usually – but need not be – frequent or pervasive violations. The Commission considers the Awgaro incident such a serious incident, involving as it did the entire village population of some 600 families as victims, that it does, by itself, engage State responsibility. Consequently, the Commission holds Ethiopia liable for the unlawful direct displacement of the Eritrean residents of Awgaro.

E. Award

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

1. Jurisdiction

- a. The claims for indirect displacement are inadmissible in this Claim to the extent that they relate to the previously adjudicated Western Front or Central Front.
- b. The claims for indirect displacement that relate to the Eastern Front are admissible and within the jurisdiction of the Commission.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

2. Findings of Liability for Violations of International Law
 - a. All claims for indirect displacement relating to the Eastern Front are dismissed for failure of proof of violation of international law.
 - b. The Respondent is liable to the Claimant for the unlawful displacement of all the residents of Awgaro in violation of Article 49 of Geneva Convention IV.
 - c. All other claims presented in this Claim are dismissed for failure of proof.

[Rest of page purposely left blank.]

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

IX. COMBINED AWARD SECTIONS

A. **Award in Eritrea’s Claims 1, 3, 5 and 9–13: Western Front**

1. Jurisdiction

All claims asserted in these Western Front Claims are within the jurisdiction of the Commission.

2. Findings of Liability for Violations of International Law

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

- a. For permitting looting and burning of buildings and destruction of livestock in the town of Teseney during May and June 2000;
- b. For permitting looting and burning of houses and destruction of livestock in the village of Alighidir and the burning and detonation of the nearby cotton factory and its stored cotton during May and June 2000;
- c. For permitting looting and burning of structures and destruction of livestock in the town of Guluj during May and June 2000, Ethiopia is liable for 90% (ninety percent) of the total loss and damage to property in Guluj during that time;
- d. For permitting looting in the village of Talbadia during June 2000;
- e. For permitting looting in the village of Gergef during June 2000;
- f. For permitting looting and stripping of buildings and destruction of livestock in Omhajer from May 16, 2000 until the departure of the last Ethiopian forces in September 2000, Ethiopia is liable for 75% (seventy-five percent) of the total property damage in Omhajer during that time;
- g. For permitting breaking, entering and looting of houses, business establishments and government buildings in the town of Barentu during its occupation from May 18 to 26, 2000;
- h. For the destruction of the police station, the courthouse, the Gash-Setit Hotel and Conference Center, and a bakery in the town of Barentu during its occupation;

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

- i. For permitting looting of buildings and destruction of the police station in the town of Tokombia, and the destruction of the nearby Rothman tobacco plant, during its occupation in May 2000;
- j. For permitting looting of buildings in Molki Sub-Zoba on May 15 to 16, 2000; and
- k. For failure to take effective measures to prevent the rape of women in the towns of Barentu and Teseney.
- l. All other claims presented in the Western Front Claims are dismissed.

B. Award in Eritrea’s Claim 26: Unlawful Aerial Bombardment

1. Jurisdiction
 - a. Claims of unlawful aerial bombardment that were timely filed by the Claimant in other Claims submitted to the Commission that have not previously been decided by the Commission will be admitted in this Claim to the exclusion of the Claims in which they were filed.
 - b. This claim, as thus expanded and restated by the Claimant as a claim that the Respondent conducted an unlawful, indiscriminate and disproportionate bombing campaign, is within the jurisdiction of the Commission.
2. Findings of Liability for Violations of International Law
 - a. The provisions of Geneva Protocol I relevant to this Claim, which are found in Articles 48, 51, 52, 57 and 58 of that Protocol, expressed customary international humanitarian law during the 1998–2000 armed conflict between the Parties.
 - b. The claim that Ethiopia conducted an indiscriminate and disproportionate bombing campaign in violation of the relevant provisions of customary international humanitarian law fails for lack of proof.
 - c. The provisions of Article 54 of Geneva Protocol I that prohibit attack against drinking water installations and supplies that are indispensable to the survival of the civilian population for the specific purpose of denying them for their sustenance value to the adverse Party had become customary international humanitarian law by 1999.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

- d. The aerial bombing attacks by the Respondent in February 1999 and June 2000 against the Harsile water reservoir were in violation of customary international humanitarian law.
- e. As no damage to the Harsile water reservoir has been shown, the finding of violation of law, by itself, shall represent satisfaction to the Claimant.
- f. All other claims presented in this Claim are dismissed.

C. Award in Eritrea’s Claim 25: Aerial Bombardment of Hirgigo Power Station

1. Jurisdiction

The Commission has jurisdiction over this Claim.

2. Findings of Liability for Violations of International Law

The Claim is dismissed on the merits.

D. Award in Eritrea’s Claim 14: Preventing Displaced Persons from Returning

1. Jurisdiction

All portions of this Claim based on events subsequent to December 12, 2000 and all portions based on acts within the Temporary Security Zone are dismissed for lack of jurisdiction.

2. Findings of Liability for Violations of International Law

To the extent any part of this Claim involves actions prior to December 12, 2000 outside of the Temporary Security Zone, it is dismissed for failure of proof.

E. Award in Eritrea’s Claim 21: Displacement of Civilians

1. Jurisdiction

- a. The claims for indirect displacement are inadmissible in this Claim to the extent that they relate to the previously adjudicated Western Front or Central Front.

PARTIAL AWARD – WESTERN FRONT,
AERIAL BOMBARDMENT AND RELATED CLAIMS
ERITREA’S CLAIMS 1, 3, 5, 9–13, 14, 21, 25 & 26

- b. The claims for indirect displacement that relate to the Eastern Front are admissible and within the jurisdiction of the Commission.

- 2. Findings of Liability for Violations of International Law
 - a. All claims for indirect displacement relating to the Eastern Front are dismissed for failure of proof of violation of international law.

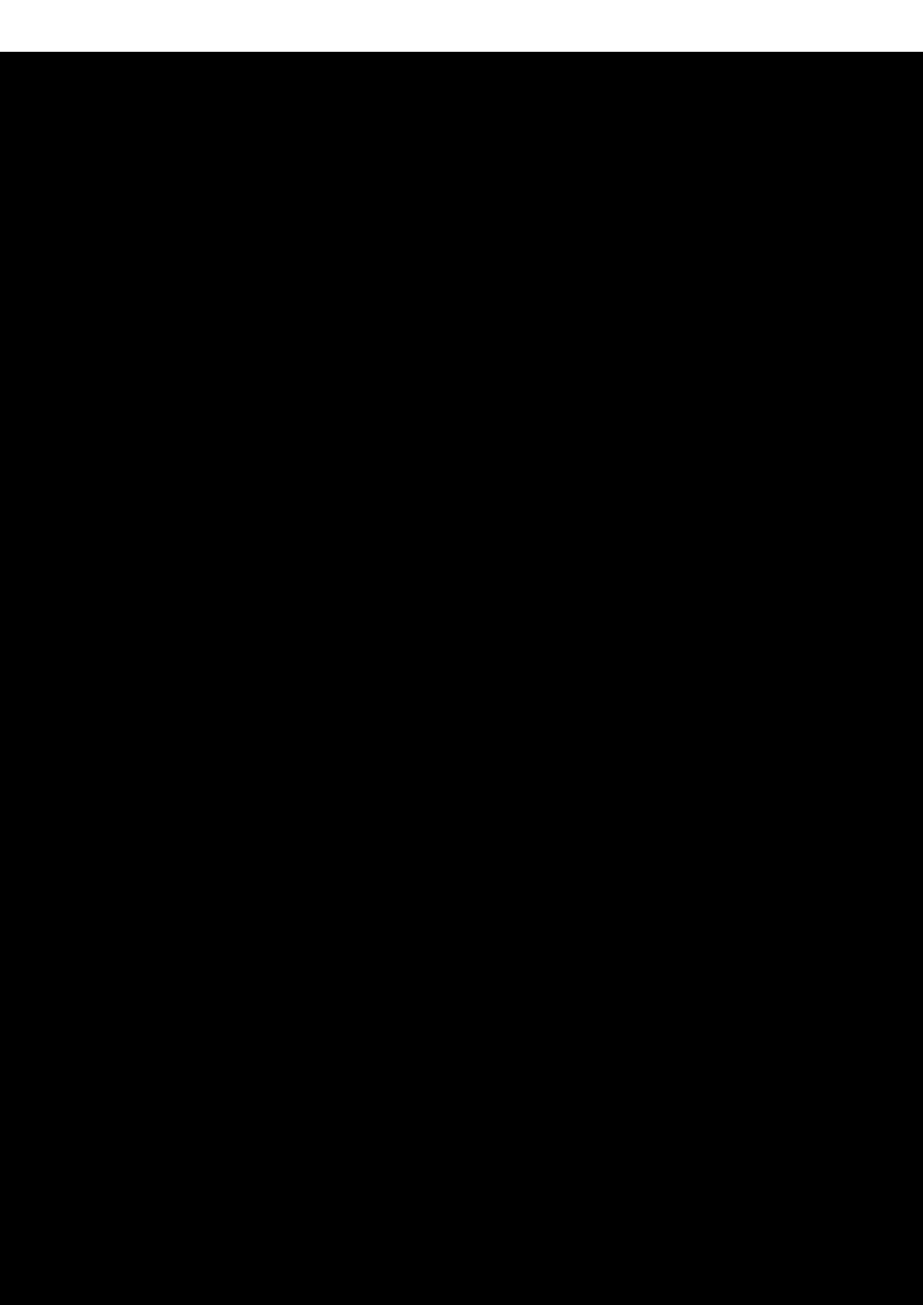
 - b. The Respondent is liable to the Claimant for the unlawful displacement of all the residents of Awgaro in violation of Article 49 of Geneva Convention IV.

 - c. All other claims presented in this Claim are dismissed for failure of proof.

ATTACHMENT:

Separate opinion of the President, Hans van Houtte, relating to Claim 25

[Remainder of page purposely left blank.]



AERIAL BOMBARDMENT OF HIRGIGO POWER STATION
(ERITREA'S CLAIM 25)

SEPARATE OPINION

1. Customary international humanitarian law, as formulated in Article 52, paragraph 2, of Geneva Protocol I, limits military objectives “to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

2. This restrictive definition requires, cumulatively, (1) that the objective makes an effective contribution to military action; and (2) that its destruction, capture or neutralization provides a definite military advantage.

3. As regards the first condition, the objective's contribution to the military action must be “effective” in the actual situation, not *in abstracto*. Otherwise, every object potentially of use to enemy troops could become a military objective.¹ Similarly, more is required than a mere contribution to the “war-fighting capability” of the enemy.²

4. As regards the second condition, a reference to the hypothetical or speculative effect of the destruction of the military objective on the conduct of the war is, in my view, not sufficient. A demonstration of the “*definite* military advantage” of the attack is required.³ The infliction of economic loss or the undermining of morale through the destruction of a civilian object, or the probability that the destruction may bring the decision-makers to the negotiation table, do not make that object a military objective.⁴

5. An object is entitled to the full protection afforded to civilian objects if these two conditions have not been fulfilled. Indeed, under the principle of customary law as laid down in Article 52, paragraph 3, “[i]n case of doubt whether an object which is normally dedicated

¹ MARCO SASSÒLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? pp. 161–162 (ICRC 1999).

² See SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA p. 161 (Cambridge 1995). See also Yoram Dinstein, *Legitimate Military Objectives under the Current Jus in Bello*, 31 ISRAEL YEARBOOK ON HUMAN RIGHTS p. 7 (2001).

³ ICRC Commentary to the Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, para. 2024, *available at* <http://www.icrc.org> [hereinafter ICRC Commentary]; MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS p. 324 (Martinus Nijhoff 1982) [hereinafter BOTHE ET AL.].

⁴ ICRC Commentary, *supra* note 3, at para. 2017; Dinstein, *supra* note 2, at pp. 1 & 5; THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS p. 442 (Dieter Fleck ed., Oxford University Press 1995) [hereinafter FLECK]; Waldemar A. Solf, *Article 52*, in BOTHE ET AL., *supra* note 3, at p. 326; H. DeSaussure, *Remarks*, 2 AM. U. J. INT'L L. & POL. pp. 513–514 (1987); FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA, 39 I.L.M. p. 1257 (2000), at para. 55 [hereinafter ICTY Report]; Michael Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY*, 12(3) E.J.I.L. p. 531 (2001) [hereinafter Bothe]; ERIC DAVID, PRINCIPES DE DROIT DES CONFLITS ARMÉS p. 273 (Bruylant, 3rd ed. 2002) [hereinafter DAVID].

AERIAL BOMBARDMENT OF HIRGIGO POWER STATION
(ERITREA'S CLAIM 25)

SEPARATE OPINION

to civilian purposes ... is being used to make an effective contribution to military action, it shall be presumed not to be so used.”

6. The burden of proof lies upon the party that must justify the military action.⁵

7. The Hircigo power station, which was intended to become a principal supplier of electricity in Eritrea, unquestionably had a civilian purpose. It could have been a military objective if it was established that it made or could make an effective contribution to military action, or was or could be of fundamental importance for the conduct of war.⁶ A determination that the Hircigo power station was a military objective must sufficiently specify the basis for this assumption.⁷

8. Ethiopia has declared – and Eritrea has not denied – that stockpiles of military hardware and weapons were stored at the Massawa port.⁸ Consequently, the Massawa port was undoubtedly a military objective. Ethiopia did not, however, in my opinion, sufficiently specify the extent to which Hircigo power station, by its nature or purpose, made or would make an effective contribution to the military action or that its destruction offered a definite military advantage. Ethiopia's general statement that “cutting off the power to Massawa would have presented Ethiopia with a clear military advantage of interrupting power to the military offices in Massawa”⁹ is insufficient. Moreover, the presence of anti-aircraft missiles in the vicinity of the Hircigo station does not indicate in itself that the station had military significance, especially as missiles were already located in the area long before the construction of the station had started.¹⁰

9. Furthermore, military action must be proportional, i.e. the military advantage must outweigh the damage to civilians and civilian objects.¹¹ This basic requirement of proportionality is expressed in Article 57 of Geneva Protocol I, which has already been applied by the Commission as customary international law:

With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

⁵ See, e.g., ICRC Commentary, *supra* note 3, at para. 2034; DAVID, *supra* note 4, at p. 274; FLECK, *supra* note 4, at p. 164.

⁶ See, e.g., ICTY Report, *supra* note 4, paras. 38 & 39; FLECK, *supra* note 4, at pp. 158 & 161.

⁷ Bothe, *supra* note 4, at p. 535.

⁸ Ethiopia's Counter Memorial to Eritrea's Claim 25, filed by Ethiopia on January 17, 2005, at p. 24.

⁹ *Id.* at p. 24.

¹⁰ Transcript of the Eritrea-Ethiopia Claims Commission Hearings of April 2005, Peace Palace, The Hague, at p. 378 (Apr. 7, 2005).

¹¹ See, e.g., ICRC Commentary, *supra* note 3, at paras. 2023 & 2028; DAVID, *supra* note 4, at p. 273; YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* p. 94 (Cambridge University Press 2004); Horace B. Robertson, Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, in *THE LAW OF MILITARY OPERATIONS* p. 211 (Naval War College Press 1998).

AERIAL BOMBARDMENT OF HIRGIGO POWER STATION
(ERITREA'S CLAIM 25)

SEPARATE OPINION

- (i) ...
- (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, ... damage to civilian objects;
- (iii) refrain from deciding to launch any attack which may be expected to cause ... damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

10. Ethiopia stated to the Commission that it did not plan the bombing of the Hircigo station on May 28, 2000. It follows, therefore, that Ethiopia did not investigate beforehand whether the concrete and direct military advantage of this bombing outweighed the damage to civil society, as Article 57 requires. International law does not permit bombing first and justification later.¹²

11. In assessing proportionality, it is relevant to consider that Ethiopia was aware at the time of the attack that the power station was not yet fully operational. Furthermore, the fact that neither the port of Massawa itself nor the Grar power station (which effectively supplied power to the Massawa port) were ever bombed is also relevant. Indeed, if different means are available to block harbour activities, the method that is most effective and that causes the least damage to civilians must be chosen.¹³ Finally, the expected benefits of the Hircigo power station to civilians and the expense and time required to repair the damage caused by the attack should also be taken into account. Considering these elements, I find the potential military advantage caused by the bombing to be disproportionate to the damage to civilian objects and the civilian population.



Hans van Houtte

¹² DAVID, *supra* note 4, at p. 274.

¹³ LESLIE GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* p. 193 (Manchester University Press, 2d ed. 2000).