

CIVIL LIABILITY FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW: THE JURISPRUDENCE OF THE ERITREA-ETHIOPIA CLAIMS COMMISSION IN THE HAGUE

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I. INTRODUCTION

Violations of international humanitarian law¹ are compensable

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¹ The term “international humanitarian law” or *jus in bello* represents in its current usage all rules of international law designed to govern the treatment of human persons, civilian or military, active, inactive, sick or wounded in armed conflict. Hans-Peter Gasser writes that International Humanitarian law is not “a cohesive body of law, but a category of separate legal proscriptions.” M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 441 (1996) (citing Hans-Peter Gasser, *International Humanitarian Law*, in HANS HAUG, HUMANITY FOR ALL 1, 3 (1993)). Most rules of current importance are contained in the Four Geneva Conventions of 1949: Geneva Convention I for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field arts. 31-83, *entered into force* Oct. 21, 1950, 75 U.N.T.S. 1950; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 85-133, *entered into force* Oct. 21, 1950, 75 U.N.T.S. 1950; Geneva Convention III Relevant to the Treatment of Prisoners of War arts. 135-285, *entered into force* Oct. 21, 1950, 75 U.N.T.S. 1950; Geneva Convention IV Relevant to the Protection of Civilian Persons in Time of War arts. 287-417, *entered into force* Oct. 21, 1950, 75 U.N.T.S. 1950; and the two Additional Protocols of 1977: Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 3-608, *entered into force* Dec. 7, 1978, 1125 U.N.T.S. 1979 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict 609-99, *entered into force* Dec. 7, 1978, 1125 U.N.T.S. 1979. This also comprises a set of rules formerly known as the Laws of War contained in the Hague Conventions of 1907: Hague Convention IV Respecting the Laws and Customs of War on Land, *entered into force* Jan. 26, 1910, *reprinted in* ADAM ROBERTS & RICHARD GUELFFEE, DOCUMENTS IN THE LAWS OF WAR 67-84 (3d ed. 2000) [hereinafter Hague Convention IV]; Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, *entered into force* Jan. 26, 1910, *reprinted in* ADAM ROBERTS & RICHARD GUELFFEE, DOCUMENTS IN THE LAWS OF WAR 87-94 (3d ed. 2000); Hague Convention VII Relating to the Conversion of Merchant Ships into Warships, *entered into force* Jan. 26, 1910, *reprinted in* ADAM ROBERTS & RICHARD GUELFFEE, DOCUMENTS IN THE LAWS OF WAR 97-104 (3d ed. 2000); Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines, *entered into force* Jan. 26, 1910, *reprinted in* ADAM ROBERTS & RICHARD GUELFFEE, DOCUMENTS IN THE LAWS OF WAR 105-10 (3d ed. 2000); Hague Convention IX Concerning Bombardment by Naval Forces in Time of War, *entered into force* Jan. 26, 1910, *reprinted in*

by a state causing the violations.² The roots of this obligation can be traced to Article 3 of Hague Convention IV, which states that a party to the conflict “which violates the provisions of [international humanitarian law] shall . . . be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”³ A similar rule is also contained in Protocol I Additional to the 1949 Geneva Conventions.⁴

In practice, the enforcement of this important provision of international humanitarian law has remained a matter of rarity, particularly in terms of civil—rather than criminal—liability.⁵ However, a

ADAM ROBERTS & RICHARD GUELFFEE, DOCUMENTS IN THE LAWS OF WAR 112-17 (3d ed. 2000); 1907 Hague Convention XI Relevant to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, *entered into force* Jan. 26, 1910, *reprinted in* ADAM ROBERTS & RICHARD GUELFFEE, DOCUMENTS IN THE LAWS OF WAR 121-25 (3d ed. 2000); Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War, *entered into force* Jan. 26, 1910, *reprinted in* ADAM ROBERTS & RICHARD GUELFFEE, DOCUMENTS IN THE LAWS OF WAR 127-37 (3d ed. 2000). More recent instruments include the Inhumane Weapons Convention of 1980: U.N. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects arts. 137-255, *entered into force* Dec. 2, 1983, 1342 U.N.T.S. 1983; and related norms of customary international law. This set of rules is distinct from a body of rules governing the legitimacy of the resort to force, often referred to as the *jus ad bellum*, which is essentially based on Article 2 paragraph 4 and Chapter VII of the United Nations Charter. *See* U.N. Charter ch. VII, art. 2, ¶ 4. *See generally* INTERNATIONAL COMMITTEE OF THE RED CROSS, BASIC RULES OF THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS (1983); FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW (Int'l Comm. of the Red Cross 2001) (1987); George Aldrich, *The Law of War on Land*, 94 AM. J. INT'L L. 42-63 (2000).

² The closest philosophical underpinning of this obligation can be linked to the early contributions of Hugo Grotius, who wrote that “restitution is due, from authors of the war, for all evils inflicted: and for anything unusual which they have done, or not prevented when they could.” HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, Vol. II, 719 (Francis W. Kelsey trans., Oxford Univ. Press 1925) (1646).

³ Hague Convention IV, *supra* note 1, art. 3.

⁴ Protocol I, *supra* note 1, art. 91.

⁵ *See* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 542-543 (Dieter Fleck ed., 1995). Traditionally, enforcement methods include retaliation, reprisals, and self defense. Measures taken under these headings include demand for compensation and punishment of individuals for crimes associated with violations of law. *Id.* at 518. For a discussion of these and other methods of enforcement, *see generally id.* at 517-549. Investigations of crimes and criminal prosecutions have been the most preferred and frequent methods of enforcement of violations of international humanitarian law. For example, since 1919, there have been five international investigative commissions (the 1919 Commission on the Responsibilities of the Authors of the War and Enforcement of Penalties, the 1943 United Nations War Crimes Commission, the 1946 Far Eastern Commission, the 1992 Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate War Crimes and Other Violations of International Humanitarian Law in the Former Yugoslavia, and the 1994 Independent Commission of Experts Established Pursuant to Security Council Resolution 935

recent exception is the Eritrea-Ethiopia Claims Commission in The Hague (the “Claims Commission” or the “Commission”). The Claims Commission was established pursuant to a peace agreement signed by Eritrea and Ethiopia in Algiers, Algeria, on December 12, 2000, ending a devastating war fought between the two countries from May 1998 to December 2000.⁶

The Commission was charged with the duty of deciding, through binding arbitration, all claims by one party or citizens of that party against the other party for loss, damage, or injury resulting from violations of international law (mainly violations of international humanitarian law that occurred during the war).⁷ The Commission

(1994) to Investigate Grave Violations of International Humanitarian Law in the Territory of Rwanda); four *ad hoc* international criminal tribunals (the 1945 International Military Tribunal to Prosecute the Major War Criminals of the European Theater, the 1946 International Military Tribunal to Prosecute the Major War Criminals of the Far East, the 1993 International Criminal Tribunal for the Former Yugoslavia, and the 1994 International Criminal Tribunal for Rwanda); and three prosecutions mandated internationally (the 1921-23 Prosecutions by the German Supreme Court Pursuant to Allied Requests Based on the Treaty of Versailles, the 1946-1955 Prosecutions by the Four Major Allies in the European Theater Pursuant to Control Council Law No. 10 (CCL 10), and the 1946-51 Military Prosecutions by Allied Powers in the Far East Pursuant to Directives of the 1946 Far Eastern Commission). See M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-five Years: The Need to Establish a Permanent Criminal Court*, 10 HARV. HUM. RTS. J. 11, 13 (1997). For a comprehensive treatment of civil liability as an alternative to criminal prosecutions, see generally John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1 (1999).

⁶ Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea art. 5, Dec. 12, 2000, 40 I.L.M. 260 (2001), available at http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited June 15, 2007) [hereinafter Algiers Agreement]. See *infra* Section II.A. (briefly discussing the genesis of the conflict).

⁷ The Algiers Agreement states that:

Consistent with the Framework Agreement, in which the parties commit themselves to addressing the negative socio-economic impact of the crisis on the civilian population, including the impact on those persons who have been deported, a neutral Claims Commission shall be established. The mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law. The Commission shall not hear claims arising from the cost of military operations, preparing for military operations, or the use of force, except to the extent that such claims involve violations of international humanitarian law.

Algiers Agreement, *supra* note 6, art. 5 ¶ 1.

commenced its work in March 2001⁸ and decided to consider the claims of the parties in two different phases of the proceedings: a liability phase and a damages phase. The Commission rendered the final decisions of the liability phase on December 19, 2005. The damages phase is still being conducted, although no decisions have been rendered by the Commission to date as part of that phase. Thus, this Article exclusively focuses on the Commission's work as it relates to the completed liability phase.

Following this introduction, the second section assesses the Commission's overall adjudicative procedures and efficiency with a view to discerning aspects that can be used as models for future claims litigations involving violations of international humanitarian law. In this light, a comparison is made with the experiences of the Iran-United States Claims Tribunal (IUSCT)⁹ and the United Nations Compensation Commission (UNCC).¹⁰ The third section is devoted to a description and

⁸ Hans Van Houtte, *Progress Report of the Secretary General on Ethiopia and Eritrea*, Annex II, ¶ 3, U.N. Doc. S/2001/608 (June 19, 2001), available at <http://pca-cpa.org/PDF/UN%20Report%2019-06-01.pdf>.

⁹ The Iran-United States Claims Tribunal was established by the Claims Settlement Declaration agreed to by Iran and the United States to settle claims of nationals of the United States against Iran and claims of nationals of Iran against the United States. Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran of 19 January 1981, reprinted in 1 IRAN-U.S. CL. TRIB. REP 9 art. II ¶ 1 (Cambridge Univ. Press 1993) (1983) [hereinafter Claims Settlement Declaration]. The Claims Settlement Declaration was one of many instruments agreed to between Iran and the United States following lengthy negotiations relating to the November 1979 seizure of the U.S. Embassy in Tehran (commonly known as the "hostage crisis") and related economic measures. See generally GEORGE H. ALDRICH, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 1-43 (1996) (discussing the background and formation of the Iran-United States Claims Tribunal); WAYNE MAPP, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL, THE FIRST TEN YEARS 1981-1991, AN ASSESSMENT OF THE TRIBUNAL'S JURISPRUDENCE AND ITS CONTRIBUTIONS TO INTERNATIONAL ARBITRATION* 1-49 (1993) (discussing the background and the formation of the Iran-United States Claims Tribunal). See also, e.g., Declaration of the Government of the Democratic and Popular Republic of Algeria of 19 January 1981, reprinted in 1 IRAN-U.S. CL. TRIB. REP. 3 (Cambridge Univ. Press 1993) (1983) [hereinafter General Declaration].

¹⁰ The UNCC was established by the United Nations Security Council to adjudicate claims arising out of the Iraqi invasion of Kuwait. S.C. Res. 687, ¶ 18, U.N. Doc S/Res/687 (Apr. 8, 1991). The Security Council determined that Iraq "is liable, under international law, for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait." *Id.* ¶ 16. Describing the nature of the UNCC, the Secretary General of the United Nations said:

The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving

analysis of the Commission's jurisdiction, the laws it applied, the evidentiary standards it adopted, and the remedies it granted. By so doing, this section addresses the Commission's contributions to the jurisprudence of a very important but rare aspect of international humanitarian law enforcement, namely, civil liability. The fourth and final section summarizes the Commission's contributions to the development of enforcement of international humanitarian law, particularly in the civil liability context.

II. STRUCTURE AND ADJUDICATIVE SCHEME: A COMPARATIVE ANALYSIS

Although unique in many respects, the Eritrea-Ethiopia Claims Commission shares some commonality with the IUSCT and the UNCC. Indeed, it can fairly be said that the pre-existence of these models of international claims adjudication greatly contributed to the very conception of the Claims Commission, and their experience has remarkably assisted in streamlining the Claims Commission's proceedings. Nonetheless, the Commission has had to struggle with novel issues given the unique set of circumstances that necessitated its own creation. This section addresses the structure and adjudicative schemes of these respective tribunals and offers a comparative analysis.

A. CIRCUMSTANCES GIVING RISE TO THE CLAIMS AND THE CREATION OF THE COMMISSION: THE GENESIS OF THE CONFLICT

From 1889 to 1941 Eritrea was an Italian colony.¹¹ From 1941 to 1952 Eritrea was a protectorate of Great Britain.¹² In 1952 it was federated with Ethiopia.¹³ Thereafter, elements within Eritrea, including the Eritrean People's Liberation Front (EPLF), the precursor of the

disputed claims; it is only in this last respect that a quasi-judicial function may be involved.

The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991)*, ¶ 20, Distr. S/22559 (May 2, 1991).

¹¹ Eritrea-Ethiopia Claims Comm'n, *Civilians Claims, Eritrea's Claims* 15, 16, 23 & 27-32, ¶ 6 (Perm. Ct. Arb. 2004) [hereinafter *EECC*] (all *EECC Claims available at* http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited June 15, 2007)).

¹² *Id.*

¹³ *Id.*

People's Front for Democracy and Justice, the current ruling party in Eritrea, soon commenced what would become a thirty-year movement for independence.¹⁴ Relations between the province of Eritrea and the Ethiopian government further worsened after the Marxist regime known as the "Derg" came to power in Ethiopia in 1974.¹⁵

In 1991 a joint military operation of the EPLF and the Ethiopian People's Revolutionary Democratic Front (EPRDF), which later spearheaded the political change in Ethiopia, overthrew the Derg, and the EPRDF and other smaller resistance groups constituted a new government in Ethiopia.¹⁶ Meanwhile, Eritrea became formally independent in 1993 following a referendum.¹⁷ Although some economic and boundary issues would come to present challenges to relations between the countries over the following years, relations between Ethiopia and Eritrea were generally viewed as good over the next several years.¹⁸

In May 1998, however, an armed conflict commenced between Eritrea and Ethiopia in the western part of their common boundary.¹⁹ Within approximately one month, fighting had spread to encompass almost the entire border between the two countries,²⁰ including air attacks that would leave dozens of civilians killed or wounded.²¹ The fighting soon subsided, however, due in part to the advent of the rainy season, resulting in a World War I-style trench-based standoff.²² Hostilities picked up again in February 1999 and again in May 2000 when Ethiopia undertook a comprehensive counter-offensive that resulted in the retreat of Eritrean forces from territories that had been administered by Ethiopia

¹⁴ See HAROLD G. MARCUS, A HISTORY OF ETHIOPIA 174-76, 178, 194-95, 246 (2002).

¹⁵ *Id.* at 187-89, 199.

¹⁶ *Id.* at 221.

¹⁷ EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 7 (2004). See MARCUS, *supra* note 14, at 238-39, 246-53.

¹⁸ See MARCUS, *supra* note 14, at 246-53.

¹⁹ The circumstances leading up to the commencement of the armed conflict have been a subject of immense controversy. According to the Claims Commission, the conflict started when Eritrean forces attacked Ethiopian administered territory in the western region of the border between the two countries. See, e.g., EECC, *Jus Ad Bellum*, Ethiopia's Claims 1-8, ¶¶ 14, 16 (2004).

²⁰ See, e.g., EECC, Central Front, Ethiopia's Claim 2, ¶¶ 24, 26 (2004).

²¹ EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶ 96 (2005); EECC, Central Front, Ethiopia's Claims 2, ¶¶ 32, 101 (2004).

²² EECC, Central Front, Ethiopia's Claims 2, ¶ 26 (2004); EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶¶ 30, 32 (2004). See MARCUS, *supra* note 14, at 254.

prior to the commencement of the conflict.²³ A cessation of hostilities agreement was signed between the two countries in June 2000,²⁴ and a comprehensive agreement was signed on December 12, 2000, bringing a formal end to the conflict.²⁵ The Claims Commission was established as an important part of the Algiers Agreement to address matters of compensation.²⁶

B. STRUCTURE, TIMETABLE, AND PROCEEDINGS OF THE COMMISSION

Structurally, the Eritrea-Ethiopia Claims Commission is similar in many respects to the IUSCT. The Commission is comprised of five members.²⁷ Each party nominated two commissioners and a president was mutually elected by the party-appointed commissioners. Similarly, the Iran-United States Claims Tribunal is composed of nine commissioners, with each party nominating a third of the commissioners and the remaining third mutually selected by the seated commissioners.²⁸ The Permanent Court of Arbitration located at the Peace Palace in The Hague serves as the registry for both the IUSCT and the Eritrea-Ethiopia Claims Commission. Given the general complexity of the situation that the Iran-United States Claims Tribunal had to resolve and the longevity of its operation, there were several challenges of commissioners on different grounds and resignations.²⁹ In the six years of its operation, the Eritrea-Ethiopia Claims Commission has had only one commissioner resign, and this occurred within months of the commissioner's initial appointment.³⁰

²³ EECC, Western and Eastern Fronts, Ethiopia's Claims 1 & 3, ¶ 27 (2005); EECC, Central Front, Ethiopia's Claim 2, ¶ 26 (2004).

²⁴ Agreement on Cessation of Hostilities Between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia (June 18, 2000) *available at* <http://www.pca-cpa.org/ENGLISH/RPC/EEBC/E-E%20Agreement.html> [hereinafter Cessation of Hostilities Agreement].

²⁵ Algiers Agreement, *supra* note 6, art. 1.

²⁶ *Id.* art. 5.

²⁷ *Id.* art. 5 ¶ 2.

²⁸ Claims Settlement Declaration, *supra* note 9, art. III ¶ 1e. Two commissioners were appointed by each side (Commissioners George H. Aldrich and James C.N. Paul were appointed by Ethiopia, and Commissioners John R. Crook and Lucy Reed were appointed by Eritrea), and a president (Professor Hans Van Houtte) was chosen by the party-appointed commissioners. Van Houtte, *supra* note 8, Annex II ¶ 2.

²⁹ *See generally* Aldrich, *supra* note 1, at 6-31 (providing a general discussion of such instances).

³⁰ Van Houtte, *supra* note 8, Annex II ¶ 2.

While the Iran-United States Claims Tribunal and the Eritrea-Ethiopia Claims Commissions have adopted an arbitral model, the UNCC adopted a unique method that is neither arbitral nor pure reparation, i.e., it is a quasi-reparation model.³¹ This approach was adopted because the issue of liability had already been determined by the Security Council, and the primary task was merely the evaluation of losses. The UNCC is also structurally different from the Iran-United States Claims Tribunal and the Eritrea-Ethiopia Claims Commission. The UNCC is composed of three bodies, namely the Governing Council, the Commissioners, and the Secretariat.³² The Governing Council oversees the works of the Commissioners, sets forth guidelines and approves compensation recommended by the Commissioners.³³ The Commissioners adjudicate the claims, and the Secretariat services the Governing Council and the panel of commissioners by providing administrative, legal, and technical support.³⁴

The Iran-United States Claims Tribunal's rules of procedure are primarily based on the United Nations Commission on International Trade Law (UNCITRAL) rules.³⁵ Because most of the claims have been of a commercial nature, UNCITRAL rules have been compatible.³⁶ The Eritrea-Ethiopia Claims Commission, on the other hand, adopted its own rules of procedure and evidence based on the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States ("PCA Rules").³⁷ Although the PCA Rules are themselves based on the UNCITRAL rules, they are modified to "reflect the public international law character of disputes between States, and diplomatic practice appropriate to such disputes."³⁸

³¹ See *supra* note 10. Reparation is traditionally understood as a demand by the victor for a lump sum payment of compensate from the defeated without due regard to specific violations of international law. See HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 5, § 1214.

³² See The UNCC at a Glance, <http://www2.unog.ch/uncc/ata glance.htm> (last visited June 15, 2007).

³³ *Id.*

³⁴ *Id.*

³⁵ Claims Settlement Declaration, *supra* note 9, art. III ¶ 2.

³⁶ See MAPP, *supra* note 9, at 42; see generally Aldrich, *supra* note 1, at 412-58 (providing a comprehensive discussion of procedural matters of the Iran-United States Claims Tribunal).

³⁷ EECC, Rules of Procedure, art. 1 ¶ 1, available at <http://www.pca-cpa.org/ENGLISH/RPC/EECC/Rules%20of%20Procedure.PDF> [hereinafter EECC Rules of Procedure].

³⁸ See Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Sates, Introduction, available at <http://www.pca-cpa.org/ENGLISH/BD/BDEN/2STATENG.pdf>. The PCA Rules are made even more compatible to inter-state disputes because they provide for

The Commission's rules are divided into three chapters.³⁹ The first chapter, which applies to all proceedings, contains, *inter alia*, provisions on (1) the appointment, challenge, and replacement of arbitrators; (2) arbitral proceedings, including detailed rules on the conduct of the hearings; and (3) issues of evidence and applicable law.⁴⁰ The second chapter relates exclusively to claims to be adjudicated individually. It provides procedures for filing claims and defenses.⁴¹ The third chapter addresses mass claims procedures and sets forth the different subject-matter categories and sub-categories of the mass claims.⁴²

Another important similarity between the two tribunals is the finality of the awards. Although most arbitral awards are binding, but not necessarily final, the decisions and awards of both the Iran-United States Claims Tribunal and the Eritrea-Ethiopia Claims Commission are final and binding without any possibility of appeal on any substantive or procedural grounds.⁴³ As such, the responsibility of the arbitrators has been considerable. In this regard the Iran-United States Claims Tribunal and Eritrea Claims Commission, though they follow the arbitral model, are like the quasi-reparations model of the UNCC, the Governing Council decisions of which are final and binding without any possibility of appeal.

The Commission began operation in March 2001 and completed the liability phase in December 2005.⁴⁴ Thus, the process of determining

enormous flexibility and autonomy to the parties with respect to, among other things, choice of arbiters and also provide for the UN Secretary General to designate an appointing authority in case the parties fail to agree on a particular one. *See id.*

³⁹ *See* EECC Rules of Procedure, *supra* note 37.

⁴⁰ *See id.* These rules contain no notable peculiarities. However, owing to the nature of the proceedings and sensitivities of some types of evidence, the Commission's rule on adverse inference for failure to produce evidence played an important role in the various proceedings. This rule states that "[a]t any time, the Commission may request the parties to produce documents, exhibits or other evidence within a specified time. The Commission shall take note of any failure to do so, as well as any reason given for such failure. Where circumstances warrant, the Commission may draw adverse inferences from any failure by a party to produce evidence." *Id.* art. 14 ¶ 4.

⁴¹ EECC Rules of Procedure, *supra* note 37, arts. 23-29.

⁴² *Id.* arts. 30-33.

⁴³ *See* Claims Settlement Declaration, *supra* note 9, art. VI ¶ 1 ("All decisions and awards of the Tribunal shall be final and binding."); *see also* Algiers Agreement, *supra* note 6, art. 5 ¶ 17 ("Decisions and awards of the commission shall be final and binding. The parties agree to honor all decisions and to pay any monetary awards rendered against them promptly.").

⁴⁴ *See* Eritrea-Ethiopia Claims Commission, http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited June 15, 2007) [hereinafter Summary Report]; *see also* Algiers Agreement, *supra*

liability took nearly five years. During this time, the Commission considered claims under several different categories and sub-categories⁴⁵ and rendered fifteen different awards.⁴⁶

All of the Commission's hearings were held in camera following extensive filings by the parties.⁴⁷ The first round of filings involved Statements of Claims filed on December 12, 2001.⁴⁸ Statements of Defense responding to the allegations contained in the Statements of Claims were filed in February 2002.⁴⁹ Following these filings, the Commission set the order for the first three rounds of claims as follows: Prisoners of War Claims, Central Front Claims, and Civilian Claims.⁵⁰ Thereafter, the parties filed Memorials detailing the alleged violations under each claim category and including volumes of evidence. The evidence included, inter alia, hundreds of sworn affidavits, documents,

note 6, at 5 (stating that the Commission shall endeavor to complete its work within three years of the filing of the claims). This target date has proven overly optimistic.

⁴⁵ Eritrea presented thirty-two claims, and Ethiopia presented eight claims within the framework of the six major subject-matter categories established by the Commission. See Summary Report, *supra* note 44 (the differences in the number of claims stemmed from organizational differences rather than the volume of alleged violations).

⁴⁶ Eritrea's awards, which followed its sub-categorization of claims included the following EECC Partial Awards: Prisoners of War, Eritrea's Claim 17; Central Front, Eritrea's Claim 4; Civilian Claims, Eritrea's Claims 15, 16, 23, & 27-32; Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26; Final Award, Pensions, Eritrea's Claims 15, 19 & 23; Diplomatic Claim, Eritrea's Claim 20; and Loss of Property in Ethiopia Owned by Non-Residents, Eritrea's Claim 24. Ethiopia's awards, which followed its categorization, included the following Eritrea-Ethiopia Claims Commission Partial Awards: Prisoners of War, Ethiopia's Claim 4; Central Front, Ethiopia's Claim 2; Civilian Claims, Ethiopia's Claim 5; Western and Eastern Fronts, Ethiopia's Claims 1 & 3; Final Award, Ports, Ethiopia's Claim 6; Economic Loss Throughout Ethiopia, Ethiopia's Claim 7; Diplomatic Claim, Ethiopia's Claim 8; and *Jus Ad Bellum*, Ethiopia's Claims 1-8. All awards available at http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited June 15, 2007).

⁴⁷ See generally *id.*

⁴⁸ EECC Rules of Procedure, *supra* note 37, art. 24 ¶ 1. According to the Commission's Rules of Procedure, Statements of Claim shall contain the following particulars:

- (a) The names and address of the parties;
- (b) If the claimant is a government of a Party or an agency of such government, whether the claim is solely of that government or agency or whether it includes the claims of persons, and, if the latter, the identification of such persons, including their names, places of residence and nationalities;
- (c) A statement of the facts supporting the claim or claims;
- (d) The violation or violations of international law on the basis of which the claim or claims are alleged to have arisen;
- (e) any other points at issue;
- (f) The relief or remedy sought;
- (g) The Commission's jurisdiction over the claim or claims; [and] (h) Whether the claim or claims have been filed in any other forum.

Id. art. 24 ¶ 3.

⁴⁹ Summary Report, *supra* note 44.

⁵⁰ *Id.* All remaining claims were later heard during a fourth round of proceedings. *Id.*

claims forms, expert reports, satellite imagery, photographs, charts, news reports, statements of officials, administrative and court documents, and bomb fragments. Each party responded to the allegations of the other through Counter-Memorials for each category of claim. The Counter-Memorials also contained different types of evidence in support of the responding party's defense. With respect to the Central Front and Civilians Claims, and all other remaining claims, the Commission allowed a third round of filings for the rebuttal of evidence contained in the Counter-Memorials.

The Commission held its first hearing on substantive claims, involving the treatment of prisoners of war, in December 2002, at the Peace Palace in The Hague.⁵¹ The Commission rendered partial awards with respect to the prisoner of war claims on July 1, 2003,⁵² in which it found violations of humanitarian law on both sides.⁵³ The Commission held its second hearing on substantive claims, which involved the Central Front Claims, in November 2003 in the same venue.⁵⁴ It rendered partial awards with respect to the Central Front Claims on April 28, 2004,⁵⁵ again finding violations of humanitarian law on both sides.⁵⁶ The Commission held its third hearing on substantive claims, which involved the Civilian Claims, in December 2004 in the same venue.⁵⁷ It rendered partial awards with respect to these claims on December 17, 2004,⁵⁸ finding violations of international humanitarian law on both sides.⁵⁹ All remaining claims were thereafter addressed in a final round of filings and hearings. These claims included Eritrea's Western Front, Aerial Bombardment, Pensions, Diplomatic, and Non-Resident Property Loss Claims, and Ethiopia's Western and Eastern Front, Port, Economic Loss,

⁵¹ Summary Report, *supra* note 44.

⁵² EECC, Prisoners of War Claims, Eritrea's Claim 17 (2004); EECC, Ethiopia's Prisoners of War Claim 4 (2004). The awards are "partial" in that they do not become final until after the subsequent damages phase.

⁵³ EECC, Prisoners of War, Eritrea's Claim 17, ¶¶ 11, 12 (2003); EECC, Prisoners of War, Ethiopia's Claim 4, ¶¶ 12, 13 (2003).

⁵⁴ Summary Report, *supra* note 44.

⁵⁵ *Id.*

⁵⁶ EECC, Central Front, Eritrea's Claim 2, 4, 6, 7, 8 & 22 (2004); EECC, Central Front, Ethiopia's Claim 2.

⁵⁷ Summary Report, *supra* note 44.

⁵⁸ *Id.*

⁵⁹ EECC, Central Front, Eritrea's Claim 2, 4, 6, 7, 8 & 22 (2004); EECC, Central Front, Ethiopia's Claim 2.

Diplomatic, and Jus ad Bellum Claims.⁶⁰ Following the filing of Memorials and Counter-Memorials addressing each claim, the Commission held hearings in April 2005 in The Hague.⁶¹ The Commission rendered awards with respect to all of these claims on December 19, 2005.⁶² It dismissed some of the claims for various reasons such as lack of evidence⁶³ but found violations of international law on both sides.⁶⁴

Despite the sheer volume of cases involving claims concerning hundreds of thousands of individuals, the Commission completed the liability phase in approximately five years.⁶⁵ Given the caseload and the complexity of the matters involved, the speed of the Commission's adjudicative work was perhaps unprecedented. However, it is to be noted that some serious matters of contention are left for the damages phase.⁶⁶ Nonetheless, the Commission's overall approach to the liability phase was done with efficacy and care.

C. CATEGORIES OF CLAIMS

As indicated in Section II.A. above, during the more than two years of armed conflict between Ethiopia and Eritrea, tens of thousands of people were killed, injured, expelled or displaced, and property worth billions of dollars was damaged or destroyed in different ways. The Claims Commission had to design a method to systematically address the various claims of loss, damages, and injury linked to the war. Accordingly, in its Decision Number 2, the Commission ruled that claims could be filed under six different categories.⁶⁷ These categories include:

⁶⁰ Summary Report, *supra* note 44.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See, e.g.*, EECC, Final Award, Ports, Ethiopia's Claim 6, ¶¶ 19, 20 (2004).

⁶⁴ *E.g.*, EECC, *Jus Ad Bellum*, Ethiopia's Claims 1-8, ¶¶ 16, 20; EECC, Loss of Property in Ethiopia Owned by Non-Residents, Eritrea's Claim 24, § V.B (2004).

⁶⁵ *See* Summary Report, *supra* note 44. The Algiers Agreement provides that the Commission shall endeavor to complete its adjudication within three years after the commencement of its work. Algiers Agreement, *supra* note 6, art. 5 ¶ 12.

⁶⁶ For example, in its *Jus Ad Bellum* Awards, the Commission held that Eritrea is liable for violating the *jus ad bellum*; however, it left the extent of Eritrea's liability for further proceeding during the damages phase. EECC, *Jus Ad Bellum*, Ethiopia's Claims 1-8, ¶ 20 (2005).

⁶⁷ EECC, Decision Number 2, Claims Categories, Forms and Procedures, § A (2004).

Category 1: claims of natural persons for unlawful expulsion from the country of their residence; Category 2: claims of natural persons for unlawful displacement from their residence; Category 3: claims of prisoners of war for injuries suffered from unlawful treatment; Category 4: claims of civilians for unlawful detention and injuries suffered from unlawful treatment during detention; Category 5: claims of persons for loss, damage, or injury other than those covered by other categories; and Category 6: claims of the two party governments for loss, damage, or injury.⁶⁸

All of the claims ultimately filed by the parties, however, were government-to-government claims under Category 6 with the exception of six claims filed by Eritrea on behalf of six individuals expelled from Ethiopia.⁶⁹ These individual claims would presumably have been claims brought under Category 1, although the Commission never referred to them as such.

Decision Number 2 also required the claimants to group all cases that arose out of the same violations of international law and/or the same events into the same category.⁷⁰ In addition, the decision established a mass claims process through which a fixed amount of compensation could be adjudicated,⁷¹ although it did not foreclose the possibility of pursuing claims for actual damages.⁷² The Commission established two tiers of fixed compensation.⁷³ Depending on several considerations, including whether an individual's claim was adjudicated under more than one category, the first tier was fixed at \$500 and the second tier at \$1,500 per individual.⁷⁴ Given that the Commission has only recently completed the liability phase of its proceedings, it has not had the opportunity to develop the parameters of the mass claims process in any further detail.

With respect to the categorization of claims and the mass claims adjudication process, although notable differences exist, the Commission benefited from the experiences of the UNCC and the Iran-United States Claims Tribunal. The claims categorization of each of these tribunals is discussed in turn.

⁶⁸ *Id.*

⁶⁹ See EECC, Civilians Claims, Eritrea's Claim 15, 16, 23 & 27-32, ¶ 18 (2004).

⁷⁰ EECC, Decision No. 2, Claims Categories, Forms and Procedures, § B (2004).

⁷¹ *Id.*

⁷² *Id.* The decision also did not foreclose the possibility of filing claims for one individual under different categories. See generally EECC, Decision Number 5 (2004).

⁷³ EECC, Decision No. 2, § B (2001).

⁷⁴ EECC, Decision No. 5, §§ B-C (2001) (also noting that to account for compensation for mass claims, the Commission used a multiplier of three when considering household claims).

The UNCC considered claims in six different categories.⁷⁵ Category A included claims by individuals for departure from Kuwait following Iraq's invasion.⁷⁶ The amount of compensation was fixed at \$2,500 for individuals and \$5,000 for families.⁷⁷ Category B included claims by individuals for personal injury, including death.⁷⁸ The amount of compensation was fixed at \$2,500 for individuals and up to \$10,000 for families.⁷⁹ Category C and D claims included twenty-one different kinds of losses such as personal injury, displacement, pain and suffering, loss of property interests, and business losses.⁸⁰ The only difference between Categories C and D was the amount of compensation sought, i.e., while claims for losses less than \$100,000 would be filed under Category C, claims for more than that amount would be adjudicated under Category D.⁸¹ Categories E and F included claims by business entities and governments respectively.⁸²

⁷⁵ See generally U.N. Comp. Comm'n, Claims Processing, available at <http://www2.unog.ch/uncc/clmsproc.htm> (last visited June 15, 2007).

⁷⁶ U.N. Comp. Comm'n, Category "A" Claims, available at http://www2.unog.ch/uncc/claims/a_claims.htm (last visited June 15, 2007).

⁷⁷ The United Nations Compensation Commission "received approximately 920,000 category 'A' claims . . . seeking a total of approximately US \$3.6 billion in compensation . . . [i]n total, the Governing Council has approved the payment of more than US \$3.2 billion in compensation for over 860,000 successful category 'A' claimants." *Id.*

⁷⁸ U.N. Comp. Comm'n, Category "B" Claims, available at http://www2.unog.ch/uncc/claims/b_claims.htm (last visited June 15, 2007).

⁷⁹ The United Nations Compensation Commission adjudicated "approximately 6,000 category 'B' claims . . . [and] [p]ayment of US \$13,450,000 in compensation was made available . . . for distribution to 3,945 successful claimants." *Id.*

⁸⁰ A total of approximately \$9 billion was sought under category "C" claims. U.N. Comp. Comm'n, Category "C" Claims, available at http://www2.unog.ch/uncc/claims/c_claims.htm (last visited June 15, 2007). To date, "[t]he Governing Council approved the payment of more than US \$4.9 billion to successful category 'C' claimants." *Id.* With respect to category "D" claims, \$10 billion was sought in compensation. Information is not available as to the amount of compensation awarded to successful claimants. U.N. Comp. Comm'n, Category "D" Claims, available at http://www2.unog.ch/uncc/claims/d_claims.htm (last visited June 15, 2007).

⁸¹ See U.N. Comp. Comm'n, Category "D" Claims, *supra* note 80.

⁸² U.N. Comp. Comm'n, Category "E" Claims, available at http://www2.unog.ch/uncc/claims/e_claims.htm (last visited June 15, 2007); U.N. Comp. Comm'n, Category "F" Claims, available at http://www2.unog.ch/uncc/claims/f_claims.htm (last visited June 15, 2007). With respect to category "E" claims, "[t]he Commission received approximately 5,800 . . . claims submitted by seventy Governments seeking a total of approximately US \$80 billion in compensation." U.N. Comp. Comm'n, Category "E" Claims, *supra*. Category "E" was further subdivided into four sub-categories. *Id.* Subcategory "E1" included claims for the oil sector and payment of \$610,048,547 was approved under this subcategory. *Id.* Subcategory "E2" included claims for non-Kuwaiti entities that did not fall under any of the other subcategories and \$12 billion in compensation was sought under this category, but information as to the disposition of these claims is not available. *Id.* Subcategory "E3" included claims for non-Kuwaiti corporations in

The claims were categorized with a view to ensuring “uniformity in the treatment of similar claims” taking into account “the type or size of the claims and similarity of legal and factual issues.”⁸³ The Eritrea-Ethiopia Claims Commission’s categorization of claims generally followed this principle. Although it adopted the same standard, it had to design its own classifications to deal with the unique circumstances it needed to resolve.

In many ways, the UNCC and the Claims Commission had to deal with similar circumstances, i.e., post-interstate conflict claims for loss, damage, or injury sustained as a result of violations of international law. The major distinction was that the Claims Commission had to determine whether violations of international law had occurred in each case, whereas the UNCC already had that issue determined for it by the UN Security Council and arguably admitted by Iraq, the violating party.⁸⁴ As indicated above, the UNCC was established unilaterally by the Security Council without any involvement by Iraq.⁸⁵ Iraq’s lack of participation in any determination of liability or damages was another important distinction between it and the Eritrea-Ethiopia Claims Commission, which was created by the contribution of both parties in determining the resolution model for their disputes.⁸⁶

In this regard, there is an obvious similarity between the Claims Commission and the Iran-United States Claims Tribunal in that Ethiopia and Eritrea mutually agreed to have their respective claims adjudicated by an independent claims tribunal just like Iran and the United States had done.⁸⁷ Because of the parties’ participation in formulating the models of

the construction-related business, excluding oil-related work, and claims amounting to \$10 billion were filed in this subcategory. *Id.* Subcategory “E4” included claims for all Kuwaiti corporations, excluding oil companies, and claims were filed for \$11 billion under this subcategory. *Id.*

⁸³ U.N.S.C., Comp. Comm’n Governing Council, *Decision Taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting* art. 17, U.N. Doc. S/AC.26/1992/10 (June 26, 1992), available at http://www2.unog.ch/uncc/decision/dec_10.pdf [hereinafter *Compensation Commission Decision*].

⁸⁴ See S.C. Res. 687, *supra* note 10, ¶ 16.

⁸⁵ See generally U.N. Comp. Comm’n, Introduction, available at <http://www2.unog.ch/uncc/introduc.htm> (last visited June 15, 2007).

⁸⁶ See generally Algiers Agreement, *supra* note 6.

⁸⁷ Roger P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 AM. SOC’Y INT’L L. PROC. 160, 163 (2000) (“The Iran-U.S. Tribunal arguably exists because Iran calculated that the political costs of not cooperating were far outweighed by the benefits of unfreezing Iranian assets and terminating U.S. court litigation.”).

adjudication, the Eritrea-Ethiopia Claims Commission and the Iran-United States Claims Tribunal did not attract the criticism that the UNCC has due to of Iraq's lack of involvement. Indeed, the lack of political will on the part of Iraq has had serious consequences with respect to the effectiveness of the UNCC in its initial phase.⁸⁸ By contrast, for the last six years, the Claims Commission has had the full cooperation of the parties and its operations have been relatively smooth.⁸⁹

Unlike the UNCC, which received and adjudicated millions of claims by individuals and enterprises,⁹⁰ only the party governments were allowed to present claims directly to the Claims Commission.⁹¹ This is an important distinction dictated by the very nature of the transactions that gave rise to the claims. While the Iraq-Kuwait war has directly affected virtually every inhabitant of Kuwait, including foreign individuals and entities, the direct impact of the Ethiopia-Eritrea war was limited to the nationals and entities of the two countries.

The Claims Commission has also benefited from the claims categorization of the Iran-United States Claims Tribunal, which considered claims in two broad categories.⁹² The Dispute Settlement Declaration, which set up the Iran-United States Claims Tribunal, states

⁸⁸ *Id.* at 164 (“[T]he coercive model of placing the Iraqi oil industry under UN receivership and skimming off 30 percent of the oil revenues was wholly ineffective for many years because Saddam Hussein simply refused to pump oil.”).

⁸⁹ *Id.*

⁹⁰ Some individual claimants were deemed to have been better represented privately, given the volume of foreign investment in Kuwait and the predetermination of liability. For example, individual claimants had more autonomy and responsibility in selecting the type of claims they wanted to file. This enhanced individual autonomy has been praised “as possibly the most significant contribution of the UNCC to the development of international law in the field of claims settlement.” Andrea Gattini, *The UN Compensation Commission: Old Rules, New Procedures on War Reparations*, 13 EUR. J. INT’L L. 161, 170 (2002).

⁹¹ See Algiers Agreement, *supra* note 6, art. 5, ¶ 8 (“Claims shall be submitted to the Commission by each of the parties on its own behalf and on behalf of its nationals, including both natural and juridical persons.”). In what seems to be an unprecedented decision, the Algiers Agreement gave each party the ability to seek compensation on behalf of citizens of the other party. The Agreement states that “[i]n appropriate cases, each party may file claims on behalf of persons of Ethiopian or Eritrean origin who may not be its nationals. Such claims shall be considered by the Commission on the same basis as claims submitted on behalf of the party’s nationals.” *Id.* art. 5, ¶ 9. This provision later became very controversial. See *infra* Section III.A.4. (discussing the Commission’s application and interpretation of this provision). See *Compensation Commission Decision*, *supra* note 83, art. 5 ¶ 1(a) (“A Government may submit claims on behalf of its nationals and, at its discretion, of other persons resident in its territory. In the case of Governments existing in the territory of a former federal state, one such Government may submit claims on behalf of nationals, corporations or other entities of another such Government, if both Governments agree.”).

⁹² See Claims Settlement Declaration, *supra* note 9, art. II.

that “[c]laims of nationals of the United States and Iran that are within the scope of this Agreement shall be presented to the Tribunal either by claimants themselves or, in the case of claims of less than [\$]250,000, by the government of such national.”⁹³ Thus, the first category included property claims⁹⁴ of nationals of the United States against the Government of Iran and nationals of Iran against the Government of the United States.⁹⁵ The second category included the direct claims of the two governments against each other for contractual losses on behalf of their nationals relating to the exchange of goods and services.⁹⁶

With respect to legal standing, however, the Eritrea-Ethiopia Claims Commission differed from both the UNCC and the Iran-United States Claims Tribunal. As indicated above, the exclusion of direct private claims was dictated by the Algiers Agreement.⁹⁷ The effects of this decision will be more apparent at the damages phase during which the Commission will have to assess the precise amounts of compensation due to each individual or family—either fixed or actual amounts—based on the awards rendered during the liability phase.

Although Article 5, paragraph 8 of the Algiers Agreement provided that the Claims Commission was to be the only forum for adjudicating claims arising from the armed conflict between Ethiopia and Eritrea, it made an exception for claims filed in another forum prior to the effective date of the agreement.⁹⁸ This exception is another important distinction with the Iran-United States Claims Tribunal, which was necessitated as a result of multiple cases filed in U.S. courts based on the events leading to the 1979 hostage crisis and the counter-economic measures that followed.⁹⁹ Because the Algiers Agreement between

⁹³ See *id.* art. III, ¶ 3.

⁹⁴ These claims include debts, contracts, transactions subject to letters of credit or bank guarantees, and expropriation claims. MAPP, *supra* note 9, at 18. Some claims, however, were excluded from the jurisdiction of the Tribunal. *Id.* These were mainly claims arising out of contracts that expressly provide for the exclusive jurisdiction of the Iranian courts. *Id.*

⁹⁵ See Claims Settlement Declaration, *supra* note 9, art. II.

⁹⁶ See *id.* art. II, ¶ 2.

⁹⁷ See Algiers Agreement, *supra* note 6, art. 5, ¶ 8 (“Claims shall be submitted to the Commission by each of the parties on its own behalf and on behalf of its nationals, including both natural and juridical persons.”).

⁹⁸ *Id.*

⁹⁹ The events giving rise to the litigation began on November 4, 1979, when Iranian militants held sixty-one U.S. diplomats in Tehran as hostages; two more senior diplomats were also detained at Iranian Ministry of Foreign Affairs the same day. See MAPP, *supra* note 9, at 5. The next day, Iranian revolutionary Ayatollah Khomeini endorsed the actions, and diplomatic efforts failed to resolve the crisis. *Id.* at 5.

Ethiopia and Eritrea did not provide for the consolidation of all claims,¹⁰⁰ several cases arising out of the same events have been litigated in Ethiopian, regional, and U.S. courts. However, the proceedings of the Claims Commission have had significant impacts on these proceedings.

For example, in 1999, while the war was still being fought, Ethiopia brought a claim against Eritrea before the Court of Justice for the Common Market for Eastern and Southern Africa (COMESA) seeking the release of and damages for Ethiopian-owned property at the Eritrean ports of Assab and Massawa.¹⁰¹ Eritrea objected on the grounds that the claim was an abuse of the process of the court and argued that it

On November 12, 1979 the United States President ordered the cessation of all oil purchases from Iran. As a consequence, Iran gave notice that it would take further action to damage the interests of the United States

On November 14, 1979 the President executed an order blocking all dealings in any property and any interests in property of Iran and Iranian governmental entities As a result, all Iranian bank accounts in United States banks, irrespective of the country in which the funds were located, were frozen. Some \$12 billion was affected by this action

. . . .

. . . On November 26, 1979 the Treasury, acting under delegated authority, granted a general license authorising judicial proceedings against Iran

Id. at 6-7. As the crisis intensified, the United States increased regulatory efforts against Iran.

In April 1980 the President executed orders blocking all commerce and travel between the United States and Iran Thus by April 1980 there was in force a complete freeze on Iranian assets

. . . .

. . . The hostage crisis brought a new wave of litigants to the United States courts seeking compensation from Iran. By 1980 more than 400 actions against Iran had been filed in United States courts

. . . .

Iran therefore faced the prospect of its frozen assets being used to satisfy United States claims

Id. at 6-7. The hostage crisis lasted for 444 days and finally came to an end on January 19, 1981, with the implementation of two major declarations—the General Declaration and Claims Settlement Declaration—collectively known as the Algiers Declarations. *Id.* at 13-14. One of the most important objectives of the General Declaration was the termination of all litigation in U.S. courts and the resolution of the same by the Iran-United States Claims Tribunal, which was established by the Claims Settlement Declaration. *Id.* at 14-15.

¹⁰⁰ See Algiers Agreement, *supra* note 6.

¹⁰¹ See Case 1/99, Ethiopia v. Eritrea, Ct. of Justice of the Common Mkt. for E. and S. Afr. (2001), available at <http://www.comesa.int/> (follow “Institutions” hyperlink; then follow “Court of Justice” hyperlink; then follow “Precedents” hyperlink; then follow “Judgements” [sic] hyperlink; then follow “Ethiopia v. Eritrea. IA. 1/2000.” hyperlink) (last visited June 15, 2007).

was not a matter that arose from the treaty that would grant the court jurisdiction to adjudicate the claim.¹⁰² Following the establishment of the Eritrea-Ethiopia Claims Commission, however, the parties sought to stay the COMESA proceedings in favor of the Claims Commission, and the Court of Justice of COMESA did so accordingly without addressing any of the substantive issues raised in the matter.¹⁰³

Similarly, the Claims Commission proceedings have played an important role in *Nemariam v. Federal Democratic Republic of Ethiopia*.¹⁰⁴ *Nemariam* was brought before the U.S. District Court for the District of Columbia on June 12, 2000, by several individuals of Eritrean origin expelled from Ethiopia during the conflict against the Government of Ethiopia and the Commercial Bank of Ethiopia for the alleged unlawful takings of the plaintiffs' property in violation of international law.¹⁰⁵ A pivotal issue in the early proceedings of the case was whether it should be dismissed on *forum non conveniens* grounds in favor of the Eritrea-Ethiopia Claims Commission.¹⁰⁶ The District Court concluded that the case should be dismissed on those grounds, but its decision was overturned by the U.S. Court of Appeals for the District of Columbia Circuit.¹⁰⁷ The D.C. Circuit Court noted that the *forum non conveniens* issue was "a close one,"¹⁰⁸ but concluded that the Eritrea-Ethiopia Claims Commission was an inadequate forum for the plaintiffs' claims because of its "inability to make an award directly" to the plaintiffs and because of Eritrea's ability to set off the plaintiffs' claims against any claims that Ethiopia might have against Eritrea.¹⁰⁹ The D.C. Circuit's findings touch

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See Nemariam v. Federal Democratic Republic of Ethiopia*, 315 F.3d 390, 391-92 (D.C. Cir. 2003).

¹⁰⁵ *See id.* The action was brought under § 1605(a)(3) of the Foreign Sovereign Immunities Act [FSIA], which vests U.S. courts with jurisdiction in cases "in which rights in property taken in violation of international law are in issue" and where certain other requirements are met. 28 U.S.C. § 1605(a)(3) (2006). *See Nemariam*, 315 F.3d at 392.

¹⁰⁶ *See Nemariam*, 315 F.3d at 392-93.

¹⁰⁷ *See id.* at 393-95.

¹⁰⁸ *Id.* at 395.

¹⁰⁹ *Id.* Following the reversal by the U.S. Court of Appeals for the District of Columbia Circuit, the case returned to the District Court where it has had "a protracted history." *Nemariam v. Federal Democratic Republic of Ethiopia*, 400 F. Supp. 2d 76, 78 n.1 (D.D.C. 2005). As of the writing of this article, the lawsuit was again on appeal in the D.C. Circuit Court of Appeals after having been dismissed for a second time by the District Court on the grounds that the expropriation exception of the FSIA established subject matter jurisdiction only in cases where *tangible* property rights were at issue. *Id.* at 81-83. The District Court found that the rights relevant to

on the important issue of how effective the imposition of civil liability for violations of international humanitarian law is if the victims of violations are not directly compensated.

III. JURISDICTION, APPLICABLE LAW, AND EVIDENCE

This section discusses the Commission's jurisdiction, the laws it applied, the evidentiary matters it addressed, and the remedies it granted. The Commission addressed all of these issues in its various decisions. In discussing these issues, this section makes extensive reference to these various decisions.

A. JURISDICTION

The source of the Claims Commission's jurisdiction is Article 5(1) of the Algiers Agreement. It states that the Commission's jurisdiction extends to:

All claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party . . . that are (a) related to the conflict . . . and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.¹¹⁰

In its very first decision, the Commission interpreted the scope of its jurisdiction. In doing so, the Commission addressed several areas of contention and paid particular attention to the Commission's supervisory jurisdiction, i.e., the power of the Commission to interpret or implement the Algiers Agreement, and temporal jurisdiction.¹¹¹ In the subsequent partial awards that the Commission issued with respect to the parties' substantive claims, the Commission expanded on these two issues and addressed other important jurisdictional questions. Discussion

jurisdiction in the *Nemariam* proceedings were *intangible* contractual rights to withdraw money from bank accounts at the Commercial Bank of Ethiopia. *Id.* at 83-84. The District Court further held that jurisdiction was lacking under the expropriation exception to immunity because the Commercial Bank of Ethiopia did not own or operate the bank accounts, which is one of the requirements of the FSIA's expropriation exception. *Id.* at 84-86.

¹¹⁰ Algiers Agreement, *supra* note 6, art. 5, ¶ 1.

¹¹¹ See EECC, Decision No. 1, §§ A-D (Perm. Ct. Arb. 2001), available at http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited June 15, 2007).

of the Commission's key jurisdictional findings is contained in the following sections.

1. SUPERVISORY JURISDICTION

The Claims Commission ruled that it could not imply supervisory jurisdiction to interpret the Algiers Agreement from Article 5(1) of that agreement.¹¹² The Commission concluded that if the parties had envisioned the grant of supervisory authority, they would have expressly provided for it.¹¹³ The Commission contrasted this approach with the jurisdiction of the Iran-United States Claims Tribunal, which was given express authority to decide disputes regarding the interpretation and application of the Claims Settlement Declaration agreed to by Iran and United States.¹¹⁴ This decision left the issue of authority to interpret the Algiers Agreement as it relates to the Claims Commission's work an open question.

However, the Commission's subsequent decisions make clear that it did not completely refrain from filling this gap. One such example is its decision on Ethiopia's *jus ad bellum* claim.¹¹⁵ In that case, Eritrea argued that the Commission lacked jurisdiction because the Algiers Agreement assigned the authority to determine the "origins of the conflict"—and, thus, a party's resort to force—to an independent investigative body.¹¹⁶ Eritrea relied on Article 3 of the agreement, which states that "[i]n order to determine the origins of the conflict, an investigation will be carried out on the incidents of 6 May 1998 and on any other incident prior to that date which could have contributed to a misunderstanding between the parties regarding their common border, including the incidents of July and August 1997."¹¹⁷ In interpreting this

¹¹² *See id.* § A.

¹¹³ *See id.*

¹¹⁴ *See* Claims Settlement Declaration, *supra* note 9, art. II, ¶ 3 ("The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that Declaration.").

¹¹⁵ Ethiopia's *jus ad bellum* claim is one of several claims that it presented against Eritrea. Although Eritrea also presented several independent claims based on alleged violations of international humanitarian law, it did not have a *jus ad bellum* claim against Ethiopia. The parties' most important claims based on alleged violations of international humanitarian law are discussed under different headings in Part III. *See infra* Part III.

¹¹⁶ *See* EECC, *Jus Ad Bellum*, Ethiopia's Claims 1-8, ¶ 3 (2005).

¹¹⁷ Algiers Agreement, *supra* note 6, art. 3, ¶ 1.

provision, the Commission held that the terms “origins of the conflict” and “misunderstanding between the parties regarding their common border” did not refer to the legal issue of whether Eritrea unlawfully resorted to the use of force.¹¹⁸ More importantly, the Commission stated that “it seems clear that Article 3 was carefully drafted to direct the impartial body to inquire into matters of fact, not to make any determinations of law. This Commission is the only body assigned by the Agreement with the duty of deciding claims of liability for violations of international law.”¹¹⁹ Thus, this decision provides an example of the Commission’s assertion of interpretive authority despite its decision regarding supervisory jurisdiction. However, such authority was indeed vital for the proper disposition of cases brought under the Algiers Agreement.

2. TEMPORAL JURISDICTION

The Commission defined the scope of its temporal jurisdiction in the first decision it rendered, concluding:

[T]he central reference point for determining the scope of [the Commission’s] mandate under Article (5)1 of the Agreement is the conflict between the parties. In the overall context of the relevant documents cited in Article (5)1, the Commission understands this to mean the armed conflict that began in May 1998 and was formally brought to an end by the Agreement on December 12, 2000. There is a presumption that claims arising during this period “relate to” the conflict and are within the Commission’s jurisdiction.¹²⁰

The Commission went on to conclude:

[C]ertain claims associated with events after December 12, 2000, may also “relate to” the conflict, if a party can demonstrate that those claims arose as a result of the armed conflict between the parties, or occurred in the course of measures to disengage contending forces or otherwise to end the military confrontation between the two sides.¹²¹

As an example, the Commission cited claims that could potentially arise for violations of international humanitarian law that might have occurred as the military forces were withdrawing from

¹¹⁸ EECC, *Jus Ad Bellum*, Ethiopia’s Claims 1-8, ¶ 4 (2005).

¹¹⁹ *Id.* ¶ 4.

¹²⁰ EECC, Decision No. 1, § B (2001).

¹²¹ *Id.* ¶ C.

occupied territory after December 12, 2000.¹²² In its later partial awards, the Commission noted that this principle was “in harmony with important international humanitarian law principles, which continue to provide protection throughout the complex process of disengaging forces and addressing the immediate aftermath of armed conflict.”¹²³

The Commission’s temporal jurisdiction was tested during the prisoner of war proceedings, the first round of claims heard by the Commission. During these proceedings, the issue arose whether Eritrea’s claim of alleged mistreatment of prisoners of war, including a delay in repatriation of prisoners following the signing of the Algiers Agreement on December 12, 2000, was sufficiently related to the conflict to be within the Commission’s jurisdiction.¹²⁴ Ethiopia maintained that the Commission did not have jurisdiction over such claims,¹²⁵ and, having taken this position, made no repatriation or related claims.¹²⁶ Ethiopia further argued that the repatriation issue was governed by Article 2 of the Algiers Agreement, which provided that “[i]n fulfilling their obligations under international humanitarian law . . . the parties shall without delay release and repatriate all prisoners of war,”¹²⁷ rather than Article 118 of Geneva Convention III.¹²⁸ As such, Ethiopia argued that the Claims Commission could not decide the repatriation issue because doing so would require it to entertain a claim concerning “the interpretation or implementation of the [Algiers] Agreement,” which, as discussed in the preceding section, the Commission had earlier found it was not empowered to do.¹²⁹

The Commission concluded that it had jurisdiction to address the repatriation claim and other claims of mistreatment arising after the

¹²² *Id.*

¹²³ EECC, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27-32, ¶ 15 (2004) (citing Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 6, Aug. 12, 1949, 6 U.S.T. 3517, 3522) (“Protected persons whose release, repatriation or re-establishment may take place after [the general close of military operations] . . . shall meanwhile continue to benefit by the present Convention.”).

¹²⁴ See EECC, Prisoners of War, Eritrea’s Claim 17, §§ III, V.A.; EECC, Prisoners of War, Ethiopia’s Claim 4, §§ III, V.A.

¹²⁵ *E.g.*, EECC, Prisoners of War, Eritrea’s Claim 17, ¶ 16 (2003). The final repatriation of prisoners of war by Eritrea did not occur until August 2002, and Ethiopian repatriation occurred in November 2002. See, *e.g.*, *id.* ¶ 10.

¹²⁶ *E.g.*, *id.* ¶ 16.

¹²⁷ *Id.* ¶ 17 (citing Algiers Agreement, *supra* note 6, art. 2).

¹²⁸ See *id.* ¶¶ 18, 22.

¹²⁹ *Id.* ¶ 18.

signing of the Algiers Agreement.¹³⁰ The Commission stated that “the timely release and repatriation of POWs is clearly among the types of measures associated with disengaging contending forces and ending the military confrontation between the two Parties that fall within the scope” of its jurisdiction.¹³¹ The Commission further rejected Ethiopia’s argument that the Commission was prevented from addressing the repatriation claim because doing so would require it to interpret the Algiers Agreement.¹³² The Commission observed that Article 118 of Geneva Convention III was still in play and that “[i]t frequently occurs in international law that a party finds itself subject to cumulative obligations arising independently from multiple sources.”¹³³ The Commission went on to hold Ethiopia liable for the delayed repatriation of Eritrean POWs.¹³⁴

The Commission was not as sympathetic to Eritrea’s claim that “the alleged forcible expulsion from Ethiopia of 722 persons in July 2001” was a claim related to the conflict and, thus, fell within the Commission’s temporal jurisdiction.¹³⁵ With no discussion of the evidence presented on the issue, the Commission concluded that “the record did not establish that this event was related to the disengagement of forces or otherwise fell within the scope of the Commission’s jurisdiction pursuant to Decision No. 1.”¹³⁶

The Commission also took a more limited approach to its temporal jurisdiction with respect to Eritrea’s claim against Ethiopia for allegedly preventing displaced Eritreans from returning to their homes in territory under the continued occupation of Ethiopia in violation of Article 49 of Geneva Convention IV.¹³⁷ Eritrea argued that because the original displacement of these individuals occurred during the conflict,

¹³⁰ *Id.*

¹³¹ *Id.* ¶ 20.

¹³² *See id.* ¶ 22.

¹³³ *See id.* (citing *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 174-178 (June 27)).

¹³⁴ *Id.* ¶ 163.

¹³⁵ EECC, *Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27-32*, ¶ 16 (2004).

¹³⁶ *Id.*

¹³⁷ *See* EECC, *Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 1, 3, 5, 9-13, 14, 21, 25 & 26*, ¶¶ 122-130 (2005). The Commission observed that “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.” *Id.* ¶ 122.

their inability to return home “related to the conflict.”¹³⁸ Eritrea relied on the Commission’s earlier decision regarding temporal jurisdiction in the prisoners of war proceedings by seeking to analogize the position of these individuals with the prisoners of war whose repatriation was delayed.¹³⁹ The Commission, however, did not agree with the analogy and concluded that Eritrea’s claim for the alleged prevention of the displaced persons’ return did not meet the requirements of Decision No. 1.¹⁴⁰ The Commission stated that the requirement to repatriate prisoners of war was “an explicit element of an integrated body of law, Geneva Convention III of 1949, brought into operation by the war,”¹⁴¹ whereas “Geneva Convention IV creates no corresponding duty with respect to the return of displaced civilians.”¹⁴² The Commission observed that it “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.”¹⁴³

Thus, although the Commission indicated a willingness in the first round of proceedings to take a somewhat expansive interpretation of its temporal jurisdiction, it took a more limited approach in later proceedings. Although the Commission’s discussion of why the alleged expulsion of individuals in July 2001 was not related to the conflict was rather cursory, its later discussion regarding the alleged prevention of displaced persons from returning to occupied territory involved a much more thorough discussion of the applicable law and facts.

¹³⁸ *Id.* ¶ 126.

¹³⁹ *See id.*; *see also* EECC, Prisoners of War, Eritrea’s Claim 17, ¶ 146 (2003).

¹⁴⁰ EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶ 127 (2005).

¹⁴¹ *Id.*

¹⁴² *Id.* ¶ 128.

¹⁴³ *Id.* The Commission noted that the preamble to the Algiers Agreement specifically noted that the Organization of African Unity (now the African Union) and the United Nations were committed to “work[ing] closely with the international community to mobilize resources for the resettlement of displaced persons.” *Id.* (citation omitted). The Commission also noted that its limited supervisory jurisdiction precluded it from adjudicating any aspect of the claim relating to the Temporary Security Zone because this zone was established in the Cessation of Hostilities Agreement. *Id.* ¶ 129.

3. EXTINGUISHING OF CLAIMS NOT FILED BY DECEMBER 12, 2001

The Commission found that several claims that were not filed by December 12, 2001, were extinguished pursuant to Article 5, paragraph 8 of the Algiers Agreement for not having been timely filed.¹⁴⁴ During the prisoner of war proceedings, the Commission found three such claims filed by Eritrea.¹⁴⁵ Eritrea argued that it had not discovered the violation at issue in one of these claims until after the filing deadline, but the Commission rejected this argument.¹⁴⁶ With respect to the other two claims that were extinguished, the Commission recognized “[t]hat, during the proceedings, the Parties may wish to refine their legal theories or present more detailed or accurate portrayals of the underlying facts.”¹⁴⁷ Nonetheless, the Commission concluded that these two claims were not “identified with the degree of clarity required to permit balanced and informed proceedings.”¹⁴⁸ The Commission also found that one claim filed by Ethiopia—the repatriation claim discussed above—was extinguished, which followed from the position taken by Ethiopia that

¹⁴⁴ EECC, Diplomatic Claim, Ethiopia’s Claim 8, ¶¶ 10-13 (2005); EECC, Diplomatic Claim, Eritrea’s Claim 20, ¶¶ 9-12 (2005); EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶¶ 86-87 (2005); EECC, Civilians Claims, Ethiopia’s Claim 5, ¶¶ 19-21 (2004); EECC, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27-32, ¶ 22 (2004); EECC, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 & 22, ¶¶ 11-17 (2004); EECC, Prisoners of War, Eritrea’s Claim 17, ¶¶ 23-29 (2003); EECC, Prisoners of War, Ethiopia’s Claim 4, ¶¶ 19-21 (2003). The Algiers Agreement states that “[a]ll claims submitted to the Commission shall be filed no later than one year from the effective date of this agreement [S]uch claims that could have been and were not submitted by that deadline shall be extinguished, in accordance with international law.” Algiers Agreement, *supra* note 6, art. 5, ¶ 8.

¹⁴⁵ EECC, Prisoners of War, Eritrea’s Claim 17, ¶ 25 (2003). These included the following: (1) the claim that Eritrean prisoners of war “were subjected to insults and public curiosity” in violation of Article 13 of Geneva Convention III; (2) the claim that female Eritrean prisoners of war “were accorded inappropriate housing and sanitation conditions” in violation of Articles 25 and 29 of Geneva Convention III; and (3) the claim that Eritrean prisoners of war “were mistreated during transfers between camps” in violation of Article 46 of Geneva Convention III. *Id.* ¶ 24. Eritrea’s claim that its civilians were detained in camps with prisoners of war was deferred to the Civilians Claims proceedings during which the Commission ultimately concluded that Ethiopia was not liable for this alleged violation. *Id.* ¶¶ 24, 28; EECC, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27-32, ¶¶ 119-22 (2004).

¹⁴⁶ See EECC, Prisoners of War, Eritrea’s Claim 17, ¶ 26 (2003) (Eritrea explained that it did not discover a website operated by Ethiopia containing photographs and personal information about Eritrean prisoners of war, which Eritrea contended subjected the prisoners of war to “insults and public curiosity,” until after the deadline had passed.).

¹⁴⁷ See *id.* ¶ 27.

¹⁴⁸ See *id.* ¶ 26.

such a claim was outside the temporal scope of the Commission's jurisdiction.¹⁴⁹

The Commission also dismissed several claims filed by Eritrea during the proceedings for the Central Front on the grounds that they were not timely filed. Four of these claims were dismissed summarily for not having been included in Eritrea's statements of claim: (1) "[a]lleged violations of international law by Ethiopia occurring after March 2001;" (2) "[a]lleged continuing unlawful occupation that occurred after March 2001;" (3) "[a]lleged unlawful use of landmines by Ethiopia" in one geographic area; and (4) "[a]lleged conduct by Ethiopia of unlawful "political re-education" classes in one geographic area.¹⁵⁰

Two other claims pursued by Eritrea were also dismissed in whole or in part, but they prompted further discussion by the Commission. The first claim was Eritrea's allegation that Ethiopia had unlawfully failed or refused to stop illegal action by Ethiopian soldiers in two geographic areas in Eritrea.¹⁵¹ The Commission observed that Eritrea's statement of claim for one of the geographic areas had made a reference to an Ethiopian officer ignoring rape complaints.¹⁵² The Commission observed, however, that the particular statement of claim did "not include in its list of relevant treaty articles any dealing with the responsibility of commanders; nor, more importantly, [did] it include any reference to the failure of commanders to stop illegal conduct by the troops under their command when it lists the violations of international law" upon which Eritrea based its claims for that geographic area.¹⁵³ As such, the Commission concluded that this claim was not stated with the degree of specificity required and found that it was extinguished pursuant to Article 5, paragraph 8.¹⁵⁴ The Commission made a similar finding with respect to the other geographic area addressed by Eritrea as part of this claim, observing that Eritrea had made no reference to the failure or refusal of Ethiopian commanders in this geographic area to stop the illegal conduct of soldiers serving under them.¹⁵⁵

¹⁴⁹ See EECC, Prisoners of War, Ethiopia's Claim 4, ¶ 20 (2003).

¹⁵⁰ EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 13-14 (2004).

¹⁵¹ See *id.* ¶¶ 15-16.

¹⁵² *Id.* ¶ 15.

¹⁵³ *Id.*

¹⁵⁴ See *id.* The Commission noted, however, that this finding did "not affect Eritrea's claims that Ethiopia is liable for illegal conduct by members of its armed forces." *Id.*

¹⁵⁵ See *id.* ¶ 16 (noting that with respect to this geographic area, all of the violations alleged by Eritrea were "intentional or deliberate actions by the Ethiopian army" and not done by omission).

The second claim that the Commission explored in more detail before finding that part of it was extinguished was Eritrea's claim concerning alleged violations of Protocol II to the 1980 Convention on Certain Conventional Weapons and Protocol I to Geneva Convention IV.¹⁵⁶ The Commission concluded that although its Rules of Procedure required a "precise statement" of "the violation or violations of international law on the basis of which the claim or claims are alleged to have arisen," [they did] not require that the Statement of Claim specify every treaty article that might be relevant to a claimed illegal act."¹⁵⁷ The Commission went on to explain that what was "required is adequate notice to the Respondent of the act that gives rise to the claim and the assertion that it was in violation of applicable international law."¹⁵⁸ Thus, the Commission concluded, for example, that "where illegal use of mines or booby-traps is alleged in [Eritrea's] Statement of Claim, the claim is not extinguished simply because no reference is made to Protocol II of 1980."¹⁵⁹ On the other hand, the Commission concluded that Eritrea's claim with respect to "undefended localities" under Article 59 of Protocol I was extinguished because Eritrea had not referred to "undefended localities" in its Statements of Claim.¹⁶⁰ Although the Commission did not articulate the precise contours of its findings, it appears that failure by a party to state the factual basis for its claims in its Statements of Claim was more likely to lead to that claim being extinguished than any omission of the legal grounds for the claim.

Ethiopia likewise fell victim to claim extinguishment during the proceedings related to the civilian claims.¹⁶¹ During these proceedings,

¹⁵⁶ See *id.* ¶ 17.

¹⁵⁷ *Id.* The Commission built on this statement in a later partial award when it observed that "the Commission does not regard references to additional international legal authorities or legal arguments to support a claim presented in the Statements of Claim as constituting impermissible new claims." EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 22 (2004).

¹⁵⁸ EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 17 (2004).

¹⁵⁹ *Id.* (referring to 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. 1529).

¹⁶⁰ See *id.*

¹⁶¹ EECC, Civilians Claims, Ethiopia's Claim 5, ¶¶ 20-21 (2004). Ethiopia also made timeliness challenges to some of the claims Eritrea pursued during the "Civilians Claims" proceedings and the "Western Front, Aerial Bombardment and Related Claims" proceedings; however, these challenges were rejected by the Commission. EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 22; EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶¶ 86-87 (2005). Challenges were also made successfully by both parties during the "Diplomatic Claims" proceedings. EECC, Diplomatic Claim,

Eritrea argued that eighteen specific claims being pursued by Ethiopia had not been properly identified in Ethiopia's statements of claim.¹⁶² The Commission found that three of these claims had not been timely raised: (1) failure to provide proper transport conditions to or among detention camps; (2) exposure of Ethiopian detainees and internees to public curiosity; and (3) forcing Ethiopians to donate blood.¹⁶³ The Commission noted that many of the remaining challenged claims were part of more general claims such as Ethiopia's claim for "unlawful treatment and conditions of confinement," that had been sufficiently articulated in Ethiopia's Statements of Claim.¹⁶⁴

4. CLAIMS ON BEHALF OF NON-NATIONALS

When claims are asserted by states on behalf of individuals against another state, nationality is often the single most important factor for the determination of legal standing.¹⁶⁵ This issue was one of the most difficult adjudicatory challenges that the Eritrea-Ethiopia Claims Commission faced. The issue had distinct peculiarity because it emanated from a remarkably unique and complex set of circumstances. These circumstances are briefly described as follows.

Ethiopia's Claim 8, ¶¶ 10-13 (2005); EECC, Diplomatic Claim, Eritrea's Claim 20, ¶¶ 9-12 (2005).

¹⁶² EECC, Civilians Claims, Ethiopia's Claim 5, ¶ 20 (2004). The claims were that Eritrea did the following:

1. Interned Ethiopians at the Massawa Naval Base;
2. Did not provide proper conditions of transport to detention or between supposed detention sites;
3. Interrogated Ethiopians;
4. Exposed Ethiopian detainees/internees to public curiosity;
5. Subjected Ethiopians to curfew;
6. Subjected Ethiopians to house arrest;
7. Rounded up Ethiopian street children;
8. Did not allow Ethiopians to congregate in public places;
9. Did not provide separate quarters for women held in detention;
10. Housed Ethiopian detainees with criminals;
11. Housed healthy detainees with those who were infirm;
12. Improperly denied relations with the exterior to Ethiopian detainees/internees;
13. Interfered with detainees'/internees' freedom of religion;
14. Improperly failed to post camp regulations;
15. Allowed children to be beaten in Eritrean schools, both by Eritrean teachers and by Eritrean students;
16. Prohibited employers from paying Ethiopian workers;
17. Conducted "sweeps" of the street of Assab to collect young Ethiopian men; and
18. Forced Ethiopians to donate blood.

Id.

¹⁶³ *Id.* ¶¶ 20-21.

¹⁶⁴ *See id.* ¶ 21.

¹⁶⁵ *Id.* For example, the issue of nationality figured prominently in the jurisdictional issues presented during the Iran-United States Claims Tribunal. *See, e.g.,* RAHMATULLAH KHAN, THE IRAN-UNITED STATES CLAIMS TRIBUNAL: CONTROVERSIES, CASES AND CONTRIBUTIONS 120-145 (1990).

Eritrea claimed that all inhabitants of present-day Eritrea and persons of Eritrean descent who had never acquired another nationality were nationals of Ethiopia until Eritrean independence in 1993.¹⁶⁶ The issue of nationality remained unresolved following Eritrea's independence and became further complicated when the two parties went to war in 1998.¹⁶⁷

The most important dispute between the parties regarding nationality related to the manner of Eritrea's independence. Eritrea's official independence in May 1993¹⁶⁸ followed a referendum held pursuant to a proclamation that the Eritrean Provisional Government issued in April 1992.¹⁶⁹ The provisional administration had been established in May 1991 following the EPLF's gaining of control over the territory of present-day Eritrea.¹⁷⁰ Eritrea's legal status between May 1991 and May 1993 was ambiguous and, as such, was a disputed fact.¹⁷¹

Following the start of the conflict between Ethiopia and Eritrea in May 1998, Ethiopia expelled thousands of persons of Eritrean origin on national security grounds.¹⁷² Eritrea argued that Ethiopia's expulsion was contrary to international law because, among other things, it amounted to a denationalization of Ethiopian nationals because of their Eritrean descent.¹⁷³ Ethiopia, on the other hand, argued that the expelled individuals had acquired Eritrean nationality as of the time of the Eritrean referendum by operation of (1) the Eritrean proclamation that set forth the requirements for the referendum¹⁷⁴ and (2) Ethiopia's own nationality law.¹⁷⁵ Under the referendum proclamation, every individual taking part in the referendum had to be able to demonstrate that he or she

¹⁶⁶ See EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 39 (2004).

¹⁶⁷ See *id.* ¶¶ 46-47.

¹⁶⁸ See *id.* ¶¶ 7, 39.

¹⁶⁹ See Proclamation No. 21/1992 of the Provisional Government of Eritrea (April 6, 1992) (setting forth several requirements for acquiring Eritrean citizenship, which include birth, marriage and naturalization) available at <http://www.unhcr.org/home/RSDLEGAL/3ae6b4e026.html> (last visited June 15, 2007), cited in EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 40 (2004).

¹⁷⁰ See EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶¶ 6, 7 (2004).

¹⁷¹ See *id.* ¶ 45.

¹⁷² See *id.* ¶¶ 65, 79-80.

¹⁷³ See *id.* ¶¶ 79-80.

¹⁷⁴ See *id.* ¶ 45.

¹⁷⁵ See *id.* ¶ 43.

was an Eritrean national.¹⁷⁶ And, according to Ethiopia's nationality law, anyone who acquired another nationality lost his or her Ethiopian nationality by operation of law.¹⁷⁷

This argument was complicated by Ethiopia's continued treatment of these individuals—i.e., persons of Eritrean descent who had taken part in the Eritrean referendum—like its own nationals from 1993 to 1998, including the issuance of passports and granting of all citizenship privileges pursuant to an agreement made between the two parties.¹⁷⁸ The agreement, which was in the form of meeting minutes signed by high-ranking officials of the two governments in 1996, provided that “on the question of nationality, it was agreed that Eritreans who have so far been enjoying Ethiopian citizenship should be made to choose and abide by their choice.”¹⁷⁹

The two major issues that arose were (1) whether registering to vote for the Eritrean referendum, which required one to possess Eritrean nationality as set forth under the Eritrean nationality law issued by the provisional government of Eritrea, amounted to the acquisition of Eritrean nationality before the Eritrean state was formally established,¹⁸⁰ and (2) whether Ethiopia's continued treatment of individuals as its own citizens who qualified under the Eritrean nationality law as Eritrean nationals amounted to the recognition of the continuity of their Ethiopian nationality.¹⁸¹

The Commission came up with a creative resolution commensurate with its arbitral role. It held that registering for the Eritrean referendum could not have been done without legal

¹⁷⁶ See Proclamation No. 22/1992 of the Provisional Government of Eritrea (Apr. 7, 1992) (setting forth the procedures for participating in the Referendum), cited in EECC, Civilians Claims, Eritrea's Claim 15, 16, 23 & 27-32, ¶ 41 (2004). The text of the relevant provision reads:

Any person having *Eritrean citizenship pursuant to Proclamation No. 21/1992* on the date of his application for registration and who was of the age of 18 years or older or would attain such age at any time during the registration period, and who further possessed an Identification Card issued by the Department of Internal Affairs, shall be qualified for registration.

Id. ¶ 41 (citing Proclamation No. 21/1992 of the Provisional Government of Eritrea (Apr. 7, 1992)).

¹⁷⁷ EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 46 (2004).

¹⁷⁸ See *id.* ¶¶ 46-50.

¹⁷⁹ *Id.* ¶ 52. The Commission concluded that it was unnecessary to determine whether the minutes constituted a binding treaty between the two states because, regardless of the document's legal status, it showed the parties' intentions. *Id.* ¶ 53.

¹⁸⁰ See *id.* ¶ 44.

¹⁸¹ See *id.* ¶ 46.

consequences.¹⁸² At the same time, however, the Commission concluded that continued treatment of individuals as nationals, including issuance of passports, “is an internationally significant act, not a casual courtesy.”¹⁸³ Consequently, “the Commission conclude[d] that those who qualified to participate in the Referendum in fact acquired dual nationality. They became citizens of the new State of Eritrea pursuant to Eritrea’s Proclamation No. 21/1992, but at the same time, Ethiopia continued to regard them as its own nationals.”¹⁸⁴

In its determination, the Commission did not rely on international precedent because it had to resolve an unprecedented set of issues. In this case, the issues of nationality and a state’s legal standing to claim on behalf of individuals arose in a manner that clearly diverged from the manner in which these issues had traditionally arisen in the context of international disputes.

The standing of dual nationals in international law has long been a subject of immense controversy.¹⁸⁵ International tribunals often

¹⁸² *See id.* ¶ 48.

¹⁸³ *Id.* ¶ 49.

¹⁸⁴ *Id.* ¶ 51. The Commission made this ruling despite Eritrea’s argument that it could not have conferred Eritrean nationality prior to its formal existence. *Id.* ¶ 44. The Commission said that Eritrea enacted its nationality law prior to its formal recognition. *Id.* ¶ 48. The authorities exercised effective control over a defined territory and population, undertook complex international relations and, as such, had de facto existence. *Id.* *See generally* IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 70-72 (6th ed. 2003) (describing the legal criteria of statehood); AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 75-81 (Peter Malanczuk ed., 7th rev. ed. 1997) (describing the definition of a state for purposes of international law).

¹⁸⁵ *E.g.*, KHAN, *supra* note 165, at 122. Although there is still some controversy regarding whether dual nationals can bring claim against one of the states of their nationality, the question seems to be increasingly answered in the affirmative. *See id.* at 122-23. *See generally* Peter E. Mahoney, *The Standing of Dual Nationals before the Iran-United States Claims Tribunal*, 24 VA. J. INT’L L. 695 (1984); Notes, *Claims of Dual Nationals in the Modern Era: The Iran-United States Claims Tribunal*, 83 MICH. L. REV. 597 (1984). This controversy, however, relates only to situations where the two states are parties to the dispute. There is little controversy when the respondent is a third state because of the existence of a relatively clear rule. *See, e.g.*, Convention on Certain Questions Relating to the Conflict of Nationality Laws art. 5, *reprinted in* 11 LEAGUE OF NATIONS OFFICIAL J. 847 (1930):

Within a third state, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.

consider two competing theories: the theory of non-responsibility and the theory of dominant-and-effective nationality.¹⁸⁶ The theory of non-responsibility “is based on the principle of sovereign equality of states”¹⁸⁷ because the determination of nationality has always been considered the exclusive prerogative of the state.¹⁸⁸ Under this theory, if two states consider the same individual to be their national, any choice between the two by an international tribunal is considered a preference for the nationality laws of one nation over the other.¹⁸⁹ This is believed to negate the principle of sovereign equality of nations.¹⁹⁰

The theory of dominant-and-effective nationality, on the other hand, is based primarily on the seminal *Nottebohm* case decided by the International Court of Justice (ICJ) in 1955.¹⁹¹ In that case, the ICJ held that nationality is:

Id. But see Nissim Bar-Yaacov, *Dual Nationality*, in 54 LIBR. WORLD AFF. 214-17 (George W. Keeton & George Schwarzenberger eds., 1961); L. OPPENHEIM, INTERNATIONAL LAW 348 (H. Lauterpacht ed., 8th ed. 1955) (contending that dual nationals could not bring claims against either of their states of nationality).

¹⁸⁶ KHAN, *supra* note 165, at 122.

¹⁸⁷ *Id.*

¹⁸⁸ See, e.g., Convention on Certain Questions Relating to the Conflict of Nationality Laws, *supra* note 185, art. 1 (“It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.”). See generally BROWNLIE, *supra* note 184.

¹⁸⁹ See KHAN, *supra* note 165, at 122.

¹⁹⁰ *Id.* at 122-123. For example, Guy I.F. Leigh argues that:

[I]f both nationalities are valid, then to permit one state to represent the individual against his other state would be given greater effect to the nationality of the claimant state, thus denying this sovereign equality. Therefore, neither state of which the individual is a national may represent him against the other state whose nationality he possesses.

Guy I.F. Leigh, *Nationality and Diplomatic Protection*, 20 INT’L & COMP. L.Q. 453, 460 (1971) quoted in KHAN, *supra* note 165, at 122-123. Under this theory, the practical difficulties associated with dual nationality are emphasized as follows:

[T]he State of one of his nationalities can never give him, or his interests, diplomatic protection or support, or bring an international claim on his behalf, against the State of his other nationality even if he is not at the time resident in that State, and is resident in the territory of the State desiring to claim. If this were not so, a dual national having a grievance against the authorities of one of his countries, in which he was resident, would only have to remove to the other in order to be able to obtain foreign support.

Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 1, 193 (1957), quoted in KHAN, *supra* note 165, at 123.

¹⁹¹ *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4 (Apr. 6).

[A] legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.¹⁹²

The ICJ also said that in cases where a preference needs to be made as to “the real and effective nationality,” arbitrators look at “the habitual residence of the individual . . . the centre of his interests, his family ties, his participation in public life, [and] attachment shown by him for a given country and inculcated in his children”¹⁹³ Despite its recent origin, the theory of dominant-and-effective nationality has been recognized as a general principle of international law,¹⁹⁴ unlike the principle of non-responsibility.

As indicated above, in resolving the nationality issue between Eritrea and Ethiopia, the Claims Commission concluded that some individuals did indeed acquire dual nationality.¹⁹⁵ However, the

¹⁹² *Id.* at 23.

¹⁹³ *Id.* at 22.

¹⁹⁴ Although the theory of dominant-and-effective nationality is generally recognized, there is some dispute as to whether it has acquired the status of customary law. Ian Brownlie, for example, argues that the theory of dominant-and-effective nationality is a general principle of international law and should be recognized as such. See BROWNLIE, *supra* note 184, at 19. Others offer a more cautious endorsement. See, e.g., Mahoney, *supra* note 185, at 728. Case No. A/18 of the Iran-United States Claims Tribunal “represents the most affirmative statement to date that the applicable rule of international law with regard to dual nationals is that of dominant and effective nationality.” Notes, *supra* note 185, at 622 (citing Iran-United States Claims Tribunal: Decision in Case No. A/18, 23 I.L.M., 489, 497-99). In *Esfahanian v. Bank Tejarat*, the Iran-United States Claims Tribunal held that “the Tribunal had jurisdiction (a) over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the Claimant is that of the United States and (b) over claims against the United States by dual Iran-United States nationals when the dominant and effective nationality of the Claimant is that of Iran.” Award No. 31-157-2 (Mar. 29, 1983), reprinted in 2 IRAN-U.S. CL. TRIB. REP. 157, 166 (1983). In fact, the Tribunal added a “caveat” to this principle because it recognized that some claimants might attempt to seek redress as U.S. nationals for rights that they had acquired solely because of their Iranian nationality. Nancy Amoury Combs, *Toward A New Understanding of Abuse of Nationality in Claims Before the Iran-United States Claims Tribunal*, 10 AM. REV. INT’L ARB. 27, 28 (1999). In such instances, the Tribunal looked at two fundamental questions: (1) whether the ownership of the property in question was reserved by law to Iranian nationals and (2) the manner of the claimant’s acquisition of such property. *Id.*

¹⁹⁵ EECC, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27-32, ¶ 51 (2004). The Commission considered the effects of this determination to be in two different groups: persons who were expelled from urban and rural areas and persons who chose to join family members who were expelled. See *id.* ¶¶ 80-97.

Commission did not deem it necessary to determine the dominant-and-effective nationality of the dual nationals, mainly because the issue of legal standing had already been determined by the Algiers Agreement.¹⁹⁶ Rather, the Commission followed a completely different, perhaps unprecedented, line of inquiry because the issue was whether Ethiopia had in fact engaged in unlawful denationalization of its own nationals.¹⁹⁷ Ironically, the claimant was another state whose nationality was held by the represented individuals.¹⁹⁸ If it were not for the Algiers Agreement, under international law discussed above, Eritrea would have had to prove that it was the source of the dominant-and-effective nationality in order to present a claim against Ethiopia. Even then, the claim would have been exceedingly strange because it would have to allege that, Eritrea, as the repository of the dominant-and-effective nationality, would seek compensation on behalf of the same individuals who were deprived of their non-dominant nationality by Ethiopia. That strange option was foreclosed by the Algiers Agreement. The facts of this case were unprecedented, and as indicated above, in determining the issues that arose out of these facts, the Commission engaged in a creative application of existing norms and contributed its own methods of resolving claims against a state on behalf of individual claimants whose nationality was at issue.

B. APPLICABLE LAW

The Algiers Agreement provides that the Commission shall adjudicate claims that “result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.”¹⁹⁹ The Agreement excludes from the Commission’s jurisdiction “claims arising from the cost of military operations, preparing for military operations, or the use of force, except

¹⁹⁶ See Algiers Agreement, *supra* note 6, art. 5, ¶ 9 (“In appropriate cases, each party may file claims on behalf of persons of Ethiopian or Eritrean origin who may not be its nationals. Such claims shall be considered by the Commission on the same basis as claims submitted on behalf of that party’s nationals.”). In arbitral proceedings, parties ordinarily agree to certain jurisdictional matters. Though unprecedented, this provision was endorsed by the Commission. In fact, even the doctrine of non-responsibility recognizes waiver by mutual consent. See H. Lauterpacht, *The Subjects of the Law of Nations*, 63 L.Q. REV. 438, 457 (1947), cited in KHAN, *supra* note 165, at 123.

¹⁹⁷ See EECC, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27-32, ¶¶ 57-58.

¹⁹⁸ *Id.* ¶ 63.

¹⁹⁹ Algiers Agreement, *supra* note 6, art. 5 ¶ 1.

to the extent that such claims involve violations of international humanitarian law.”²⁰⁰ The Algiers Agreement further mandates that “[i]n considering claims, the Commission shall apply relevant rules of international law.”²⁰¹ Relying on Article 38, paragraph 1, of the Statute of the International Court of Justice, the Commission’s rules of procedure identified the relevant rules as:

- (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; [and]
- (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.²⁰²

In addition, the parties did not dispute that the armed conflict that occurred between them was an international armed conflict and that the applicable laws relating to international armed conflicts applied.²⁰³ During the proceedings, international humanitarian law would prove to be the key source of law.²⁰⁴

By way of comparison, the applicable substantive rules of the Iran-United States Claims Tribunal are stated more generally as “[t]he Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.”²⁰⁵ Thus, in terms of the applicable law, it appears that

²⁰⁰ *Id.* art. 5 ¶ 1.

²⁰¹ *Id.* art. 5 ¶ 13. It is important to note that as described above, in Eritrea’s Civilians Claims, the Commission in fact looked at Ethiopia’s 1930 nationality law in reaching its conclusion. *See* EECC, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27-32, ¶¶ 43, 46, 59 (2004).

²⁰² *See* EECC, Prisoners of War, Eritrea’s Claim 17, ¶ 31 (2003).

²⁰³ EECC, Central Front, Ethiopia’s Claim 2, ¶¶ 13, 14 (2004); EECC, Civilians Claims, Ethiopia’s Claim 5, ¶ 22 (2004).

²⁰⁴ *See* EECC, Civilians Claims, Ethiopia’s Claim 5, ¶ 24 (2004) (Norms derived from international humanitarian law “were the central element of the Parties’ legal relationships during the conflict, and both Parties drew upon them heavily in framing their cases.”).

²⁰⁵ Claims Settlement Declaration, *supra* note 9, art. V.

the Iran-United States Claims Tribunal enjoys more latitude and flexibility than the Eritrea-Ethiopia Claims Commission because the Tribunal was essentially empowered to determine the law that applied. Indeed, in interpreting the provision dealing with the applicable law, the Iran-United States Claims Tribunal stated that it was given extraordinary latitude in choosing from among a variety of sources of law, including municipal laws and general principles of international public and private laws.²⁰⁶

With respect to the applicable law for the adjudication of claims by the UNCC, the Governing Council Rules state that

In considering the claims, Commissioners will apply Security Council Resolution 867 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law.²⁰⁷

Thus, although general principles of international law are important sources of law for all three tribunals, there is a clear emphasis on international humanitarian law, particularly the Geneva Conventions, in the establishment of the Eritrea-Ethiopia Claims Commission.

Several issues arose during the proceedings concerning applicable-law issues. Three of the key issues are addressed below, namely the Commission's findings that (1) customary international law as reflected by the Geneva Conventions was the primary source of law for the proceedings; (2) recently developed international landmine conventions create only treaty obligations and do not yet reflect customary international law; and (3) international humanitarian law and international human rights law concurrently apply during armed conflict. Each of these issues is discussed in turn below.

²⁰⁶ David J. Bederman, *The Glorious Past and Uncertain Future of International Claims Tribunals*, in *INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY* 161, 176 (Mark W. Janis ed., 1992).

²⁰⁷ U.N. Comp. Comm'n, Governing Council, *Decision Taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, Sixth Session Held on 26 June 1992* art. 31, U.N. Doc. S/AC.26/1992/10 (June 26, 1992), available at <http://www2.unog.ch/uncc/>.

1. CUSTOMARY LAW AS REFLECTED BY THE GENEVA CONVENTIONS

A significant issue arose regarding the applicable law in the prisoner-of-war proceedings. Although the most obvious source of law concerning the treatment of prisoners of war was Geneva Convention III, and both Eritrea and Ethiopia relied on and cited this instrument extensively during the proceedings,²⁰⁸ Eritrea did not accede to the Geneva Convention until August 14, 2000, well after active hostilities had come to an end.²⁰⁹ This timing led to disagreement between the parties over its applicability.²¹⁰

Eritrea had been part of Ethiopia when the latter signed all four of the Geneva Conventions in 1949 and ratified them in 1969.²¹¹ As such, the conventions were in force in Ethiopia when Eritrea achieved its independence in 1993.²¹² The Commission, however, found that Eritrea had not automatically succeeded to the Geneva Conventions “desirable though such succession would be as a general matter” given that “senior Eritrean officials made clear that Eritrea did not consider itself bound by the Geneva Conventions” following independence.²¹³ This finding was buttressed by the fact that the International Committee of the Red Cross (ICRC) also did not consider Eritrea to be bound by the Geneva Conventions prior to its accession to those treaties in 2000²¹⁴ and that Eritrea did not permit the ICRC to access its prisoner-of-war camps.²¹⁵ For the same reasons, the Commission further held that Eritrea was not bound by the Geneva Conventions by virtue of Article 2 (common to the four conventions), which provides that a party to the Geneva Conventions “shall . . . be bound by the Convention in relation to the [party not bound by the conventions], if the latter accepts and applies the provisions thereof.”²¹⁶

²⁰⁸ See EECC, Prisoners of War, Eritrea’s Claim 17, ¶ 32 (2004).

²⁰⁹ Accession to the Four Geneva Conventions of 12 August 1949 by Eritrea, <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQQH> (last visited June 15, 2007).

²¹⁰ See EECC, Prisoners of War, Eritrea’s Claim 17, ¶ 32 (2004).

²¹¹ *Id.* ¶ 33.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* ¶ 34.

²¹⁵ See *id.* ¶ 37.

²¹⁶ See *id.* ¶¶ 36-37. The Commission also rejected an argument set forth by Ethiopia that Eritrea’s accession to the Geneva Conventions was made retroactive to the period covering the conflict by virtue of Article 5, Paragraph 1, of the Algiers Agreement, which referenced the application of the Geneva Conventions to the proceedings of the Claims Commission. *Id.* ¶ 42.

Rather than finding no applicable law, however, the Commission concluded that customary international law governed the relations between Eritrea and Ethiopia with respect to prisoners of war during the conflict and that “for most purposes, ‘the distinction between customary law regarding POWs and the Geneva Convention III is not significant.’”²¹⁷ The Commission noted that the question of “the extent to which the[] provisions [of the Geneva Conventions] have become part of customary international law arises today only rarely” but observed that the Geneva Conventions were “concluded for the purpose of creating a treaty law for the parties to the convention and for the related purpose of codifying and developing customary international law that is applicable to all nations.”²¹⁸ The Commission found support for the conclusion that the Geneva Conventions had “largely become expressions of customary international law” in the *Nuclear Weapons* decision of the International Court of Justice, UN documents, and the writings of preeminent international legal scholars.²¹⁹ The Commission noted that this proposition had achieved “nearly universal acceptance” and that there was authority for the general proposition that rules pertaining to international humanitarian law achieved customary status more rapidly than other rules.²²⁰ Having found that the Geneva Conventions largely reflected customary international law, the Commission concluded that “[w]henver either Party asserts that a particular relevant provision of those Conventions should not be considered part of customary international law at the relevant time, the Commission will decide that question, and the burden of proof will be on the asserting Party.”²²¹

One of the specific claims in which this finding played a significant role was Ethiopia’s claim against Eritrea for refusing to allow

²¹⁷ *Id.* ¶ 38 (quoting Eritrea’s Claim 17, Prisoners of War, Counter Memorial to Eritrea’s Claim 17 Memorial at 19); EECC, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27-32, ¶ 28 (2003). *See generally* Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT’L L. 817, 818 (2005) (discussing customary international law issues).

²¹⁸ EECC, Prisoners of War, Eritrea’s Claim 17, ¶ 39 (2003). The Commission’s observation regarding the rarity of the issue finds support from other authorities, but this point makes the Commission’s finding regarding the applicability of customary international law all the more remarkable. *See, e.g.*, Meron, *supra* note 217, at 817 (“In an era when international legal principles are increasingly codified in multilateral conventions, the overall importance of customary law has arguably eroded.”).

²¹⁹ EECC, Prisoners of War, Eritrea’s Claim 17, ¶ 40 (2003) (citing *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, ¶ 79 (July 8)).

²²⁰ *Id.*

²²¹ *Id.* ¶ 41. *See also* Meron, *supra* note 195, at 819 n.19.

the ICRC to send delegates to visit Ethiopian prisoner-of-war camps in Eritrea during the conflict, including the period prior to Eritrea's accession to the Geneva Conventions in August 2000.²²² Although Eritrea argued that ICRC visits were a treaty-based right stemming from Geneva Convention III and that such rights were procedural and had not attained customary status,²²³ the Commission observed that not only did the ICRC not agree with this position, "the ICRC 'has played an indispensable humanitarian role in every armed conflict for more than a century.'"²²⁴ As such, the Commission concluded that:

[It could not] agree with Eritrea's argument that provisions of the Convention requiring external scrutiny of the treatment of POWs and access to POWs by the ICRC are mere details or simply implementing procedural provisions that have not, in half a century, become part of customary international law. These provisions are an essential part of the regime for protecting POWs that has developed in international practice, as reflected in Geneva Convention III. These requirements are, indeed, "treaty-based" in the sense that they are articulated in the Convention; but, as such, they incorporate past practices that had standing of their own in customary law, and they are of such importance for the prospects of compliance with the law that it would be irresponsible for the Commission to consider them inapplicable as customary international law.²²⁵

Consequently, the Commission held Eritrea liable for failing to permit ICRC visits prior to August 2000 even though it had not yet ratified Geneva Convention III.²²⁶

The Commission continued to apply the provisions of the Geneva Conventions as a reflection of customary international law throughout the course of the proceedings and expanded this approach to other international legal instruments. In consideration of the parties' War Front claims, the Commission found that (1) the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 and its annexed Regulations and (2) the Additional Protocol I to the Geneva

²²² EECC, Prisoners of War, Ethiopia's Claim 4, ¶¶ 55-62 (2003).

²²³ *Id.* ¶ 56.

²²⁴ *Id.* ¶¶ 57, 60 (quoting HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 312 (1978)).

²²⁵ *Id.* ¶ 61.

²²⁶ *See id.* ¶ 62. This violation also included Eritrea's refusal to permit the ICRC to register prisoners of war, to interview them without witnesses present, and to provide them with customary relief and services. *Id.*

Conventions of 1977 had achieved customary international law status.²²⁷ Although it had no practical consequence with respect to the matters pending before the Commission, the Commission was slightly more circumspect regarding the customary status of Protocol I, observing that “most” but not all “of the provisions of Protocol I were expressions of customary international humanitarian law.”²²⁸ However, the Commission confirmed in one award that it believed that Article 75 of Protocol I, which “articulates fundamental guarantees applicable to all ‘persons who are in the power of a Party to the conflict who do not benefit from more favorable treatment under the Conventions or under this Protocol,’” had achieved customary status.²²⁹ Similarly, the Commission noted that provisions of Protocol I relating to aerial bombardments—Articles 48, 51, 52, 57, and 58—had similarly become customary norms of international law:

The provisions of Geneva Protocol I [relating to aerial bombardments] 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.²³⁰

There was only one example of a party arguing that a specific provision of an international legal instrument had not attained customary status following the Commission’s handling of the issue in the prisoner-of-war proceedings. Ethiopia argued in its defense to an aerial bombardment claim, made by Eritrea for the targeting of a water reservoir, that Article 54 of Protocol I (which provides for the protection of objects indispensable to the survival of the civilian population) “was a new development in 1977 that had not become a part of customary

²²⁷ See, e.g., EECC, Central Front, Ethiopia’s Claim 2, ¶ 16, 17 (2004); EECC, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27-32, ¶ 29 (2004); EECC, Civilians Claims, Ethiopia’s Claim 5, ¶ 25 (2004).

²²⁸ EECC, Civilians Claims, Ethiopia’s Claim 5, ¶ 25 (2004).

²²⁹ EECC, Civilians Claims, Eritrea’s Claim 15, 16, 23 & 27-32, ¶ 30 (2004).

²³⁰ EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶ 95 (2005). See also EECC, Western & Eastern Fronts, Ethiopia’s Claims 1 & 3, ¶ 25 (2005); EECC, Central Front, Ethiopia’s Claim 2, ¶ 110 (2004).

international humanitarian law by the 1998-2000 war.²³¹ The Commission rejected this argument, observing that:

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 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. 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, 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.²³²

Another example of the Commission's consideration of customary law as reflected in international legal instruments was its imposition of liability on Ethiopia for the destruction of an obelisk named the Stela of Matara, believed to be about 2,500 years old.²³³ The

²³¹ EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶ 103 (2005).

²³² EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶¶ 104-105 (2005). Although it found Ethiopia liable for targeting the water reservoir, the Commission concluded that the finding of liability was sufficient satisfaction for the violation because no the reservoir was not hit and no damage occurred. *See id.* ¶ 105; *see also* ICRC, JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005) (concluding that a broader prohibition than the one stated in Article 54(2) has become customary law).

²³³ EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶¶ 107-114 (2004).

Commission concluded that Ethiopia, as the occupying power of the area around the obelisk when it was destroyed, was responsible for the damage,²³⁴ and based its decision on customary humanitarian law because the 1954 Hague Convention on the Protection of Cultural Property was not applicable between the parties.²³⁵ The Commission noted that the deliberate destruction of historic monuments is a violation of Article 56 of the Hague Regulations, which, as discussed above, the Commission characterized as a customary norm of international law.²³⁶ Moreover, the Commission stated that the obelisk was civilian property protected under Article 53 of Geneva Convention IV and Article 52 of Protocol I.²³⁷

2. LANDMINES: TREATY BASED OBLIGATIONS

In contrast to its findings with respect to the Geneva Conventions, Hague Conventions and Regulations, and Protocol I, the Commission held that (1) 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; (2) the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-

²³⁴ *Id.* ¶ 112.

²³⁵ *Id.* ¶ 113.

²³⁶ *Id.* See Hague Convention IV, *supra* note 1, art. 56 (“All seizures of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.”).

²³⁷ EECC, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 & 22, ¶ 113; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War art. 53, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (“Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or other public authorities, or social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”); see also Protocol I, *supra* note 1, art. 52 (“Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives. . .”). The Commission further noted that the application of Article 53 of Protocol I, which provides for the protection of cultural objects and places of worship, was uncertain because its negotiating history suggested that it was intended to protect only a few monuments of particular significance such as the Acropolis in Athens and St. Peter’s Basilica in Rome. EECC, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 & 22, ¶ 113 (2004); see also Protocol I, *supra* note 1, art. 53 (“[I]t is prohibited: (a) To commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) To use such objects in support of the military effort; (c) To make such objects the object of reprisals.”). The language of this provision does not, however, contain any suggestion that its applicability is limited by geography or historical prominence. Ultimately, it is not clear from the Commission’s decision whether it found a violation of this provision.

Traps and Other Devices (“Protocol II of 1980”), and that Protocol as amended on May 3, 1996; and (3) the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction had not achieved status as customary norms of international law because these “treaties have been concluded so recently and the practice of States has been so varied and episodic that it is impossible to hold that any of the resulting treaties constituted an expression of customary international humanitarian law applicable during the armed conflict between the Parties.”²³⁸ As such, they are not applicable in the absence of treaty obligation. As neither of the parties were parties to these conventions, the Commission held that the obligations that they set forth were not operational between them.²³⁹

Nonetheless, recognizing the substantial harm that even the lawful defensive use of landmines can cause, the Commission emphasized the importance of the rapid development of these international conventions restricting or prohibiting the future use of landmines.²⁴⁰ The Commission also observed that some provisions of Protocol II did express customary international law norms, including the provisions relating to the recording of mine fields and the indiscriminate use of mines.²⁴¹

3. CONCURRENT APPLICATION OF INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW

The concurrent application of humanitarian law and human rights law²⁴² is often necessary when human rights issues arise in conflict

²³⁸ EECC, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 & 22, ¶ 24 (2004).

²³⁹ *Id.*

²⁴⁰ EECC, Central Front, Ethiopia’s Claim 2, ¶ 51 (2004).

²⁴¹ EECC, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 & 22, ¶ 24 (2004). Without specifying any relevant provision of an international legal instrument, the Commission also concluded that the use of landmines to protect fixed positions was a lawful use of these weapons under customary international law. EECC, Central Front, Ethiopia’s Claim 2, ¶ 50 (2004).

²⁴² Some experts argue that there is a close relationship between human rights and humanitarian law norms and they in fact overlap to a large extent. *See, e.g.,* Dale Stephens, *Human Rights and Armed Conflict—The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 4 YALE HUM. RTS. & DEV. L. J. 1 (2001); Meron, *supra* note 217. *See also* Michael Matheson, *The Opinion of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT’L L. 417, 423 (1997) (explaining the view that the two sets of rules have fundamental philosophical distinctions, and that such distinctions must be maintained).

situations that are mainly regulated by humanitarian law.²⁴³ The two sets of norms have significant commonality because they both concern the protection of individuals.²⁴⁴ There are, however, important distinctions. In simplistic terms, while human rights law is designed to regulate peacetime circumstances, humanitarian law is designed to regulate wartime circumstances.²⁴⁵ Inevitably, however, certain wartime circumstances demand the application of human rights norms. A good example of the concurrent application of these norms in wartime circumstances is the set of denationalization and unlawful expulsion claims that Eritrea brought against Ethiopia.²⁴⁶

As discussed in Section III.A.4. above, the Commission determined that the affected individuals were dual nationals of both Eritrea and Ethiopia. The next question for the Commission was whether Ethiopia's expulsion of some of the dual nationals was lawful.²⁴⁷ To answer this question, the Commission had to weigh rights and duties enshrined under both human rights and humanitarian laws.²⁴⁸

The arguments set forth by the parties are summarized as follows: Ethiopia argued that customary international law (presumably including human rights law) gave it the authority to revoke Ethiopian nationality from individuals who had acquired another nationality.²⁴⁹ Eritrea, on the other hand, argued that such a prerogative is not without limitations and relied on Article 15 of the Universal Declaration of Human Rights,²⁵⁰ which prohibits the arbitrary deprivation of nationality.²⁵¹ The Commission acknowledged the applicability of the laws cited by both parties; however, it stated that the question would be whether Ethiopia's actions were arbitrary in light of the wartime circumstances,²⁵² which are governed by international humanitarian law.

The Commission observed that in determining whether the deprivation of nationality and subsequent expulsion was arbitrary it

²⁴³ See HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT, *supra* note 5, at 9.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32 (2004).

²⁴⁷ *Id.* art. VII.

²⁴⁸ See *id.* ¶ 57.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Universal Declaration of Human Rights, G.A. Res. 217A, at 74, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

²⁵² EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 58-64 (2004).

would look at several factors, including “whether the action had a basis in law; whether it resulted in persons being rendered stateless; and whether there were legitimate reasons for it to be taken given the totality of the circumstances.”²⁵³

With respect to the basis in law, the Commission concluded that Ethiopia’s 1930 Nationality Law was legally sufficient because its provisions were comparable to the laws of many nations and not contrary to international law,²⁵⁴ essentially human rights law. The Commission added that the application of this law does not generally result in statelessness because its application depends on acquisition of another nationality.²⁵⁵ Most importantly, however, the Commission held that Ethiopia’s deprivation of its nationality to those who also held Eritrean nationality and showed some allegiance to Eritrea was not unlawful.²⁵⁶ In reaching this conclusion, the Commission weighed the totality of the wartime circumstances.²⁵⁷ It concluded that the evidence showed that some dual nationals were considered threats to national security by Ethiopian authorities because of their participation in Eritrean organizations and collection of funds for the Eritrean state.²⁵⁸ It also said that Ethiopia’s screening process, although it fell short of recognized standards, was not arbitrary or contrary to international law given the exceptional wartime circumstances.²⁵⁹

²⁵³ *Id.* ¶ 60.

²⁵⁴ *See id.* ¶ 61.

²⁵⁵ *Id.* ¶ 62.

²⁵⁶ *Id.* ¶ 72.

²⁵⁷ *Id.* ¶¶ 65-71.

²⁵⁸ The court said that:

The first [organization] was the Popular Front for Democracy and Justice (“PFDJ”).

The evidence showed that the PFDJ was the ruling political party in Eritrea, but it was more than a western-style political party. . . . The evidence showed that the PFDJ maintained a structure of local groups at numerous locations in Ethiopia, which were used to promote the interests of Eritrea.

Id. ¶ 67. *See also id.* ¶ 68 (“Ethiopia’s screening process also focused on persons active in the Eritrean Community Associations. The Community Associations were less overtly political than the PFDJ. Nevertheless, the evidence showed that they raised funds to support Eritrea and promoted nationalistic solidarity among their members.”).

²⁵⁹ *Id.* ¶ 72. *See id.* ¶ 70 (“Eritrea’s evidence was consistent with Ethiopia’s claim that the process involved deliberation and selection of individuals. Eritrean witnesses regularly described Ethiopian security personnel coming to their residences or places of work seeking them individually by name.”). Compare with the following:

The process was hurried. Detainees received no written notification, and some claimed they were never told what was happening. Ethiopia contended that detainees could orally apply to security officials seeking release. The record includes some

Thus, it is apparent that the Commission applied a combination of human rights and humanitarian law principles in arriving at this conclusion. Human rights law allows derogations from the general principles under limited circumstances, but, even then, it provides for important safeguards.²⁶⁰ For example, in case of deprivation of nationality, there must be a fair hearing by an independent and impartial agency.²⁶¹ The issue of the sufficiency of such legal process would

declaration of persons who were released, but it also includes senior Ethiopian witnesses' statements suggesting that there were few appeals.

Id. ¶ 71.

²⁶⁰ These derogations and safeguards include:

1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

....

3) Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

International Covenant on Civil and Political Rights [ICCPR] art.4, Dec. 19, 1966, 999 U.N.T.S. 171. *See also* European Convention for the Protection of Rights and Fundamental Freedoms art. 15, Sept. 3, 1953, 213 U.N.T.S. 221 (providing for similar derogations from international obligations); American Convention on Human Rights art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (providing for similar derogation of international obligations).

²⁶¹ *See, e.g.*, Universal Declaration of Human Rights [UDHR] art. 8, G.A. Res. 217A at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."); *id.* art. 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.").

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

ICCPR, *supra* note 260, art. 13. *See also* Convention on the Reduction of Statelessness art. 8(4), 989 U.N.T.S. 175, entered into force Dec. 13, 1975 ("A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.").

essentially be a factual issue. It is, however, argued generally that under humanitarian law there is no express prohibition of the expulsion of enemy aliens when it occurs for security reasons.²⁶² Agreeing with this proposition, the Commission stated that international humanitarian law “gives belligerents broad power to expel nationals of the enemy State from their territory during a conflict.”²⁶³ In reaching its conclusion, the Commission analyzed the circumstances surrounding the conflict in light of the standards set forth by both human rights and humanitarian laws

²⁶² See, e.g., GERALD DRAPER, *THE RED CROSS CONVENTIONS* 36 (1958) (noting that the customary right of a state to expel all enemy aliens at the outset of a conflict was not abrogated by the Geneva Civilians Convention of 1949 and that such expulsion is not condemned by customary international law). Compare with ICRC Commentary on Article 45 of Geneva Convention IV, which states:

Any movement of protected persons to another State, carried out by the Detaining Power on an individual or collective basis, is considered as a transfer for the purposes of Article 45. The term ‘transfer’, for example, may mean internment in the territory of another Power, repatriation, the returning of protected persons to their country of residence or their extradition. The Convention makes provision for all these possibilities. On the other hand there is no provision concerning deportation (in French *expulsion*), the measure taken by a State to remove an undesirable foreigner from its territory. In the absence of any clause stating that deportation is to be regarded as a form of transfer, this Article would not appear to raise any obstacle to the right of Parties to the conflict to deport aliens in individual cases when State security demands such action. However, practice and theory both make this right a limited one: the mass deportation at the beginning of a war, of all the foreigners in the territory of a belligerent cannot, for instance, be permitted.

THE GENEVA CONVENTIONS OF 12 AUGUST 1949, COMMENTARY IV, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 266 (Jean S. Pictet ed., International Committee of the Red Cross 1958).

²⁶³ The Commission noted:

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

EECC, *Civilians Claims, Eritrea’s Claims* 15, 16, 23 & 27-32, ¶ 81 (2004) (quoting OPPENHEIM’S INTERNATIONAL LAW § 413 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1997)).

and determined that Ethiopia's expedited procedures fell short of human rights standards but were justified under humanitarian law because of the wartime exigencies.²⁶⁴ Indeed, the set of unique issues presented in this case offered an excellent opportunity for the analysis of the simultaneous application of these important bodies of law.

C. EVIDENTIARY ISSUES

As discussed above, the Commission adopted its own rules of procedure and evidence based on the Permanent Court of Arbitration Rules of Procedure and Evidence.²⁶⁵ This section discusses the Commission's resolution of evidentiary issues in its various proceedings.

1. STANDARD OF PROOF

The Commission adopted a high standard of evidentiary proof for the proceedings before it, concluding that the parties must establish facts with clear and convincing evidence based on the totality of the evidence and show that violations occurred in a frequent or pervasive manner. With respect to one important set of claims, i.e., allegations of rape, the Commission worked within this standard to produce a slightly altered approach that took into account characteristics of this violation that likely would not be accounted for under the general standard.

a. Clear and Convincing Evidence of Violations That Occurred on a Frequent or Pervasive Basis Based on the Totality of the Evidence

Although the Commission's Rules of Procedure state that "[e]ach party shall have the burden of proving the facts it relies on to

²⁶⁴ The dual application of human rights and humanitarian law was important because the right to expel enemy aliens is dependent on the ability to accord them due process. The right to expel during wartime emanates from humanitarian law but the safeguard mainly emanates from human rights law. For example, the Humanitarian Law Handbook, on which the Commission relied, states:

Art. 45, para. 4 GC IV contains a universally applicable principle of international law. In this connection, attention is drawn to Article 13 of the International Covenant on Civil and Political Rights, which stipulates an orderly procedure for expulsion of aliens and in particular a procedure enabling the persons concerned to present their own case. This rule should be applied generally.

HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT, *supra* note 5, § 589.4 at 287.

²⁶⁵ *Infra* Part II.B.

support its claim or defense” and that “[t]he Commission shall determine the admissibility, relevance, materiality and weight of the evidence offered,”²⁶⁶ the rules do not “articulate the quantum or degree of proof that a party must present to meet this burden of proof.”²⁶⁷ The Commission noted that these characteristics of the rules were “reflect[ive of] common international practice.”²⁶⁸ Thus, the Commission was left with the challenge of articulating the applicable evidentiary standards that it would apply.

The Commission found that the standards argued for by both of the parties during the first round of proceedings were high standards that took into account the seriousness of the violations at issue and the fact that states—not individuals or corporate entities—were parties to the proceedings.²⁶⁹ As such, the Commission concluded that “[p]articularly in light of the gravity of some of the claims advanced, the Commission will require *clear and convincing evidence* in support of its findings.”²⁷⁰ Thus, the standard was set somewhere between the standard of probability common in civil court proceedings in the United States and the standard of “beyond a reasonable doubt” common in U.S. criminal proceedings. Indeed, the Commission specifically noted that although some of the allegations might amount to criminal acts if proven, the Commission was not a criminal court and would not adopt an evidentiary standard appropriate for criminal proceedings.²⁷¹ Accordingly, the Commission observed that “[t]he possibility that particular findings may involve very serious matters does not change the international law rules to be applied or fundamentally transform the quantum of evidence required.”²⁷² On the other hand, the Commission noted in subsequent decisions that it “recognizes that this standard of proof and the existence of conflicting evidence may result in fewer findings of liability than either Party expects. The Awards on these Claims must be understood in that unavoidable context.”²⁷³

²⁶⁶ EECC Rules of Procedure, *supra* note 38, art. 14.

²⁶⁷ EECC, Prisoners of War, Eritrea’s Claim 17, ¶ 44 (2003).

²⁶⁸ *Id.*

²⁶⁹ *See id.* ¶ 45.

²⁷⁰ EECC, Prisoners of War, Eritrea’s Claim 17, ¶ 46 (2003) (emphasis added). *See, e.g.*, EECC, Central Front, Ethiopia’s Claim 2, ¶ 20 (2004).

²⁷¹ *E.g.*, EECC, Prisoners of War, Ethiopia’s Claim 4, ¶ 38 (2003).

²⁷² *Id.*

²⁷³ EECC, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 & 22, ¶ 7 (2004). *See, e.g.*, EECC, Civilians Claims, Eritrea’s Claim 15, 16, 23 & 27-32, ¶ 35 (2004).

Consistent with this view of its function, the Commission also concluded that the parties must establish that violations occurred not on an individual and isolated basis but in a “frequent or pervasive” manner.²⁷⁴ Specifically, the Commission stated that it “does not see its task to be the determination of liability of a Party for each individual incident of illegality suggested by the evidence. Rather, it is to determine liability for serious violations of the law by the Parties, which are usually illegal acts or omissions that were frequent or pervasive and consequently affected significant numbers of victims.”²⁷⁵ The Commission concluded that “[t]hese parameters are dictated by the limit of what is feasible for the two Parties to brief and argue and for the Commission to determine in light of the time and resources made available by the Parties.”²⁷⁶ The Algiers Agreement imposed several restrictions on the proceedings that likely influenced the Commission’s finding. For example, the Algiers Agreement stipulates that the commission must “endeavor” to complete the proceedings within three years of the closing date for filing the claims or four years of the enactment of the agreement.²⁷⁷ As discussed in the following section, however, the Commission did not find the “frequent or pervasive” standard to be “an invariable requirement.”²⁷⁸

In articulating its evidentiary standards, the Commission also stressed the importance of the cumulative weight or totality of the evidence. In this regard, the Commission observed that:

The consistent and cumulative character of much of the Parties’ evidence was of significant value to the Commission in making its factual judgments. When the totality of the evidence offered by the Claimant provided clear and convincing evidence of a violation—*i.e.*, a *prima facie* case—the Commission carefully examined the evidence offered by the Respondent (usually in the form of a declaration or

²⁷⁴ EECC, Prisoners of War, Ethiopia’s Claim 4, ¶ 54 (2003); EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶ 91 (2005).

²⁷⁵ EECC, Prisoners of War, Ethiopia’s Claim 4, ¶ 54 (2003).

²⁷⁶ *Id.*

²⁷⁷ Algiers Agreement, *supra* note 6, art. 5(12). Notably, this requirement was stated in suggestive terms rather than mandatory terms. The liability phase itself has taken more than three years to complete.

²⁷⁸ EECC, Central Front, Ethiopia’s Claim 2, ¶ 37 (2004); EECC, Civilians Claims, Ethiopia’s Claim 5, ¶ 85 (2004).

camp records) to determine whether it effectively rebutted the Claimant's proof.²⁷⁹

This approach appears to be a sound one given the general reliability of corroborating evidence. In some respects, the Commission's standards are in accord with the standards used by other international tribunals, but in other respects, it diverges from them. For example, the Commission's "clear and convincing" standard appears to comport with the standard adopted by the International Court of Justice in the *Congo* case, where the ICJ stated that "[t]he Court must first establish which relevant facts it regards as having been *convincingly established* by the evidence . . ."²⁸⁰ In contrast, however, a cumulative-weight approach does not appear to have been adopted by the ICJ in the *Congo* case.²⁸¹

The Iran-United States Claims tribunal adopted the UNCITRAL rules of evidence in its totality because of the commercial nature of most of the claims.²⁸² The application of the UNCITRAL rules of evidence often leads to the common evidentiary standard of "preponderance of the evidence". Accordingly, this was the standard adopted by the Iran-United States Claims Tribunal, which has faced serious problems with respect to the scarcity of direct evidence.²⁸³ Thus, the manner in which it handled this challenge was fundamentally different from the manner in which the Eritrea-Ethiopia Claims Tribunal handled the same issue. While the Eritrea-Ethiopia Claims Commission effectively raised the standards of proof—or at least adopted the baseline standard—for findings of liability as discussed above, the Iran-United States Claims Tribunal lowered the standard of proof in the face of scarcity.²⁸⁴ As such,

²⁷⁹ EECC, Prisoners of War, Ethiopia's Claim 4, ¶ 43 (2003). Although the Commission occasionally referred to the parties' burden to establish a prima facie case based on the cumulative weight of the evidence throughout the proceedings, this standard was articulated only in the partial awards regarding prisoners of war. *See id.*

²⁸⁰ *See* Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda) (Judgment of Dec. 19, 2005), ¶ 72 (emphasis added), available at http://www.icj-cij.org/icjwww/idocket/ico/ico_judgments/ico_judgment_20051219.pdf.

²⁸¹ *See, e.g., id.*

²⁸² *See* Iran-U.S. Cl. Trib., Rules of Procedure, art. 24, available at <http://www.iusct.org/tribunal-rules.pdf> (cited in ALDRICH, *supra* note 1, at 332).

²⁸³ *See* Aldrich, *supra* note 1, at 332 ("In practice, the Tribunal was conscious of the practical difficulties facing the parties in finding and producing evidence.").

²⁸⁴ For example, in *R.J. Reynolds Tobacco Co. v. Gov. of the Islamic Rep. of Iran*, the Tribunal held that if a purchaser fails to object to the invoiced amount within a reasonable time following receipt, and not until the proceedings are instituted, the burden shifted to the buyer to prove that

among other principles, the IUSCT relied on presumptions, inferences, and burden shifting under different circumstances.²⁸⁵

b. The Rape Exception

One of the most serious allegations that attracted the Commission's attention was rape, which drew separate and general comments by the Commission each time it was addressed.²⁸⁶ Although the Commission commended both parties for the absence of any suggestion of rape being used as an "instrument of war,"²⁸⁷ the Commission nonetheless found both parties liable for certain limited violations concerning rape.²⁸⁸ The Commission began its analysis by recognizing that there was no disagreement between the parties that rape is a violation of customary international humanitarian law as enshrined in the Geneva Conventions.²⁸⁹ The Commission then proceeded to address

it did not owe the amount of the invoices. Partial Award No. 145-35-3, ¶ 17 (Aug. 6, 1984), reprinted in 7 IRAN-U.S. CL. TRIB. REP. 181, 190-91 (cited in Aldrich, *supra* note 1, at 334).

²⁸⁵ See generally Aldrich, *supra* note 1, at 333.

²⁸⁶ See EECC, Prisoners of War, Eritrea's Claim 17, ¶¶ 139-142 (2003); see also EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶¶ 36-43 (2004); EECC, Central Front, Ethiopia's Claim 2, ¶¶ 34-40 (2004); EECC, Civilians Claims, Ethiopia's Claim 5, ¶¶ 83-90 (2004); EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶¶ 74-84 (2005); EECC, Western and Eastern Fronts, Ethiopia's Claims 1, 3, ¶¶ 49-56, 68-69 (2005).

²⁸⁷ E.g., EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 36 (2004).

²⁸⁸ Eritrea was held liable for failing to take effective measures to prevent rape in Irob Wereda on the Central Front. EECC, Central Front, Ethiopia's Claim 2, ¶ 39 (2004). Eritrea was also held liable for failure to prevent rape in Elidar and Dalul Weredas on the Eastern Front. EECC, Western and Eastern Fronts, Ethiopia's Claims 1, 3, ¶¶ 68-70 (2005). Ethiopia was held liable for the same violation in Senafe Town on the Central Front. EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 42, 80-8 (2004). Ethiopia was also held liable for violations in Barentu and Tesseney Towns on the Western Front. EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶ 83 (2005).

²⁸⁹ E.g., EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 37 (2004). The Commission cited to the following provisions. The first is Common Article 3(1), which, *inter alia*, prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, torture . . . outrage on personal dignity, in particular humiliating and degrading treatment . . ." Protocol I, *supra* note 1, art. 3 ¶ 1. The second provision is Article 27 of Geneva Convention IV, which states that:

Protected Persons are entitled, in all circumstances, to respect for their persons, their honour, their families 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.

the evidentiary challenges that arose given the nature of this violation.²⁹⁰ The Commission observed that heightened cultural sensitivities in both Eritrea and Ethiopia made it less likely that victims would come forward to communicate the rape or sexual abuse they endured, resulting in available evidence that is “likely to be far less detailed and explicit than for non-sexual offenses.”²⁹¹ The Commission accepted such sensitivities as an objective reality and took them into account when considering the evidence because, in the words of the Commission, “[t]o do otherwise would be to subscribe to the school of thought, now fortunately eroding, that rape is inevitable collateral damage in armed conflict.”²⁹²

In undertaking this approach to the evidence, the Commission observed that its earlier enunciated requirement that violations be shown to have occurred on a frequent or pervasive basis did not apply across the board.²⁹³ The Commission quoted its earlier language, stressing that its duty was to “determine liability for serious violations . . . which are *usually* illegal acts or omissions that were frequent or pervasive”²⁹⁴ In other words, the Commission concluded that rape was of a sufficiently serious nature to warrant liability without a showing that it occurred in a frequent or pervasive manner.²⁹⁵ As the Commission put it:

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.²⁹⁶

The Commission explained that the specific areas in which it found evidence of rapes having occurred were those “where large numbers of opposing troops were in closest proximity to civilian

Id. art. 27. The third provision is Article 76.1 of Protocol I, which states that “[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.” *Id.* art. 76.

²⁹⁰ EECC, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 & 22, ¶ 39 (2004).

²⁹¹ *E.g., id.*

²⁹² *E.g., id.*

²⁹³ *E.g., id.* ¶ 40. As the Commission put it, the frequent-or-pervasive requirement was not “an invariable requirement.” *Id.*

²⁹⁴ *E.g., id.*

²⁹⁵ *Id.* ¶ 41.

²⁹⁶ *E.g., id.*

populations (disproportionately women, children and the elderly) for the longest periods of time.”²⁹⁷ The Commission concluded that military officials were obligated to take special care in such situations: “[k]nowing, as they must, that such areas pose the greatest risk of opportunistic sexual violence by troops, Eritrea and Ethiopia were obliged to impose effective measures, as required by international humanitarian law, to prevent rape of civilian women.”²⁹⁸

Thus, the Commission was faced with a situation where there was clear and convincing evidence of incidents of rape in territories occupied by both parties,²⁹⁹ but the evidence did not show that incidents were frequent or pervasive.³⁰⁰ It compensated for this shortcoming, which, as discussed above, stemmed from the cultural sensitivities inherent in the region,³⁰¹ not by adopting a new standard or altering the existing standard, but by operating within the standard already enunciated.³⁰² This approach provides an effective means of addressing a difficult and important issue and will undoubtedly prove to be one of the most significant contributions of the Commission to the growth of international humanitarian law.

2. EVIDENCE USED TO PROVE FACTS

The primary source of evidence that the parties relied on was a significant number of signed affidavits from persons with personal knowledge of the events that transpired during the more than two years of conflict.³⁰³ In evaluating the evidence, the Commission recognized the

²⁹⁷ *E.g., id.* ¶ 42.

²⁹⁸ *Id.* While the Commission found both parties responsible for not taking measures to prevent rape in some specific geographic areas, it did not find such failure in other areas. *Id.* ¶¶ 42-43. However, the Commission said that in those areas where there was no gross failure, there were individual instances “deserving of at least criminal investigation.” *Id.* ¶ 43.

²⁹⁹ EECC, Prisoners of War, Eritrea’s Claim 17, ¶¶ 139-142 (2003). It should be noted that with respect to some of the rape claims submitted by the parties, the evidence produced was not considered clear and convincing by the Commission. *E.g., id.* (denying Eritrea’s claim for the rape of female prisoners of war for insufficient evidence).

³⁰⁰ *See id.*

³⁰¹ EECC, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 & 22, ¶ 39 (2004).

³⁰² *Id.*

³⁰³ The parties relied heavily on signed declarations. In the POW case, for example, Eritrea submitted seventy-seven signed declarations in support of its affirmative case, forty-eight of which were from former prisoners of war and ten of which were from former civilian internees. EECC, Prisoners of War, Eritrea’s Claim 17, ¶ 48 (2003). Likewise, Ethiopia submitted thirty declarations in support of its affirmative case, all of which were from former prisoners of war.

importance placed on the signed declarations submitted by the parties. It stated that in determining the probative value of an affidavit to establish a violation of international law, it considered the clarity and detail of the relevant testimony and whether the allegations were corroborated by testimony in other affidavits or other evidence.³⁰⁴ The Commission also observed that it relied on the formal affidavits as supplemented by the testimony at the hearings and other documents in the record, signaling the importance it assigned to the signed affidavits.³⁰⁵

Live testimony by witnesses at the various hearings also played a remarkable role in the parties' efforts to establish their allegations.³⁰⁶ The fact witnesses included, among others, former prisoners of war,³⁰⁷ civilian detainees,³⁰⁸ expellees,³⁰⁹ victims of violence (including shootings and bombings),³¹⁰ military commanders,³¹¹ and security officials. Expert witnesses included psychiatrists,³¹² medical doctors,³¹³ retired U.S. army generals,³¹⁴ and various military and explosives experts.³¹⁵

EECC, Prisoners of War, Ethiopia's Claim 4, ¶¶ 39, 42 (2003). Ethiopia also submitted numerous claim forms that were "filled in by a former POW or a person writing for him, responding at varying length to detailed questions regarding conditions and experiences in each of Eritrea's POW camps." *Id.* at ¶40. The Commission concluded that the claim forms were "of uncertain probative value" and did not use "them in arriving at the factual judgments." *Id.* at ¶ 41. For all of the other cases, including the civilian and war front cases, both parties submitted hundreds of sworn declaration for their respective affirmative and defensive cases. *E.g.*, EECC, Civilians Claims, Ethiopia's Claim 5, ¶ 32 (2004).

³⁰⁴ *E.g.*, EECC, Prisoners of War, Eritrea's Claim 17, ¶ 49 (2003).

³⁰⁵ Again, this emphasis on signed declarations should be compared with the ICJ's reliance on documents in the Congo case. *See* Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Judgment of Dec. 19, 2005), *available at* <http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>.

³⁰⁶ The important role of witnesses in these proceedings should be contrasted with the more limited role played by witnesses before the International Court of Justice [ICJ].

³⁰⁷ EECC, Prisoners of War, Ethiopia's Claim 4, ¶ 44 (2004).

³⁰⁸ EECC, Prisoners of War, Eritrea's Claim 17, ¶ 48 (2003).

³⁰⁹ EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 1 (2004).

³¹⁰ EECC, Central Front, Ethiopia's Claim 2, ¶¶ 22, 72 (2004).

³¹¹ EECC, Central Front, Eritrea's Claim 2, 4, 6, 7, 8, & 22, ¶ 28 (2004) (Brigadier General Alemu Ayele for Ethiopia); EECC, Central Front, Ethiopia's Claim 2, ¶ 22 (2004) (Col. Abraham Ogbasellassie for Eritrea).

³¹² EECC, Prisoners of War, Eritrea's Claim 17, ¶ 48 (2003). The health officer was also presented as an expert witness. *Id.* ¶ 48.

³¹³ *See id.*

³¹⁴ EECC, Central Front, Eritrea's Claim 2, 4, 6, 7, 8, & 22, ¶ 28 (2004) (U.S. Army General (Ret.) Charles W. Dyke for Ethiopia).

³¹⁵ *Id.* ¶ 28 (Mr. Henrik Tobeisen and Mr. William Arkin for Eritrea); *id.* ¶ 109 (Mr. Laurent Bouillet for Eritrea); EECC, Central Front, Ethiopia's Claim 2, ¶ 22 (2004) (Major (Ret.) Paul Noack and Col. (Ret.) Jake Bell).

Documentary evidence appears to have played a lesser, but still important, role than that played by testimonial evidence. For example, in the prisoner of war cases, Eritrea submitted newspaper articles,³¹⁶ public statements, medical and hospital records, and expenditure receipts related to POW camps.³¹⁷ In the civilian cases, Eritrea also submitted, among other official records, immigration documents.³¹⁸ In the prisoner of war cases, Ethiopia similarly submitted official declarations, newspaper articles, training materials, camp regulations, and medical records.³¹⁹ In the war front claims, both parties relied on various pieces of documentary evidence, including military records,³²⁰ photographs,³²¹ and satellite imagery.³²² The Commission accorded the satellite imagery particularly strong probative value, mainly because it originated from a neutral source that was commercially available and showed the condition of buildings with a reasonable degree of clarity at specific dates.³²³ Ordinary photographs were also given significant weight in establishing patterns of destruction.³²⁴

Given the fact that the parties were attempting to prove events that occurred in each other's territory without having access to the opposite side's territory, the Commission's cumulative evidence approach appears to be the most workable one to determine what actually transpired between the parties during the more than two years of armed conflict.

3. SPECIFIC EVIDENTIARY ISSUES

During the course of the proceedings, the Commission faced numerous peculiar and specific evidentiary issues. Two of the most important issues were the utilization of confidential reports of the

³¹⁶ See *Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)* (Judgment of Dec. 19, 2005), ¶ 68, available at <http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm> (last visited Feb. 2, 2007); *Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)* (Judgment of May 24), ¶ 13, available at <http://www.icj-cij.org/icjwww/icaset/iusit/iusirframe.htm> (last visited Feb. 2, 2007).

³¹⁷ EECC, Prisoners of War, Eritrea's Claim 17, ¶ 48 (2003).

³¹⁸ EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 32 (2004).

³¹⁹ EECC, Prisoners of War, Ethiopia's Claim 4, ¶ 39 (2003).

³²⁰ See, e.g., EECC, Central Front, Ethiopia's Claim 2, ¶ 72 (2004).

³²¹ *Id.* ¶¶ 72, 73(4).

³²² EECC, Central Front, Eritrea's Claim 2, 4, 6, 7, 8, & 22, ¶ 62 (2004).

³²³ See *id.* ¶¶ 62-64.

³²⁴ See EECC, Central Front, Ethiopia's Claim 2, ¶ 73(4) (2004).

International Committee of the Red Cross and the failure by the parties to produce evidence known to exist in their custody. These issues are discussed below.

a. Evidence of the International Committee of the Red Cross

One of the important evidentiary issues addressed by the Commission was accessibility to confidential evidence under the authority of the ICRC. The ICRC had visited Ethiopian prisoner of war camps throughout the conflict and Eritrean prisoner of war camps beginning in August 2000.³²⁵ Accordingly, both parties had in their possession numerous confidential documents obtained from the ICRC.³²⁶ Although the parties sought to provide this evidence to the Commission—and the Commission wanted to receive it—“[t]he ICRC maintained that [this evidence] could not be provided without ICRC consent, which would not be given.”³²⁷ This, even after the president of the Commission met with senior ICRC officials and offered to review the evidence “on a restricted or confidential basis if required.”³²⁸ The only documents that the ICRC was willing to permit to be used were those that were already public.³²⁹ The Commission reacted in the following terms:

³²⁵ *E.g.*, EECC, Prisoners of War, Eritrea’s Claim 17, ¶ 50 (2003).

³²⁶ *E.g.*, *id.*

³²⁷ *E.g.*, *id.* ¶ 51.

³²⁸ *E.g.*, *id.* ¶ 52.

³²⁹ *E.g.*, EECC, Prisoners of War, Eritrea’s Claim 17, ¶ 53 (2003). The ICRC’s official position on the confidentiality of its reports is stated as follows:

ICRC believes that the best way that it can prevent or halt torture and ensure decent conditions of detention is by getting repeated and unrestricted access to prisoners, talking to them about their problems, and urging the detaining authorities to make any improvements that may be necessary. The price of this is a policy of confidentiality, taking up the problems only with the people directly concerned.

International Committee of the Red Cross [ICRC], *Frequently Asked Questions, ICRC Doesn’t Publish Its Reports on Prison Visits—How Can Working Confidentially Be Effective in Preventing Torture?* (Nov. 15, 2002), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/SFMFN8>. The ICRC sees two important benefits in keeping the reports confidential, i.e., as a tool for “negotiating access” and a strong belief in the “power of persuasion.” *Id.* With respect to “negotiating access,” the ICRC states that “[m]ost of the prisoners ICRC visits (or seeks to visit) are not protected by laws which *oblige* the authorities to open the gates—access must be negotiated.” *Id.* With respect to the “power of persuasion,” the ICRC states that its “discreet approach, in which its findings are reported only to the authority concerned, combined with its professional expertise and neutrality, form the key elements in

[T]he Commission believes that, in the unique situation here, where both parties to the armed conflict agreed that these documents should be provided to the Commission, the ICRC should not have forbidden them from doing so. Both the Commission and the ICRC share an interest in the proper and informed application of international humanitarian law. Accordingly, the Commission must record its disappointment that the ICRC was not prepared to allow it access to these materials.³³⁰

Given its unique role, the extent to which the ICRC will be called on to produce evidence—either documentary or testimonial—will continue to be an important and evolving issue not only in international civil arbitration and litigation but before criminal tribunals as well.³³¹

b. Inferences Drawn From Failure to Produce Evidence

Given the complexity and sensitivity of some of the issues, the parties were at times reluctant to produce some important evidence. In at least one important case, the Commission relied on negative inferences from non-production of evidence known to exist in the possession of a party to the dispute.³³² Undisputed facts indicated that on June 5, 1998, at least one of four Eritrean fighter jets flown that day dropped bombs in

persuading those in power to adopt, where necessary, more humanitarian measures.” *Id.* Nonetheless, the ICRC sets a limit to its confidentiality principle, stating that

[T]he ICRC might decide to break its rule of silence and/or suspend its operation under certain extreme circumstances: if, after repeated approaches and requests, the prisoners’ treatment or conditions hasn’t improved; if the ICRC’s usual procedures for visits are not respected; if a detaining authority publishes just part of a visit report

Id. The ICRC finally concludes that such decisions would be made taking into account the best interests of the detainees. *Id.* Currently, the ICRC relies on three sources of international law for its privileged exemption from providing evidence in international criminal proceedings: (1) the International Criminal Court Rules of Procedure and Evidence (which essentially grants the ICRC the final authority to decide whether to release its reports on a case-by-case basis); (2) *Prosecutor v. Simic et al.*, I.C.T.Y. (July 27, 1999), available at <http://www.un.org/icty/simic/trialc3/decision-e/90727EV59549.htm> (last visited June 15, 2007), a decision of the International Criminal Tribunal for the Former Yugoslavia [ICTY], which held that the ICRC enjoys absolute privilege to withhold its confidential information as a matter of customary international law; and (3) headquarters agreements, which almost always provide for testimonial privilege in domestic proceedings. See Gabor Rona, *The ICRC Privilege Not to Testify: Confidentiality in Action*, 845 INT’L REV. RED CROSS 207 (Mar. 31, 2002), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/59KCR4>.

³³⁰ *E.g.*, EECC, Prisoners of War, Eritrea’s Claim 17, ¶ 53 (2003).

³³¹ See generally Rona, *supra* note 329 (providing a brief discussion of ICRC’s perspective on this issue).

³³² EECC, Central Front, Ethiopia’s Claim 2 (2004).

a civilian neighborhood killing civilians, including schoolchildren.³³³ Ethiopia alleged that the Eritrean air force deliberately targeted civilians in violation of international law.³³⁴ It argued that two separate bombings targeted the same school compound.³³⁵ Eritrea admitted that it caused the injuries but said that it was accidental.³³⁶ It argued that the intended target was a nearby airport and that only one, not two, of the four flights deployed to attack the airport accidentally hit the civilian neighborhood.³³⁷

The most important issue that the Commission was asked to resolve was whether there was only one flight, which may suggest an accident, or two flights, which may make that assertion doubtful.³³⁸ The Commission thoroughly analyzed the conflicting evidence that the parties presented. The evidence included written statements from victims and witnesses of the attacks, live testimony from the deputy commander of the Eritrean Air Force, a victim of the air attack, and expert witnesses.³³⁹ It also included contemporaneous video footage, medical records of victims, and news reports from the attack.³⁴⁰

The Commission deemed the issue of the number of attacks important because of the extreme odds against two accidental bombings hitting the exact same location.³⁴¹ To determine this issue, the Commission considered the evidence and decided that two of Eritrea's four separate air force flights attacked the civilian neighborhood.³⁴² Despite this conclusion, however, the Commission said that it "was not convinced that Eritrea deliberately targeted a civilian neighborhood."³⁴³ It added that although the odds seem extreme, such accidental occurrences are not inconceivable.³⁴⁴ It offered several reasons for its

³³³ *Id.* ¶ 101. Ethiopia alleged that the bombs were dropped near an Elementary School named Ayder and the casualties included 53 deaths, including 12 schoolchildren, and 185 wounded, including 42 schoolchildren. *Id.*

³³⁴ *Id.* ¶ 102.

³³⁵ *Id.* ¶ 101.

³³⁶ *Id.* ¶ 102.

³³⁷ *Id.* ¶¶ 104-05.

³³⁸ *See id.* ¶ 104.

³³⁹ *See id.* The expert witnesses included U.S. General (Ret.) Charles W. Dyke for Ethiopia and U.S. Major (Ret.) Paul Noack and Canadian Col. (Ret.) Jack Bell for Eritrea. *Id.* ¶ 22.

³⁴⁰ *Id.* ¶ 107.

³⁴¹ *Id.* ¶ 109.

³⁴² *Id.* ¶ 108.

³⁴³ *Id.*

³⁴⁴ *Id.* ¶ 109.

conclusion: (1) Given Ethiopia's air superiority, it is unreasonable to assume that Eritrea would see any advantage in setting precedent by targeting civilians;³⁴⁵ (2) Eritrea's pilots and aircraft computer programmers "were utterly inexperienced, and it recognizes the possibility that, in the confusion of May 5, both computers could have been loaded with the same inaccurate targeting data";³⁴⁶ (3) it is also "conceivable that the pilot of the third sortie simply released too early through either a computer or human error or in an effort to avoid anti-aircraft fire that the pilots of the previous sorties had reported;"³⁴⁷ and (4) "it was also conceivable that the pilot of the fourth sortie might have decided to aim at the smoke resulting from the third sortie."³⁴⁸

Although the Commission agreed with Eritrea for the reasons stated above, it did not conclude that Eritrea was without liability. It held that Eritrea failed to take all feasible precautionary measures to prevent unintended injuries when choosing its targets in violation of Article 57 of Protocol I.³⁴⁹ The Commission stated that "the failure of

³⁴⁵ *Id.* ¶ 108.

³⁴⁶ *Id.* ¶ 109.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ Article 57 of Protocol I provides that:

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken:
 - (a) those who plan or decide upon an attack shall: (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; (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, incidental loss or civilian life, injury to civilians and damage to civilian objects; (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
 - (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
 - (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

two out of three bomb runs to come close to their intended targets clearly indicate[d] a lack of essential care in conducting them”³⁵⁰ Furthermore, the Commission said that based on the evidence before it, it was unable to determine why two of the four flights dropped bombs that hit the civilian neighborhood.³⁵¹ The Commission observed that the critical evidence could have been produced by Eritrea, but it had failed to produce this evidence.³⁵² Consequently, the Commission concluded that it was “entitled to draw adverse inferences reinforcing the conclusions . . . that not all feasible precautions were taken by Eritrea in its conduct of the air strikes.”³⁵³

Therefore, the serious conflict in the evidence and complexity of the wartime circumstances, coupled with non-production of vital evidence known to exist,³⁵⁴ led the Commission to determine the issues based largely on inferences and logical analysis.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

Protocol I, *supra* note 1, art. 57.

³⁵⁰ EECC, Central Front, Ethiopia’s Claim 2, ¶ 110 (2004). The Commission also said that this failure was compounded by Eritrea’s failure to take appropriate actions after the incidents to prevent future recurrences. The Commission came to this conclusion based on the live testimony of the Eritrean Deputy Air Force Commander who said that no systematic investigation of the bombings were subsequently conducted and all efforts of inquiry were limited to questioning one of the pilots who was believed to have accidentally bombed a civilian target. *Id.* ¶¶ 111-12.

³⁵¹ *See generally id.*

³⁵² *Id.* ¶¶ 111-12.

³⁵³ *See id.* ¶ 112.

³⁵⁴ *See* EECC, Central Front, Ethiopia’s Claim 2, ¶ 111 (2004) (noting that “Eritrea did not make available to the Commission any evidence from the pilots and refused to identify them.”). One of the most serious challenges facing tribunals dealing with inter-state claims is the withholding of evidence that may have national security implications. Because arbitral tribunals lack the authority to enforce decisions, they are often forced to adjudicate cases based only on the evidence that is made available to them. This problem is not uncommon. In fact, the Rules of Procedure of the Permanent Court of Arbitration, on which the Commission’s rules of procedures and evidence are based, envisage the occurrence of such problems. For example, Article 24 of these rules states that:

IV. CONCLUSION

Elaborate and well-conceived rules of international humanitarian law set the standard of treatment of persons involved in and affected by warfare. The lack of a centralized form of enforcement is a peculiarity that these standards share with the general body of international law.³⁵⁵ Better enforcement mechanisms are currently in place for norms of international law dealing with international peace and security. The most important of all mechanisms of enforcement is enshrined under Chapter VII of the United Nations Charter. It authorizes the UN Security Council to employ coercive measures to protect and restore international peace and security. In recent times, the threat to international peace has been broadened to include gross violations of human rights and the perpetration of serious violations of humanitarian law in times of international or non-international armed conflicts. The mechanism of enforcement of such violations has included sanctions,³⁵⁶ the appointment of commissions of inquiry for the investigation of violations,³⁵⁷ military intervention,³⁵⁸ and authorization of criminal prosecutions.³⁵⁹ However,

Any time during the arbitral proceedings, the arbitral tribunal may call upon the parties to produce documents, exhibits, or other evidence within such a period of time as the tribunal shall determine. The tribunal shall take note of any refusal to do so as well as any such reasons for such refusal.

Permanent Court of Arbitration, Optional Rules For Arbitrating Disputes Between Two States (effective Oct. 20, 1992), art. 24, ¶ 3, available at <http://www.pca-cpa.org/upload/files/2STATENG.pdf>. In disputes between states, the consequence of refusal to submit vital evidence seems to be limited to negative inferences, which is what the Commission did in this case. The Iran-United States Claims Tribunal had on numerous occasions relied on negative inferences for the determination of disputed facts. *INA Corp. v. The Government of the Islamic Republic of Iran*, 8 IRAN-U.S. CL. TRIB. REP. 373, 382 (1985), discussed in Aldrich, *supra* note 1, at 339.

³⁵⁵ HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT, *supra* note 5, at 517.

³⁵⁶ Sanctions could take a number of different forms. For example, during the Yugoslavia conflict, the UN Security Council prohibited the flight of military aircraft in the Bosnian airspace and authorized the use of all available means to protect humanitarian convoys. *Id.*

³⁵⁷ *E.g.*, S.C. Res. 780, U.N. Doc. S/RES/780 (Oct. 6, 1992); Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), reprinted in Boutros Boutros-Ghali, *Letter Dated 9 February 1993 from the Secretary-General Addressed to the President of the Security Council*, Annex I, U.N.Doc. S/25274 (Feb. 10, 1993).

³⁵⁸ A prime example is the Security Council's authorization of the U.S.-led coalition to use military force against Iraq in 1991. *See* S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990). The interpretation of this resolution as it relates to the U.S.-led use of force against Iraq in 2003 has become a subject of immense controversy. *See generally* Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004) (arguing that the U.S. decision not to adopt a legal doctrine based on preemptive self-defense was a welcome development for the

civil liability as a mechanism of enforcement of violations of international humanitarian law has never received the attention it deserves. Perhaps the only recent exception in this respect is the UNCC, which sought to compensate victims of violations within the context of the United Nations enforcement mechanism.

The Ethiopia-Eritrea Claims Commission shares some common characteristics with the UNCC. It is, however, a mutually agreed ad hoc forum established for the purpose of compensating victims of violations of humanitarian law. It is an unprecedented forum in many respects. Constituted by a mutual agreement between warring states, it sought to enforce violations of international humanitarian law through the determination of civil liability.

By so doing, it has served several important purposes: (1) it has contributed to the development of norms of international humanitarian law in the civil compensation context, (2) it has significantly contributed to the emerging consensus regarding the status of some norms of international humanitarian law as customary norms, (3) it has identified gaps in the existing standards of international humanitarian law and suggested the development of new norms to fill those gaps, (4) it has refined procedures and evidentiary standards of adjudication for mass claims processes, (5) it has clearly demonstrated that there is a feasible way to determine civil liability for violations of international humanitarian law occurring during and in the aftermath of armed conflict for the compensation of victims of such violations, and most importantly, (6) it has shown that determination of civil liability is a realistic alternative and an important supplement to criminal prosecution as a mechanism of enforcement of violations of humanitarian law.

Armed conflicts are seriously affecting the lives of societies in many parts of the world today. The work of this Commission will likely

maintenance of world order but contending that the U.S. legal theory that Resolution 678 authorized the use of force in 2003 is not persuasive).

³⁵⁹ For example, in 1993, the Security Council established the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993); and in 1994, it established the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994). Prosecution of individuals for violations of customs and laws of war is perhaps the oldest and most frequently used method of enforcement. For example, discussions of prosecutions for violations of customs of war have been noted to have occurred as early as the middle ages by the forces that defeated Napoleon. See HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT, *supra* note 5, at 518 n.9; see generally M.H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES (1965) (discussing early history); Bassiouni, *supra* note 5 (discussing the background of international criminal tribunals established since the First World War).

reinvigorate the debate over the importance of designing different mechanisms of enforcement of laws governing the conducts of these conflicts. This Commission has established a unique and workable model for future post-conflict adjudications of claims for compensation. It will likely inspire more interest in civil liability as a viable mechanism of enforcement of international humanitarian law.