

A. Prisoners of War, Ethiopia's Claim 4 - paras 1 to 80

N.B. As per the disclaimer ^[1], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source:** Eritrea-Ethiopia Claims Commission, Partial Award, Prisoners of War, Ethiopia's Claim 4, between the Federal Democratic Republic of Ethiopia and the State of Eritrea. The Hague, July 1, 2003. The Permanent Court of Arbitration, the Hague. Footnotes partially reproduced. Full Awards available on http://www.pca-cpa.org/showpage.asp?pag_id=1151 ^[2]]

PARTIAL AWARD

Prisoners of War

Ethiopia's Claim 4

**Between The Federal Democratic Republic of Ethiopia
and the State of Eritrea**

I. INTRODUCTION

A. Summary of the Positions of the Parties

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

B. The Eritrean POW Camps

3. Eritrea interned a total of approximately 1,100 Ethiopian POWs, virtually all male, between the start of the conflict in May 1998 and August 2002, when the remaining Ethiopian POWs registered by the International Committee of the Red Cross (“ICRC”) were released.
4. Eritrea utilized five permanent camps, some only briefly: Barentu, Embakala, Digdigta, Afabet and Nakfa (also known as Sahel). Eritrea utilized these camps one after the other and, with the exception of Barentu, closed each camp upon transfer of the POWs to the next camp.
5. Eritrea used facilities at Badme, Asmara, Tesseney and Barentu as transit camps during evacuation of the Ethiopian POWs from the various fronts. POWs were typically held in the transit camps for several days or weeks. [...]

C. General Comment

12. As the findings in this Award and in the related Award in Eritrea’s Claim 17 describe, there were significant difficulties in both Parties’ performance of important legal

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

13. There were deficiencies of performance on both sides, sometimes significant occasionally grave. Nevertheless, the evidence in these cases shows that both Eritrea and Ethiopia endeavored to observe their fundamental humanitarian obligations to collect and protect enemy soldiers unable to resist on the battlefield. The Awards in these cases, and the difficulties that they identify, must be read against this background. [...]

IV. THE MERITS

A. Applicable law

22. Article 5, paragraph 13, of the Agreement provides that “in considering claims, the Commission shall apply relevant rules of international law.” Article 19 of the Commission’s Rules of Procedure is modelled on the familiar language of Article 38, paragraph 1, of the Statute of the International Court of Justice. It directs the Commission to look to:
 1. International conventions, whether general or particular, establishing rules expressly recognized by the parties;
 2. International custom, as evidence of a general practice accepted as law;
 3. The general principles of law recognized by civilized nations;
 4. Judicial and arbitral decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

23. The most obviously relevant source of law for the present Award is Geneva Convention III. Both Parties refer extensively to that Convention in their pleadings, and the evidence demonstrates that both Parties relied upon it for the instruction of their armed forces and for the rules of the camps in which they held POWs. The Parties agree that the Convention was applicable from August 14, 2000, the date of Eritrea's accession, but they disagree as to its applicability prior to that date.
24. Ethiopia signed the four Geneva Conventions in 1949 and ratified them in 1969. Consequently, they were in force in Ethiopia in 1993 when Eritrea became an independent State. Successor States often seek to maintain stability of treaty relationships after emerging from within the borders of another State by announcing their succession to some or all of the treaties applicable prior to their independence. Indeed, treaty succession [...] may happen automatically for certain types of treaties. However, the Commission has not been shown evidence that would permit it to find that such circumstances here, desirable though such succession would be as a general matter. From the time of its independence from Ethiopia in 1993, senior Eritrean officials made clear that Eritrea did not consider itself bound by the Geneva Conventions.
25. During the period of the armed conflict and prior to these proceedings, Ethiopia likewise consistently maintained that Eritrea was not a party to the Geneva Conventions. The ICRC, which has a special interest and responsibility for promoting compliance with the Geneva Conventions, likewise did not at that time regard Eritrea as a party to the Conventions.
26. Thus, it is evident that when Eritrea separated from Ethiopia in 1993 it has a clear opportunity to make a statement of its succession to the Conventions, but in evidence shows that it refused to do so. It consistently refused to do so subsequently, and in 2000, when it decided to become a party to the Conventions, it did so by accession, not by succession. While it may be that continuity of treaty relationships often can be presumed, absent facts to the contrary, no such presumption could properly be made in the present case in view of these facts. These unusual circumstances render the present situation very different from that addressed in the Judgement by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the Celebici Case [footnote 6: Celebici Case (*The Prosecutor v. Delalic et al.*), 2001, ICTY Appeals

Chamber Judgement Case No. IT-96-21-A (Feb. 20).] It is clear here that neither Eritrea, Ethiopia nor the depository of the Conventions, the Swiss Federal Council, considered Eritrea party to the Conventions until it acceded to them on August 14, 2000. Thus, from the outbreak of the conflict in May 1998 until August 14, 2000, Eritrea was not a party to Geneva Convention III. Ethiopia's argument to the contrary, in reliance upon Article 34 of the Vienna Convention on Succession of States in Respect of Treaties, cannot prevail over these facts.

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

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

28. However, the evidence referred to above clearly demonstrates that, prior to its accession, Eritrea had not accepted the Conventions. This non-acceptance was also demonstrated by Eritrea's refusal to allow the representatives of the ICRC to visit the POWs it held until after its accession to the Conventions.
29. Consequently, the Commission holds that, with respect to matters prior to August 14, 2000, the law applicable to the armed conflict between Eritrea and Ethiopia is customary international law. In its pleadings, Eritrea recognizes that, for most purposes, "the distinction between customary law regarding POWs and the Geneva Convention III is not significant." It does, however, offer as examples of the more technical and detailed provisions of the Convention that it considers not applicable as customary law the right of the ICRC to visit POWs, the permission of the use of tobacco in Article 26, and the requirement of canteens in Article 28. It also suggests that payment of POWs for labor and certain burial requirements for deceased POWs should not be considered part of customary international law. Eritrea cites the von Leeb decision of the Allied Military Tribunal in 1949 as supportive of its position on

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

30. Given the nearly universal acceptance of the four Geneva Conventions of 1949, the question of the extent to which their provisions have become part of customary international law arises today only rarely. The Commission notes that the *von Leeb* case (which found that numerous provisions at the core of the 1929 Convention had acquired customary status) addressed the extent to which the Provisions of a convention concluded in 1929 had become part of the customary international law during the Second World War, that is, a conflict that occurred ten to sixteen years later. In the present case, the Commission faces the question of the extent to which the provisions of a convention concluded in 1949 and since adhered to by almost all States had become part of customary international law during a conflict that occurred fifty years later. Moreover, treaties, like the Geneva Conventions of 1949, that develop international humanitarian law are, by their nature, legal documents that build upon the foundation laid by earlier treaties and by customary international law. These treaties are concluded for the purpose of creating a treaty law for the parties to the convention and for the related purpose of codifying and developing customary international law that is applicable to all nations. The Geneva Conventions of 1949 successfully accomplished both purposes.
31. Certainly, there are important, modern authorities for the proposition that the Geneva Conventions of 1949 have largely become expressions of customary international law, and both Parties to this case agree. The mere fact that they have obtained nearly universal acceptance supports this conclusion. There are also similar authorities for the proposition that rules that commend themselves to the international community in general, such as rules of international humanitarian law, can more quickly become part of customary international law than other types of rules found in treaties. The Commission agrees.
32. Consequently, the Commission holds that the law applicable to this Claim is customary international law, including customary international humanitarian law as exemplified by the relevant parts of the four Geneva Conventions of 1949. The

frequent invocation of provisions of Geneva Convention III by both Parties in support of their claims and defenses is fully consistent with this holding. Whenever either Party asserts that a particular relevant provision of these Conventions should not be considered part of customary international law at the relevant time, the Commission will decide that question, and the burden of proof will be on the asserting Party. [...]

B. Evidentiary Issues

1. Quantum of Proof Required [...]

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

2. Proof of Facts

39. Ethiopia presented a large volume of documentation in support of its claims. [...] Ethiopia also presented three types of documents recording in differing ways information regarding the experiences of individual prisoners. It submitted thirty formal written declarations from former POWs signed by the declarants and containing affirmations of the accuracy of the translation and solemn representations that the declaration was truthful. During the hearing, counsel for Ethiopia indicated that it relied primarily on these declarations. Similar signed declarations also provided the heart of the evidence for Eritrea's claims.
40. Ethiopia also submitted multiple volumes of what were in fact forms for collecting claims. These were lengthy documents filled in by a former POW or a person writing for him, responding at varying length to detailed questions regarding conditions and experiences in each of Eritrea's POW camps. Ethiopia also filed four volumes containing typewritten distillations of the very brief answers some former prisoners gave to the claims questionnaires (generally involving pages containing only "yes" or "no" answers).

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

3. Evidence under the Control of the ICRC

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

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

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

C. Violations of the Law

1. Organizational Comment

49. Ethiopia alleged extensive violations of applicable legal obligations in Eritrea's POW camps. Its legal claims were arranged in eleven separate categories, several with multiple subsidiary elements. Ethiopia alleged violations of all or almost all of the following eleven categories with respect to each of Eritrea's five camps:
- Capture of POWs and their evacuation to the camps;
 - Physical and mental abuse in the camps;
 - Lack of adequate medical care;
 - Unhealthy camp conditions;
 - Failure to maintain POWs well being;
 - Impermissible forced labor;
 - Improper handling of deaths;
 - Lack of complaint procedures;
 - Prohibiting communication with the exterior;
 - Failure to post camp regulations; and
 - Inhumane conditions during transfer from the camps.
50. In its written and oral presentations, Ethiopia clearly explained the factors leading it to structure its claims this way. However, the result is a matrix of over fifty issues, many with several subsidiary elements, for assessment and decision. Of greater concern, the Commission found that this complex and fragmented structure served to conflate very serious matters with others of much less gravity. Moreover, given the level of evidence presented and the limited time available for the Commission to complete its work on all claims, it is clear that the Commission must focus its attention on the substantive core of the claims.
51. Accordingly, the Commission has grouped several of Ethiopia's claims together or has otherwise re-aligned their elements in order to give greater weight to and clearer focus on those matters it sees as being of greatest concern.
52. As commentators frequently have observed, Geneva Convention III, with its 143 Articles and five Annexes, is an extremely detailed and comprehensive code for the

treatment of POWs. Given its length and complexity, the Convention mixes together, sometimes in a single paragraph, obligations of very different character and importance. Some obligations, such as Article 13's requirement of humane treatment, are absolutely fundamental to the protection of POWs' life and health. Other provisions address matters of procedure or detail that may help ease their burdens, but are not necessary to ensure their life and health.

53. Under customary international law, as reflected in Geneva Convention III, the requirement of treatment of POWs as human beings is the bedrock upon which all other obligations of the Detaining Power rest. At the core of the Convention regime are the legal obligations to keep POWs alive and in good health. The holdings made in this section are organized to emphasize these core legal obligations.
54. It should also be stated at the outset that the Commission does not see its task to be the determination of liability of a Party for each individual incident of illegality suggested by the evidence. Rather, it is to determine liability for serious violations of the law by the Parties, which are usually illegal acts or omissions that were frequent or pervasive and consequently affected significant numbers of victims. These parameters are dictated by the limit of what is feasible for the two Parties to brief and argue and for the Commission to determine in light of the time and resources made available by the Parties.

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

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

56. Eritrea argues that the right of access by the ICRC to POWs is a treaty-based right and that the provision of Geneva Convention III granting such access to the ICRC should not be considered provisions that express customary international law. While recognizing that most of the provisions of the Conventions have become customary law, Eritrea asserts that the provisions dealing with the access of the ICRC are among the detailed or procedural provisions that have not attained such status.
57. That the ICRC did not agree with Eritrea is demonstrated by a press statement it issued on May 7, 1999, in which it recounted its visits to POWs and interned civilians held by Ethiopia and said: "In Eritrea, meanwhile, the ICRC is pursuing its efforts to gain access as required by the Third Geneva Convention, to Ethiopian POWs captured since the conflict erupted last year".
58. The ICRC is assigned significant responsibilities in a number of articles of the Convention. These provisions make clear that the ICRC may function in at least two different capacities – as a humanitarian organization providing relief and as an organization providing necessary and vital external scrutiny of the treatment of POWs, either supplementary to a Protecting Power or as a substitute when there is no Protecting Power. There is not evidence before the Commission that Protecting Powers were proposed by either Ethiopia or Eritrea, and it seems evident that none was appointed. Nevertheless, the Convention clearly requires external scrutiny of the treatment of POWs and, in article 10, where there is no Protecting Power or other functioning oversight body, it requires Detaining Powers to "accept the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention." In that event, Article 10 also provides that all mention of Protecting Powers in the Convention applies to such substitute organizations.
59. The right of the ICRC to have access to POWs is not limited to a situation covered by Article 10 in which it serves as a substitute for a Protecting Power. Article 126 specifies clear and critical rights of Protecting Powers with respect to access to camps and to POWs, including the right to interview POWs without witnesses, and it states that the delegates of the ICRC "shall enjoy the same prerogatives." Ethiopia relies primarily on Article 126 in its allegation that Eritrea violated its legal obligations by refusing the ICRC access to its POWs.

60. Professor Levie points out in his monumental study of the treatment of POWs in international armed conflicts that the ICRC “has played an indispensable humanitarian role in every armed conflict for more than a century.” [...]
61. The Commission cannot agree with Eritrea’s argument that provisions of the Convention requiring external scrutiny of the treatment of POWs and access to POWs by the ICRC are mere details or simply implementing procedural provisions that have not, in half a century, become part of customary international law. These provisions are an essential part of the regime for protecting POWs that has developed in international practise, 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, [...] [a]s the International Court of Justice said in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. [...] [See ICJ, Nuclear Weapons Advisory Opinion, para. 79 ^[3]]
62. For the above reasons, the Commission holds that Eritrea violated customary international law from May 1998 until August 2000 by refusing to permit the ICRC to send its delegates to visit all places where Ethiopian POWs were detained, to register these POWs, to interview them without witnesses, and to provide them with the customary relief and services. Consequently, Eritrea is liable for the suffering caused by that refusal.

3. Mistreatment of POWs at Capture and its Immediate Aftermath

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

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

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

a. Abusive Treatment

65. Ethiopia alleged that Eritrean troops regularly beat and frequently killed Ethiopians upon capture and its immediate aftermath. Ethiopia presented a *prima facie* case, through clear and convincing evidence, to support this allegation.
66. One-third of the Ethiopian POW declarations contain accounts of Eritrean soldiers deliberately killing Ethiopian POWs, most wounded, at capture or evacuation. Particularly troubling are accounts in three declarations of Eritrean officers ordering troops to kill Ethiopian POWs or beating them for not doing so. More than half of the Ethiopian POW declarants described repeated and brutal beatings, both at the front and during evacuation, including blows purposefully inflicted on wounds. Fortunately, these accounts were countered to a degree by several other accounts from Ethiopian declarants of Eritrean officers and soldiers intervening to curtail physical abuse and prevent killings.
67. In rebuttal, Eritrea offered detailed and persuasive evidence that Eritrean troops and officers had received extensive instruction during their basic training, both on the basic requirements of the Geneva Conventions on the taking of POWs and on the policies and practices of the Eritrean People’s Liberation Front (“EPLF”) in the war against the prior Ethiopian government, the Derg, for independence, which had emphasized the importance of humane treatment of prisoners. What is lacking in the record, however, is evidence of what steps Eritrea took, if any, to ensure that its forces

actually put this extensive training to use in the field. There is no evidence that Eritrea conducted inquiries into incidents of physical abuse or pursued disciplinary measures under Article 121 of Geneva Convention III.

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

b. Medical Care Immediately Following Capture

69. Ethiopia alleges that Eritrea failed to provide necessary medical attention to Ethiopian POWs after capture and during evacuation, as required under customary international law reflected in Geneva Conventions I (Article 12) and III (Articles 20 and 15). Many Ethiopian declarants testified that their wounds were not cleaned and bandaged at or shortly after capture, leading to infection and other complications. Eritrea presented rebuttal evidence that its troops provided rudimentary first aid as soon as possible, including in transit camps.
70. The Commission believes that the requirement to provide POWs with medical care during the initial period after capture must be assessed in light of the harsh conditions on the battlefield and the limited extent of medical training and equipment available to front line troops. On balance, and recognizing the logistical and resource limitations faced by both Parties to the conflict, the Commission finds that Eritrea is not liable for failing to provide medical care to Ethiopian POWs at the front and during evacuation.

c. Evacuation Conditions

71. Ethiopia also alleges that, in addition to poor medical care, Eritrea failed to ensure humane evacuation conditions. As reflected in Articles 19 and 20 of Geneva Convention III, the Detaining Power is obliged to evacuate prisoners humanely, safely

and as soon as possible from combat zones; only if there is a greater risk in evacuation may the wounded or sick be temporarily kept in the combat zone, and they must not be unnecessarily exposed to danger. The measure of a humane evacuation is that, as set out in Article 20, POWs should be evacuated “in conditions similar to those for the forces of the Detaining Power.”

72. Turning first to the timing of evacuation, Eritrea submitted clear and convincing evidence that, given the reality of battle, the great majority of Ethiopians POWs were evacuated from the various fronts in a timely manner. Despite one disquieting incident in which a wounded Ethiopian POW allegedly was forced to spend a night on top of a trench while artillery exchanges occurred and his Eritrean captors took refuge in the trench, the Commission concludes that Eritrea generally took the necessary measures to evacuate its prisoners promptly.
73. Timing aside, the Ethiopian POW declarants described extremely onerous conditions of evacuation. The POWs were forced to walk from the front for hours or days over rough terrain, often in pain from their own wounds, often carrying wounded comrades and Eritrean supplies, often in harsh weather, and often with little or no food and water. Eritrea offered rebuttal evidence that its soldiers faced nearly the same unavoidably difficult conditions, particularly given the lack of paved roads in Eritrea.
74. Subject to the holding above concerning unlawful physical abuse during evacuation and with one exception, the Commission finds that Eritrean troops satisfied the legal requirements for evacuations from the battlefield under the harsh geographic, military and logistical circumstances. The exception is the Eritrean practice of seizing the footwear of all Ethiopian POWs, testified to by many declarants. Although the harshness of the terrain and weather on the marches to the camps may have been out of Eritrea’s control, to force the POWs to walk barefoot in such conditions unnecessarily compounded their misery. The Commission finds Eritrea liable for inhumane treatment during evacuations from the battlefield as a result of its forcing Ethiopian POWs to go without footwear during evacuation marches.

d. *Coercive Interrogation*

75. Ethiopia alleges frequent abuse in Eritrea’s interrogation of POWs, commencing at

capture and evacuation. International law does not prohibit the interrogation of POWs, but it does restrict the information they are obliged to reveal and prohibits torture or other measures of coercion, including threats and “unpleasant or disadvantageous treatment of any kind.”

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

e. Confiscation of Personal Property

77. Ethiopia alleges widespread and systematic confiscation by Eritrean soldiers of the personal property of Ethiopian POWs. The declarations of Ethiopian POWs submitted into evidence clearly and convincingly support this claim. Not only were all captured Ethiopian soldiers deprived of their shoes (presumably, to make escape more difficult), but almost all declarants assert that they were searched upon capture and that all of their personal possessions were taken by their captors. The items allegedly taken included cash, watches, family photos, radios, rings and cigarettes, as well as the POWs’ identity cards and, occasionally, items of clothing. The declarants also assert that no receipts were given and that none of the confiscated property was returned.
78. Article 18 of Geneva Convention III requires that POWs be allowed to retain their personal property. Cash and valuables may be impounded on order of an officer, subject to detailed registration and other safeguards. If prisoners’ property is taken, it must be receipted and safely held for later return. Under Article 17, identity documents can be consulted by the Detaining Power but must be returned to the prisoner. The Commission believes that these obligations reflect customary international law.
79. No rebuttal evidence was submitted by Eritrea with respect to this claim, and the Commission notes that Eritrea’s camp procedures for POWs state that “every POW has the duty to hand over property which he had with him when he was captured to

the concerned authority". The Commission concludes that Eritrea failed to take the necessary measures to prevent the confiscation of prisoners' personal property. Consequently, given the unrebutted evidence of widespread takings of property and Eritrea's camp procedures, Eritrea failed to comply with the obligations of Articles 17 and 18 of Geneva Convention III and is liable to Ethiopia for the consequent losses suffered by Ethiopian POWs.

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

Paras 82 to 150 and Award

4. Physical and Mental Abuse in POW Camps [...]

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

sun, and to undergo periods of confinement in hot metal containers were notable among the other abuses, all of which violated customary international law, as exemplified by Articles 13, 42, 87 and 89 of Geneva Convention III. Regrettably, the evidence also indicates that the camp commanders did little to restrain these abuses and, in some cases, even threatened POWs by telling them that, as there was (prior to the first ICRC visits in August 2000) no list of prisoners, they could do anything they wanted to the POWs and could not be held accountable.

83. In addition to the fear and mental anguish that accompanied these physical abuses, there is clear evidence that some POWs particularly Tigrayans, were treated worse than others and that several POWs were treated as deserters and given favoured treatment. (Those given favoured treatment were not among those who signed the thirty declarations relied on by Ethiopia on this issue.) Such discrimination is, of course, prohibited by Article 16 of Geneva Convention III.
84. The evidence is persuasive that beatings were common at all camps: Barentu, Embakala, Digdigta, Afabet and Nakfa. Solitary confinement of three months or more occurred at least at Digdigta and Afabet. At Nakfa, much of the evidence of beatings and other brutal punishments relates to POWs away from camp working on labor projects and occurred at least at Digdigta and Afabet. At Nakfa, much of the evidence of beatings and other brutal punishments relates to POWs away from camp working on labor projects and occurred when fatigue slowed their work. After ICRC visits began, there is some evidence that POWs were threatened with physical punishment if they reported abuses to the ICRC. [...]

5. Unhealthy Conditions in Camps

a. The Issue

87. A fundamental principle of Geneva Convention III is that detention of POWs must not seriously endanger the health of those POWs. This principle, which is also a principle of customary international law, is implemented by rules that mandate camp locations where the climate is not injurious; shelter that is adequate, with conditions as favourable as those for the forces of the Detaining Power who are billeted in the

area, including protection from dampness and adequate heat and light, bedding and blankets; and sanitary facilities which are hygienic and are properly maintained. Food must be provided in a quantity and quality adequate to keep POWs in good health, and safe drinking water must be adequate. Soap and water must also be sufficient for the personal toilet and laundry of the POWs. [...]

b. *Analysis of Health-Related Conditions at each of Eritrea's POW Camps*

92. While there certainly is evidence that the camp at Barentu was in violation of standards prescribed by Geneva Convention III, it is insufficient to prove that the health of prisoners there was seriously endangered. This camp was in operation for no more than six weeks, and the period of internment of most of the relatively few prisoners there was for lesser periods.
93. [...] From the evidence, it appears that all the prisoners at Embakala were housed in one small building composed of corrugated metal sheets which was divided into two rooms and became dangerously overcrowded soon after the camp went into operation. The floor of these quarters consisted of dirt, which was over time converted to filthy dust as a result of the crowded living conditions and problems of hygiene. The roof was so low that the inmates could not stand erect. The prisoners were often confined in these quarters during the day with little opportunity to go outside, except when allowed to relieve themselves in an adjacent field (only once each day) and to bathe (no more than once a week). Confined in very close quarters, enduring stifling heat, often stripped to their underwear, the prisoners were also often enjoined to keep silent for long periods of time. Throughout their stay, they were provided with a meagre diet consisting of bread and lentil stew. There were no latrines in the field used for toileting (once a day). Prisoners who suffered from diarrhoea were forced to relieve themselves in the overcrowded quarters. The Commission finds this detailed evidence to be clear and convincing and to constitute a *prima facie* case of serious violations at Embakala of required health-related conditions, i.e., the provision of healthy accommodation, which seriously endangered the health of prisoners.
94. There is more abundant evidence to justify similar conclusions regarding conditions at Digdigta (nineteen POW declarations), Afabet (twenty POW declarations), and Nakfa

(thirty POW declarations). [...]

96. Indeed, provision of adequate water for both drinking and bathing was a serious problem at all three camps. In each, water was brought in by tanker trucks. At Digdigta, the drinking water provided during the day (when housing conditions were stifling) was often too hot to drink in amounts adequate to relieve thirst, as well as insufficient in quantity. At Afabet, drinking water was in short supply and sometimes quite “salty.” At Nakfa, there were often serious water shortages because the tanker trucks failed to appear as scheduled or failed to supply enough to meet the needs of the camp. There is also testimony that the water secured from other sources (rain barrels and nearby “streams”) was dirty and insect-ridden. Water for bathing was also in short supply; prisoners were allowed, at best, to bathe and launder only once a week.
97. Virtually all of the declarants allege that, at all of these camps, the food provided consisted of inedible (e.g., “dirty,” “worm-ridden”) bread and lentil stew. The testimony about food at Nakfa indicates that the diet was frequently insufficient in quantity and quality and that there was often widespread hunger.
98. [...] Nakfa was chosen in May 2000 as the site for a new camp to which all prisoners should be removed. The preparations for reception of prisoners appear to have been inadequate. There is considerable testimony that the first group to arrive at Nakfa was put in underground, windowless, dark, dank and dirty quarters, which were littered with human trash and the dung of donkeys and goats, and thereafter these premises were never properly cleaned. This evidence, coupled with that portraying the problems encountered in providing enough water for the prisoners, suggests a serious failure to meet the basic obligation of Geneva Convention III to provide at the outset “premises... affording every guarantee of hygiene and healthfulness.” [...]
100. Eritrea has failed to rebut the *prima facie* case established by Ethiopia. Eritrea’s rebuttal depended primarily on the declarations of two senior officers who were involved in the administration of the POW camps, who did not testify at the hearing. [...]

6. Inadequate Medical Care in Camps

104. A detaining Power has the obligation to provide in its POW camps the medical assistance on which the POWs depend to heal their battle wounds and to prevent further damage to their health. This duty is particularly crucial in camps with a large population and a greater risk of transmission of contagious diseases.
105. The protections provided by Articles 15, 20, 29, 30, 31, 109 and 110 of Geneva Convention III are unconditional. These rules, which are based on similar rules in Articles 4, 13, 14, 15 and 68 of the Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929, are part of customary international law.
106. Many of these rules are broadly phrased and do not characterize precisely the quality or extent of medical care necessary for POWs. Article 15 speaks of the “medical attention *required* by their state of health;” Article 30 requires infirmaries to provide prisoners “the attention they *require*” (emphasis added). The lack of definition regarding the quality or extent of care “required” led to difficulties in assessing this claim. Indeed, standards of medical practice vary around the world, and there may be room for varying assessments of what is required in a specific situation. Moreover, the Commission is mindful that it is dealing here with two countries with very limited resources.
107. Nevertheless, the Commission believes certain principles can be applied in assessing the medical care provided to POWs. The Commission began by considering Article 15’s concept of the maintenance of POWs, which it understands to mean that a Detaining Power must do those things required to prevent significant deterioration of a prisoner’s health. Next, the Commission paid particular attention to measures that are specifically required by Geneva Convention III, such as the requirements for segregation of prisoners with infectious diseases and for regular physical examinations.

a. Ethiopia’s Claims and Evidence [...]

110. The Commission was, however, sadly impressed by the high number of Ethiopian POWs who died in the Eritrean camps. A significant mortality rate among a group of predominantly young persons is objectively cause for concern. The evidence, although not wholly consistent, clearly indicated an abnormally high rate of deaths

among the prisoners in Eritrean camps. In response to questioning from the Commission, the Ethiopian POW witness testified at the hearing that, within his group of fifty-five POWs (with whom he moved from camp to camp), four had died. Several declarations state that, of the total population of some 1,100 Ethiopian POWs, forty-eight died. Ethiopia gave a list of fifty-one POWs who did not survive the camps. (Eritrea estimated that thirty-nine POWs died in captivity.) Significantly, there was substantial and reinforcing evidence that many of these deaths resulted from diarrhoea, tuberculosis and other illnesses that could have been avoided, alleviated or cured by proper medical care.

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

b. *Eritrea's Defence* [...]

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

c. *The Commission's Conclusions*

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

case.

117. The camp clinic logs (where readable) do show that numerous POWs went to the clinics, but they cannot establish that care was appropriate or that all POWs in need of medical attention were treated in a timely manner over the full course of their captivity. For example, from the records it appears that the clinics did not register patients on a daily basis. Under international humanitarian law, a POW has the right to seek medical attention on his or her own initiative and to receive the continuous medical attention required by his or her state of health – which requires daily access to a clinic.
118. International humanitarian law also requires that POWs be treated at a specialized hospital or facility when required medical care cannot be given in a camp clinic. The hospital records submitted by Eritrea, however, are not sufficient to establish that all POWs in need of specialized treatment were referred to hospitals. Moreover, a quantitative analysis of those records shows that, while a few relate to treatment in the first half of 1999 at Digdigta, nearly one half relate to the period from August to December 2000 and one quarter to 2001 and 2002, i.e., the time period after Eritrea acceded to the Geneva Conventions and ICRC camp visits started. Only a few records relate to treatment between July 1999 and May 2000, when POWs were detained at Afabet, and none relates to the time when Barentu and Embakala were open.
119. Likewise, the medicine supply reports submitted by Eritrea indicate that Eritrea distributed some drugs and vitamins to the POWs, but they do not prove that Eritrea provided adequate drugs to all POWs in the camps. It is striking that, according to the evidence submitted, Eritrea apparently distributed substantially more Vitamin A, B and C and multi-vitamins to POWs after August 2000 than before.
120. Preventive care is a matter of particular concern to the Commission. As evidenced by their prominence in Geneva Convention III, regular medical examinations of all POWs are vital to maintaining good health in a closed environment where diseases are easily spread. The Commission considers monthly examinations of the camp population to be a preventive measure forming part of the Detaining Power's obligations under international customary law. [...]
123. The evidence also reflects that Eritrea failed to segregate certain infected prisoners. POWs are particularly susceptible to contagious diseases such as tuberculosis, and

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

124. Accordingly, the Commission holds that Eritrea violated international law from May 1998 until the last Ethiopian POWs were released and repatriated in August 2002, by failing to provide Ethiopian POWs with the required minimum standard of medical care. Consequently, Eritrea is liable for this violation of customary international law.
125. In closing, the Commission notes its recognition that Eritrea and Ethiopia cannot, at least at present, be required to have the same standards for medical treatment as developed countries. However, scarcity of finances and infrastructure cannot excuse a failure to grant the minimum standard of medical care required by international humanitarian law. The cost of such care is not, in any event, substantial in comparison with the other costs imposed by the armed conflict.

7. Unlawful Conditions of Labour

126. Ethiopia claims that Eritrea forced POWs to work in conditions that violated requirements of Articles 13, 14, 26, 27, 49-55, 62, 65 and 66 of Geneva Convention III.
127. Article 49 of Geneva Convention III does not forbid a Detaining Power to compel POWs who are physically fit to work, but it does forbid compelling officers to work. The declarations by former Ethiopian POWs make clear that, while the most seriously disabled were generally excused from work, other sick or wounded POWs who were not physically fit were not excused and were generally forced to work and that officers were forced to work. [...]
133. Finally, Ethiopia asserted that Eritrea required its POWs to perform work of a military character in breach of Article 50 of Geneva Convention III. However, no sufficient evidence has been submitted for this allegation. To build residence houses and other facilities for the camp and the guards is not work of a military character, but concerns the installation of the camp, and is allowed under Article 50. Similarly, under Article

50, roads are considered works of public utility and therefore work on them is permissible, unless it is proven that they have a military character or purpose.

Ethiopia did not submit such evidence. Consequently, the Commission does not find that Eritrea breached Article 50 of Geneva Convention III.

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

8. Conditions of Transfer Between Camps

135. The Commission turns next to Ethiopia's allegations that Eritrea treated POWs inhumanely in the course of transfer between camps. As recited by Ethiopia, Articles 46 and 47 of Geneva Convention III require the Detaining Power to conduct transfers humanely. At a minimum, as with evacuation from the front, the Detaining Power should not subject POWs to transfer conditions less favourable than those to which its own forces are subjected. In all circumstances, the Detaining Power must consider the interests of the prisoners so as not to make repatriation more difficult than necessary, and should provide food, water, shelter and medical attention. The sick and wounded should not be transferred if it endangers their recovery, unless mandated by safety reasons.
136. The Ethiopian POW declarations consistently recount hours and days of travel on overcrowded military trucks or buses, over rough roads, in extremes of heat and cold, with few if any toilet breaks and little if any food and water. In rebuttal, Eritrea presented evidence that its own forces, at least to some extent, endured these same difficult transportation conditions, particularly given the lack of paved roads in Eritrea. The Commission recognizes that drastically limited Eritrean resources and infrastructure made transfer of prisoners in this conflict unavoidably miserable, but, again, only to some extent.
137. However, the evidence also reflects that, to a certain and critical extent, Eritrea did not do all within its ability to make transfer of the POWs as humane as possible. The evidence indicates that transfers were often accompanied by deliberate physical abuse by guards, and that Eritrea provided no effective measures to prevent such

misconduct. The Commission is troubled by accounts, fortunately few, of purposefully cruel treatment: one declaration describes Eritrean soldiers pouring fuel on the bed of transport truck before a twelve-hour trip in open sun. Of even greater concern is the clear and convincing evidence presented by Ethiopia that Eritrean soldiers frequently beat POWs during transfer. Particularly serious is repetitive evidence of Eritrean soldiers beating the sick and wounded. In one case, two declarations recounted the death of one sick Ethiopian prisoner who was thrown from a truck on the transfer from Afabet to Nakfa and left to die.

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

9. Treatment of the Dead

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

10. Failure to Post Camp Rules and Allow Complaints

142. As noted previously, Geneva Convention III establishes an extremely detailed regime. Earlier sections of this Award address Ethiopia's claims alleging violations of core elements of this regime involving killings, physical or mental abuse of POWs, or matters vital to POWs' survival, such as food, housing and medical care.
143. This final section addresses Ethiopia's claims involving two sets of obligations of a somewhat different character. Ethiopia claims violations of requirements to (a) post camp regulations and (b) have complaint procedures. These provisions establish administrative or procedural requirements partly aimed at protecting POWs' rights or at remedying deficiencies. The Commission does not mean to minimize their role in the total scheme of protection under the Convention. Nevertheless, these claims loom less large than many others considered previously.

a. *Camp Regulations*

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

b. *Complaint Procedures*

147. Ethiopia also claimed that Eritrea did not provide effective complaint procedures. Article 78 of Geneva Convention III assures POWs the right to “make known” to the military authorities holding them “requests” regarding their conditions. Requests and complaints cannot be limited, cannot be punished, and must be transmitted immediately.
148. Taking account, for instance, of the practice during World War I cited by Ethiopia and the inclusion of this concept in the 1929 Convention, the Commission finds that both customary law and the Convention guarantee POWs right to complain about their conditions of detention free from retribution. Ethiopia’s evidence, although not as extensive as on some other more fundamental issues, establishes that this right frequently was not allowed and that complaining prisoners were subjected to severe punishments. [...]
150. Based on clear and convincing evidence, the Commission finds that Eritrea, in violation of its obligations under international law, did not allow Ethiopian POWs held at any of its camps to complain about their conditions and to seek redress. Further, the evidence shows that in all of the camps, but particularly in Nakfa, prisoners who attempted to complain were often subjected to heavy and unlawful sanctions, including segregation from the rest of the camp population and beatings by guards. Consequently, Eritrea is liable for these violations.

V. AWARD

In view of the foregoing, the Commission determines as follows: [...]

B. Applicable Law

1. With respect to matters prior to Eritrea's accession to the Geneva Conventions of 1949, effective August 14, 2000, the international law applicable to this claim is customary international law, including customary international humanitarian law as exemplified by the relevant parts of the four Geneva Conventions of 1949.
2. Whenever either Party asserts that a particular relevant provision of those Conventions was not part of customary international law at the relevant time, the burden of proof will be on the asserting Party.
3. With respect to matters subsequent to August 14, 2000, the international law applicable to this claim is the relevant parts of the four Geneva Conventions of 1949, as well as customary international law. [...]

D. Findings of Liability for Violation of International Law

The respondent is liable to the Claimant for the following violations of international law committed by its military personnel and by other officials of the State of Eritrea:

1. For refusing permission, from May 1998 until August 2000, for the ICRC to send delegates to visit all places where Ethiopian POWs were detained, to register those POWs, to interview them without witnesses, and to provide them with relief and services customarily provided;
2. For failing to protect Ethiopian POWs from being killed at capture or its immediate aftermath;
3. For permitting beatings or other physical abuse of Ethiopian POWs, which occurred frequently at capture or its immediate aftermath;
4. For depriving all Ethiopian POWs of footwear during long walks from the place of capture to the first place of detention;
5. For permitting its personnel to threaten and beat Ethiopian POWs during

- interrogations, which occurred frequently at capture or its immediate aftermath;
6. For the general confiscation of the personal property of Ethiopian POWs;
 7. For permitting pervasive and continuous physical and mental abuse of Ethiopian POWs in its camps from May 1998 until August 2002;
 8. For seriously endangering the health of Ethiopian POWs at the Embakala, Digdigta, Afabet and Nakfa camps by failing to provide adequate housing, sanitation, drinking water, bathing opportunities and food;
 9. For failing to provide the standard of medical care required for Ethiopian POWs, and for failing to provide required preventive care by segregating prisoners with infectious diseases and conducting regular physical examinations, from May 1998 until August 2002;
 10. For subjecting Ethiopian POWs to unlawful conditions of labor;
 11. For permitting unnecessary suffering of POWs during transfer between camps; and
 12. For failing to allow the Ethiopian POW in its camps to complain about their conditions and to seek redress, and frequently punishing POWs who attempted to complain.

B. Prisoners of War, Eritrea's Claim 17 - paras 1 to 114

[Source: Eritrea-Ethiopia Claims Commission, Partial Award, Prisoners of War, Eritrea's Claim 17 between the State of Eritrea and the Federal Democratic Republic of Ethiopia. The Hague, July 1, 2003. The Permanent Court of Arbitration, The Hague. Footnotes omitted. Full Awards available on http://www.pca-cpa.org/showpage.asp?pag_id=1151 ^[2]]

ERITREA ETHIOPIA CLAIMS COMMISSION
PARTIAL AWARD
Prisoners of War
Eritrea's Claim 17
between
The State of Eritrea
and The Federal Democratic Republic of Ethiopia
The Hague, July 1, 2003

I. INTRODUCTION

A. Summary of the Positions of the Parties

1. This Claim (“Eritrea’s Claim 17”; “ERI 17”) has been brought to the Commission by the Claimant, the State of Eritrea (“Eritrea”), pursuant to Article 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of December 12, 2000 (“the Agreement”). The Claim seeks a finding of the liability of the Respondent, the Federal Democratic Republic of Ethiopia (“Ethiopia”), for loss, damage and injury suffered by the Claimant as a result of the Respondent’s alleged unlawful treatment of its Prisoners of War (“POWs”) who were nationals of the Claimant. In its Statement of Claim, the Claimant requested monetary compensation, costs, and such other relief as is just and proper. In its Memorial, the Claimant requests additional relief in the form of order: (a) that the Respondent cooperate with the International Committee of the Red Cross (“ICRC”) in effecting an immediate release of all remaining POWs it holds; (b) that the Respondent return personal property of POWs confiscated by it; and (c) that the Respondent desist from displaying information and photographs of POWs to public view.
2. The Respondent asserts that it fully complied with international law in its treatment of POWs. The Respondent denies that the Commission has jurisdiction over claims relating to the repatriation of POWs and over several claims that it alleges were not filed by December 12, 2001, and consequently were extinguished by virtue of Article 5, paragraph 8, of the Agreement. The Respondent also objects to the Claimant’s requests for the additional relief in the form of orders as inappropriate and unnecessary and, with respect to repatriation, as beyond the power of the Commission.

B. Ethiopian POW Camps

3. Ethiopia interned a total of approximately 2,600 Eritrean POWs between the start of the conflict in May 1998 and November 29, 2002, when all remaining Eritrean POWs registered by the ICRC were released.
4. Ethiopia utilized six permanent camps, some only briefly: Fiche, Bilate, Feres Mai, Mai Chew, Mai Kenetal and Dedessa. Ethiopia closed each camp upon transfer of the POWs to their next camp.

[...]

C. General Comment by the Commission

11. As the findings in this Award and in the related Award in Ethiopia's Claim 4 describe, there were significant difficulties in both Parties' performance of important legal obligations for the protection of POWs. Nevertheless, the Commission must record an important preliminary point that provides essential context for what follows. Based on the extensive evidence adduced during these proceedings, the Commission believes that both Parties had a commitment for the most fundamental principles bearing on prisoners of war. Both Parties conducted organized, official training programs to instruct their troops on procedures to be followed when POWs are taken. In contrast to many other contemporary armed conflicts, both Eritrea and Ethiopia regularly and consistently took POWs. Enemy personnel who were *hors de combat* were moved away from the battlefield to conditions of greater safety. Further, although these cases involve two of the poorest countries in the world, both made significant efforts to provide for the sustenance and care of the POWs in their custody.
12. There were deficiencies of performance on both sides, sometimes significant, occasionally grave. Nevertheless, the evidence in these cases shows that both Eritrea and Ethiopia endeavored to observe their fundamental humanitarian obligations to collect and protect enemy soldiers unable to resist on the battlefield. The Awards in these cases, and the difficulties that they identify, must be read against this background. [...]

III. JURISDICTION

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

20. It is beyond dispute that all the persons who are the subject of the present claims became POWs during the armed conflict that ended with the conclusion of the Agreement on December 12, 2000. The Commission believes 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 Decision No. 1. In that connection,

international law and practice recognize the importance of the timely release and return of POWs, as demonstrated by Article 118 of Geneva Convention III which requires that such POWs “be released and repatriated without delay following the cessation of active hostilities.” [...]

22. The Commission finds unconvincing Ethiopia’s further arguments that Article 2 of the Agreement effectively replaced Article 118 of Geneva Convention III as the governing law and that the Commission could not exercise jurisdiction over Eritrea’s claim based on Article 118 without thereby deciding whether Ethiopia was in breach of its obligations under Article 2 of the Agreement. It frequently occurs in international law that a party finds itself subject to cumulative obligations arising independently from multiple sources. Article 2 itself recognizes that the relevant repatriation obligations are obligations “under international humanitarian law, including the 1949 Geneva Conventions....” Article 5 of the Agreement grants the Commission jurisdiction over all claims related to the conflict that result from violations of the 1949 Geneva Conventions or from other violations of international law. The Commission finds no basis in the text of either Article 2 or Article 5 for the conclusion that its jurisdiction over claims covered by Article 5 is repealed or impaired by the provisions of Article 2. Consequently, the Commission finds that it has jurisdiction over Eritrea’s claims concerning the repatriation of POWs. Nevertheless, in dealing with those claims, the Commission shall exercise care to avoid assuming or exercising jurisdiction over any claims concerning compliance with Article 2 of the Agreement.

IV. THE MERITS

A. Applicable Law [...]

41. Consequently, the Commission holds that the law applicable to this Claim is customary international law, including customary international humanitarian law, as exemplified by the relevant parts of the four Geneva Conventions of 1949. The frequent invocation of provisions of Geneva Convention III by both Parties in support of their claims and defences is fully consistent with this holding. Whenever 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. [...]

C. Violations of the Law [...]

2. Mistreatment of POWs at Capture and its Immediate Aftermath [...]

a. Abusive Treatment

59. The forty-eight Eritrean POW declarations recount a few disquieting instances of Ethiopian soldiers deliberately killing POWs following capture. Three declarants gave eyewitness accounts alleging that wounded comrades were shot and abandoned to speed up evacuation.
60. The Commission received no evidence that Ethiopian authorities conducted inquiries into any such battlefield events or pursued discipline as required under Article 121 of Geneva Convention III. However, several Eritrean POW declarants described occasions when Ethiopian soldiers threatened to kill Eritrean POWs at the front or during evacuation, but either restrained themselves or were stopped by their comrades. Ethiopia presented substantial evidence regarding the international humanitarian law training given to its troops. The accounts of capture and its immediate aftermath presented to the Commission in this Claim suggest that this training generally was effective in preventing unlawful killing, even “in the heat of the moment” after capture and surrender.
61. On balance, and without in any way condoning isolated incidents of unlawful killing by Ethiopian soldiers, the Commission finds that there is not sufficient corroborated evidence to find Ethiopia liable for frequent or recurring killing of Eritrean POWs at capture or its aftermath.
62. In contrast, Eritrea did present clear and convincing evidence, in the form of cumulative and reinforcing accounts in the Eritrean POW declarations, of frequent physical abuse of Eritrean POWs by their captors both at the front and during evacuation. A significant number of the declarants reported that Ethiopian troops threatened and beat Eritrean prisoners, sometimes brutally and sometimes inflicting blows directly to wounds. In some cases, Ethiopian soldiers deliberately subjected Eritrean POWs to verbal and physical abuse, including beating and stoning from

civilian crowds in the course of transit.

63. This evidence of frequent beatings and other unlawful physical abuse of Eritrean POWs at capture or shortly after capture is clear, convincing and essentially un rebutted. Although the Commission has no evidence that Ethiopia encouraged its soldiers to abuse POWs at capture, the conclusion is unavoidable that, at a minimum, Ethiopia failed to take effective measures, as required by international law, to prevent such abuse. Consequently, Ethiopia is liable for that failure.

b. Medical Care Immediately After Capture

64. The Commission turns next to Eritrea's allegations that Ethiopia failed to provide necessary medical attention to Eritrean POWs after capture and during evacuation, as required under customary law as reflected in Geneva Conventions I (Article 12) and III (Articles 20 and 15). Some fourteen of the Eritrean declarants testified that their wounds or their comrades' wounds were not bandaged at the front or cleaned in the first days and weeks after capture, in at least one case apparently leading to death after a transit journey. In rebuttal, Ethiopia offered evidence that its soldiers carried bandages and had been trained to wrap wounds to stop bleeding, but not to wash wounds immediately at the front because of the scarcity of both water and time.
65. The Commission believes that the requirement to provide POWs with medical care during the initial period after capture must be assessed in light of the harsh conditions on the battlefield and the limited extent of medical training and equipment available to front line troops. On balance, and recognizing the logistical and resource limitations on the medical care Ethiopia could provide at the front, the evidence indicates that, on the whole, Ethiopian forces gave wounded Eritrean soldiers basic first aid treatment upon capture. Hence, Ethiopia is not liable for this alleged violation.

c. Evacuation Conditions [...]

68. On balance, and with one exception, the Commission finds that Ethiopian troops satisfied the legal requirements for evacuations from the battlefield under the harsh geographic, military and logistical circumstances. The exception is the frequent, but not invariable, Ethiopian practice of seizing footwear, testified to by several

declarants. Although the harshness of the terrain and weather on the marches to the camps may have been out of Ethiopia's control, to force the POWs to walk barefoot in such conditions unnecessarily compounded their misery. Although Ethiopia suggested, in the context of transit camps, that it is permissible to restrict shoes to prevent escape, the ICRC Commentary is to the contrary, and Ethiopia has claimed against Eritrea for the same offense. The Commission finds Ethiopia liable for inhumane treatment during evacuations from the battlefield as a result of its forcing Eritrean POWs to go without footwear during evacuation marches. [...]

d. *Coercive Interrogation*

70. Eritrea alleges frequent abuse in Ethiopia's interrogation of POWs, commencing at capture and evacuation. International law does not prohibit the interrogation of POWs, but it does restrict the information they are obliged to reveal and prohibits torture or other measures of coercion, including threats and "unpleasant or disadvantageous treatment of any kind."
71. However, only a very small number of Eritrean declarants testified that they were beaten or seriously threatened during interrogation. Without condoning any isolated incidents of abuse, the Commission finds that the evidence was insufficient to show a pattern of coercive interrogation of POWs at capture or thereafter.

3. *Taking of the Personal Property of POWs*

72. Eritrea alleges widespread confiscation by Ethiopian soldiers of POWs' money and other valuables, and of photographs and identity cards, either at the time of capture or thereafter. Eritrea accordingly asked the Commission to "order the return of all irreplaceable personal property to Eritrean POWs that was confiscated by Ethiopia ..., and in particular that Ethiopia return identity documents and personal photographs displayed on the Internet." [...]
76. Weighing the conflicting evidence, the Commission finds that it shows that personal property frequently was taken from Eritrean prisoners by Ethiopian military personnel, without receipts or any hope of return, all contrary to Articles 17 and 18 of Geneva Convention III. Sometimes this occurred at the front soon after capture,

where such thefts have been all too common during war as the independent actions of rapacious individuals. However, the Commission is troubled by evidence of taking of personal property at transit facilities and after arrival at permanent camps and by evidence that property for which receipts were given was not returned or was partly or fully “lost.” The conflicting evidence obviously cannot be fully reconciled.

77. The Commission concludes that Ethiopia made efforts to protect the rights of POWs to their personal property, but that these efforts fell short in practice of what was necessary to ensure compliance with the relevant requirements of Geneva Convention III. Consequently, Ethiopia is liable to Eritrea for the resulting losses suffered by Eritrean POWs. [...]

4. Physical and Mental abuse of POWs in Camps [...]

81. Even if one were to give full credibility to the evidence submitted by Eritrea, the evidence as a whole indicates that the Ethiopian POW camps were not characterized by a high level of physical abuse by the guards. The evidence does suggest that there were some incidents of beating and that disciplinary punishments were sometimes imposed contrary to Article 96 of Geneva Convention III in that they were decided by Ethiopian guards, rather than by camp commanders or officers to whom appropriate authority had been delegated or that the accused had been denied the benefit of the rights granted by that Article. The disciplinary punishments themselves appear to have been a mixture of clearly legitimate punishments, such as solitary confinement of less than one month and fatigue duties, such as digging, unloading cargo at the camp or carrying water to the camp, along with punishments of questionable legality, such as running, crawling and rolling on the ground. Moreover, there are allegations that some penalties, such as running, crawling or rolling on the ground in the hot sun, even if they could properly be considered fatigue duties, which seem doubtful, were painful and exceeded the limits permitted by Article 89 of Geneva Convention III. That Article permits fatigue duties not exceeding two hours daily as disciplinary punishments of POWs other than officers, but fatigue duties, as well as the other authorized punishments, become unlawful if they are “inhuman, brutal or dangerous to the health” of the POWs. The Commission lacks sufficient evidence to determine

whether the punishments actually imposed upon Eritrean POWs violated that standard. [...]

82. [...] Considering all relevant evidence, the Commission holds that the Claimant has failed to prove by clear and convincing evidence that Ethiopia's POW camps, despite the likely inconsistencies, noted above, with the requirements of Articles 89 and 96 of the Convention, were administered in such a way as to give rise to liability for frequent or pervasive physical abuse of POWs. [...]
84. Regrettably, the Commission's finding regarding physical abuse does not apply as well to mental abuse. Ethiopia admits that its camps were organized in a manner that resulted in the segregation of various groups of POWs from each other. It is acknowledged that POWs who had been in the armed forces during the much earlier fighting against the Derg were kept isolated from POWs who began their military service later, and there is some evidence that other groups were also segregated depending upon the years in which the POWs began their military service. Such segregation is contrary to Article 22 of Geneva Convention III, which states that "prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent." Ethiopia argues that this segregation was done to reduce hostility between the groups, but the Commission finds that argument unpersuasive. It seems far more likely that these actions were taken to promote defections of POWs and to break down any sense of internal discipline and cohesion among the POWs.
85. In that connection, the Commission notes that Ethiopia conducted extensive indoctrination programs for the various groups of POWs in Bilate, Mai Chew, Mai Kenetal and Dedessa and encouraged the discussion among groups of POWs of questions raised in these programs, including the responsibility for starting the war and the nature of the Eritrean Government. While Ethiopia asserts that attendance at these indoctrination and discussion sessions was not compulsory, there is considerable evidence that, except for sick or wounded POWs, attendance was effectively made compulsory by Ethiopia, contrary to Article 38 of Geneva Convention III. Moreover, there is substantial evidence that POWs were sometimes put under considerable pressure to engage in self-criticism during the discussion sessions. While there are some allegations that those POWs who made statements that appealed to the

Ethiopian authorities were subsequently accorded more favorable treatment than those who refused to make such statements, the Commission does not find sufficient evidence to prove such a violation of the fundamental requirement of Article 16 of Geneva Convention III that all POWs must be treated alike, “without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.” Nevertheless, the Commission notes with concern the evidence of mental and emotional distress felt by many Eritrean POWs and concludes that such distress was caused in substantial part by these actions by Ethiopia in violation of Articles 22 and 38 of the Convention.

86. Consequently, Ethiopia is liable for the mental and emotional distress caused to Eritrean POWs who were subjected to programs of enforced indoctrination from the date of the first indoctrination sessions at the Bilate camp in July 1998 until the release and repatriation of the last POWs in November 2002. The evidence indicates that this group includes essentially all of the POWs held by Ethiopia at the four named camps, except for those unable to attend the indoctrination sessions due to their medical conditions.

5. Unhealthy Conditions in Camps [...]

c. Analysis of Health-Related Conditions at Each of Ethiopia’s POW Camps

92. While there is certainly some disturbing testimony to support Eritrea’s claim that Ethiopia’s northern, short term POW camps at Feres Mai and Mai Chew were in serious violation of one or more basic health standards, the Commission finds the evidence relating to these camps insufficient to justify a finding that conditions there seriously endangered the health of POWs.
93. Mai Kenetal presents a different picture. Its commander testified in writing that the site for the camp was selected because it was close to an arterial road linking the camp to Mekele and Addis Ababa to the south, and because the location included a number of administrative buildings which had been vacated by the Mai Kenetal wereda government. Despite these advantages, two circumstances combined to impose great difficulties on the camp’s administrators: first, Mai Kenetal was put into

operation at the onset of the winter season in Northern Ethiopia – a three-month period characterized, at times, by torrential rains, high winds and cold temperatures; second, in May 2000, Ethiopia launched a major offensive which produced, quite rapidly, an unanticipated camp population of around 2,000 POWs – a development which strained the resources of the camp during difficult climatic conditions. [...]

95. Nearly all POWs who were not wounded were housed in tents, of varying size, made up of plastic sheeting propped up by wooden poles. It is undisputed that there was no flooring; that prisoners slept on the damp ground; that prisoners were provided with only one or two blankets; that the plastic tents were inadequate to keep out the rain; that some tents blew down in the high winds; that during much of the time these quarters were quite cold and damp and even muddy; and, that they were seriously overcrowded. [...]
97. At least twenty POWs testified regarding unsanitary toilet conditions. These facilities consisted of holes dug in the ground and covered by sheets of wood with holes cut into them, and sheltered from the rains by plastic tenting. The holes regularly became filled with rain water and mud, and there is also cumulative testimony that the ground under many of the toilet tents became muddy and contaminated and that these conditions exacerbated the hardships suffered by those POWs who lacked shoes. At least ten POWs testified that flooded toilets affected their conditions of shelter. [...]
99. There is little dispute about the content of the diet offered at Mai Kenetal. It consisted of bread and tea in the morning and bread and lentils for lunch and dinner. Overwhelmingly, the thirty-eight POWs who testified about conditions at Mai Kenetal complained about the inadequacy of this diet. Many say they were in a state of constant hunger. Many assert this diet produced serious malnutrition, which, combined with other conditions, facilitated contagious diseases, notably tuberculosis. Nearly all of the thirty- eight POWs also claim that the medical facilities provided were inadequate in terms of qualified personnel, medical supplies and other resources necessary to treat the many sick or wounded POWs at Mai Kenetal. While complaints regarding food and medical care were regularly levelled at the administration of all camps by POWs from both sides, it does appear from considerable cumulative testimony that there was serious hunger and sickness at Mai Kenetal. For example, at least twenty POWs claimed that they suffered from diarrhea. Many others complained

that tuberculosis became widespread and that POWs suffering from this disease were housed in the overcrowded tents rather than isolated in facilities set up for medical care of that disease.

100. Ethiopia made extensive efforts to discredit and rebut this evidence, [...]. [...] They testified that clothing in the form of coveralls, as well as shoes and a mat and two blankets, were issued to each POW. They assert that drinking water was at first piped from the wells at Mai Kenetal village into the camp, but then the new wells were dug at the camp, and that the water from these wells – despite some complaints by POWs – was chlorinated, potable and plentiful. They also assert that showers were available for bathing. Each of these officers further stated that ICRC teams regularly visited the camps and made no serious complaints about its conditions. The Commission notes that this is a specific instance where access to the relevant ICRC reports would have been very helpful.
101. It is clear that these officers were aware of their duties, and the Commission may assume they did their best to maintain the health of the POWs under difficult circumstances. Much of their testimony can be credited if one assumes, as the evidence justifies, that the steps taken to improve the conditions of the POWs came towards the end of the relatively brief period in which the camp was in operation. But the cumulative, reinforcing, detailed testimony of so many POWs persuades the Commission that, despite the efforts of the camp's staff, a combination of serious, sub-standard health conditions did exist at Mai Kenetal for some time, that these conditions seriously and adversely affected the health of some POWs there and endangered the health of others, and that this situation constituted a violation of customary international law. [...]
105. Nearly all of the Eritrean prisoners were ultimately interned at Dedessa. This camp had originally been constructed during the Derg era as a military training base. It was put into operation as a POW camp in June 1999 and remained so until all prisoners were finally repatriated in November 2002. There are thirty-eight declarations describing health-related conditions at this camp. While some allege serious deficiencies regarding sanitation, shelter and lack of shoes, these complaints are contradicted or mitigated by the testimony of others. Weighing the evidence, the Commission finds insufficient evidence to support a finding that the camp was in

serious violation of health-related standards. Evidence regarding the food provided at Dedessa is discussed in the context of Eritrea's general claim regarding the insufficiency of the diet provided to prisoners during their entire captivity.

d. Eritrea's General Claim Regarding the Insufficiency of the Food Provided to Eritrean POWs During the Entire Period of their Captivity

106. In its Statement of Claim and Memorial, Eritrea appears to claim that, throughout their captivity, Eritrean POWs were provided food which was insufficient in "quantity, quality, and variety to keep them in good health and prevent loss of weight." This claim does not require a finding that the food provided by every internment camp was so inadequate in quantity or quality and variety that the health of POWs in each camp was endangered. Rather, the task of the Commission is to determine whether there is clear and convincing evidence that the food provided at all camps was such that, over time, the health of some POWs came to be seriously endangered because of an insufficiency of food in quantity, quality or variety. [...]
114. In conclusion, the Commission holds, first, that the health standards at the POW camp at Mai Kenetal seriously and adversely affected the health of a number of the POWs there and endangered the health of others in violation of applicable international humanitarian law; and second, that the food provided by Ethiopia to POWs at all camps prior to December 2000 was sufficiently deficient in needed nutrition, over time, as to endanger seriously the health of Eritrean POWs in violation of applicable international humanitarian law. Consequently, Ethiopia is liable for the unlawful health standards at Mai Kenetal and, prior to December 2000, for providing food so inadequate in nutrition that, over time, it seriously endangered the health of all Eritrean POWs.

Paras 128 to 163 and Award

6. Inadequate Medical Care in Camps [...]

c. The Commission's Conclusions

128. Despite the substantial amount of evidence and hearing time devoted to medical care in Eritrea's claim, the Commission had difficulty in determining the availability and quality of medical care in the Ethiopian POW camps. Focusing on specifics did not prove necessarily helpful. For example, the evidence of psychological/psychiatric problems does not prove that Ethiopia failed to provide appropriate care; lengthy captivity can be psychologically very disturbing, and psychological care after repatriation is frequently indicated. The discussion of sympathetic ophthalmia was clearly very narrow. The hospital records submitted by Ethiopia do not establish that all POWs in need of specialized treatment were, in fact, referred to hospitals, but only that some were. Although a few Eritrean declarants complained about insufficient medical staffing, other evidence showed that camp infirmaries were staffed by one or more medical doctors and paramedics; a detained Eritrean doctor was involved in caring for the Eritrean POWs. [...]
130. First, in response to questioning, Ethiopia indicated that, to the best of its knowledge, twenty Eritrean POWs died while in captivity in Ethiopia. The Eritrean POW declarants frequently allege, especially with regard to Mai Kenetal (the seriously inadequate conditions of which the Commission discusses above), that deaths resulted from lack of medical attention. As regrettable as each and every death is, the Commission finds that a death ratio of less than one percent – in a total population of some 2,600 POWs, many seriously wounded – does not in itself indicate substandard medical care.
131. Second, the Commission was struck by the detailed testimony of the Eritrean doctors who examined the Eritrean POWs repatriated after hostilities ended in December 2000. They were of the firm opinion that these wounded and sick POWs could not have received required medical care. They testified that, of the 359 POWs they examined, twenty-two had tuberculosis – a very high ratio. They also testified that the POWs showed signs of malnutrition, which had adversely affected their health, contributed to the development of tuberculosis and scurvy, and left many unready for necessary surgery until they could put on weight. The doctors also found that nearly one-half of the POWs they examined had fractures that had not been properly treated, evidenced by non-union or mal-union of the bones. Although Ethiopia responded that fractures sometimes could not heal properly for reasons beyond its control, for

example, because of unavoidable delays in evacuation, the Eritrean doctors countered that many of the post-repatriation orthopedic operations have been successful; if those operations had been done earlier, while the patients were in Ethiopia's custody, they could have been even more successful.

132. Finally, preventive care is a matter of particular concern to the Commission. As evidenced by their prominence in Geneva Convention III, regular medical examinations of all POWs are vital to maintaining good health in a closed environment where diseases are easily spread. The Commission considers monthly examinations of the camp population to be a preventive measure forming part of the Detaining Power's obligations under international customary law.
133. The Commission must conclude that Ethiopia failed to take several important preventive care measures specifically mandated by international law. In assessing this issue, the Commission looked not just to Eritrea but also to Ethiopia, which administered the camps and had the best knowledge of its own practices. [...]
136. In conclusion, on the basis of clear and convincing evidence, including the essentially unrebutted evidence of the prevalence of malnutrition, tuberculosis and improperly treated fractures and the absence of required preventive care, the Commission finds that Ethiopia failed to provide Eritrean POWs with the required minimum standard of medical care prior to December 2000. Consequently, Ethiopia is liable for this violation of customary international law.
137. In comparison, Eritrea has failed to prove that the medical care provided to Eritrean POWs after December 2000 was less than required by applicable law. In response to Eritrea's allegations, Ethiopia submitted considerable rebuttal evidence of the increased medical care it provided at Mai Kenetal and Dedessa from December 2000 through repatriation of the remaining POWs in November 2002. The evidence indicated that approximately forty medical personnel staffed the Mai Kenetal clinic and that some POW patients were taken to a local hospital. The evidence also indicated that POWs with tuberculosis or other contagious diseases were isolated at Mai Kenetal and Dedessa and that, contrary to Eritrea's allegation, medical equipment was sterilized before each use. With respect to medical care at Dedessa, Ethiopia presented medical records rebutting the specific complaints made in a number of the Eritrean declarations.

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

7. Unlawful Assault on Female POWs

139. Eritrea brings a discrete claim for the alleged unlawful assault of female POWs, alleging in its Statement of Claim that Ethiopian soldiers raped female POWs and, in one case, raped and killed a female prisoner at Sheshebit on the Western Front. The Parties agree that Article 14 of Geneva Convention III, which provides that POWs are “entitled in all circumstances to respect for their person and their honour” and that women “shall be treated with all the regard due to their sex,” prohibits sexual assault of female POWs. [...]
141. The Commission finds that Eritrea has not presented clear and convincing evidence of rape, killing or other assault aimed at female POWs. Given the small number of female Eritrean POWs, the Commission has not looked for systematic or widespread abuse of women. The fact remains, however, that not one of the female Eritrean declarants stated explicitly or – more importantly, given the sensitivities – even implicitly that she was sexually assaulted, or that any other female prisoner she knew was assaulted. Some male Eritrean declarants described occasional or frequent screaming from the women’s quarters, but did not (and perhaps could not) observe Ethiopian guards entering or leaving. Several declarants described abuse of women that, although serious in its own right, was unrelated to their gender. Eritrea failed to submit evidence documenting the one rape and murder alleged in the Statement of Claim. Ethiopia defended these claims, in large part, by presenting detailed evidence that there were separate quarters for women in the camps, which were inspected only by senior camp officials in pairs.
142. Accordingly, and without in any way undermining its recognition of the particular vulnerability of female POWs, the Commission does not find Ethiopia liable for

breaching customary international law obligations to protect the person and honour of female Eritrean POWs.

8. Delayed Repatriation of POWs

143. The Commission has determined in this Award that Eritrea's claims regarding the timely release and repatriation of POWs are within its jurisdiction under the Agreement and Commission Decision No. 1.
144. In its Statement of Claim, Eritrea alleged that Ethiopia failed to release and repatriate POWs without delay after December 12, 2000. In its Memorial, Eritrea asked the Commission to "order Ethiopia to cooperate with the International Committee of the Red Cross in effecting an immediate release and repatriation of all POWs...." However, on November 29, 2002, shortly before the hearing in this claim, Ethiopia released all POWs registered by the ICRC remaining in its custody. While some chose to remain in Ethiopia for family or other reasons, 1,287 returned to Eritrea. During the hearing, counsel for Eritrea expressed Eritrea's great pleasure at this action. The Commission too welcomes this important and positive step by Ethiopia, which rendered moot Eritrea's request for an order regarding repatriation. Nevertheless, Eritrea's claim that Ethiopia failed to repatriate the POWs it held as promptly as required by law remains.
145. As noted above, Eritrea acceded to the four Geneva Conventions of 1949 effective August 14, 2000, so they were in force between the Parties after that date. Article 118 of Geneva Convention III states that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities". The Parties concluded an Agreement on the Cessation of Hostilities on June 18, 2000. However, the Commission received no evidence regarding implementation of that agreement and could not assess whether it marked an end to active hostilities sufficiently definitive for purposes of Article 118.
146. By contrast, Article 1 of the December 12, 2000, Agreement states that "[t]he parties shall permanently terminate military hostilities between themselves." Given the terms of this Agreement and the ensuing evolution of the Parties' relationship, including the establishment and work of this Commission, the Commission concludes that as of

December 12, 2000, hostilities ceased and the Article 118 obligation to repatriate “without delay” came into operation.

147. Applying this obligation raises some issues that were not thoroughly addressed during the proceedings, in part because Eritrea focused on the return of POWs still detained, which was mooted on the eve of the hearing, while Ethiopia consistently relied on the argument that these claims were outside the Commission’s jurisdiction, a defense that the Commission has now rejected. Nevertheless, given their everyday meaning and the humanitarian object and purpose of Geneva Convention III, these words indicate that repatriation should occur at an early time and without unreasonable or unjustifiable restrictions or delays. At the same time, repatriation cannot be instantaneous. Preparing and coordinating adequate arrangements for safe and orderly movement and reception, especially of sick or wounded prisoners, may be time-consuming. Further, there must be adequate procedures to ensure that individuals are not repatriated against their will.
148. There is also a fundamental question whether and to what extent each Party’s obligation to repatriate depends upon the other’s compliance with its repatriation obligations. The language of Article 118 is absolute. Nevertheless, as a practical matter, and as indicated by state practice, any state that has not been totally defeated is unlikely to release all the POWs it holds without assurance that its own personnel held by its enemy will also be released, and it is unreasonable to expect otherwise. At the hearing, distinguished counsel for Eritrea suggested that the obligation to repatriate should be seen as unconditional but acknowledged the difficulty of the question and the contrary arguments under general law.
149. The Commission finds that, given the character of the repatriation obligation and state practice, it is appropriate to consider the behavior of both Parties in assessing whether or when Ethiopia failed to meet its obligations under Article 118. In the Commission’s view, Article 118 does not require precisely equivalent behavior by each Party. However, it is proper to expect that each Party’s conduct with respect to the repatriation of POWs will be reasonable and broadly commensurate with the conduct of the other. Moreover, both Parties must continue to strive to ensure compliance with the basic objective of Article 118 – the release and repatriation of POWs as promptly as possible following the cessation of active hostilities. Neither

Party may unilaterally abandon the release and repatriation process or refuse to work in good faith with the ICRC to resolve any impediments.

150. The Parties submitted limited evidence regarding this claim, a fact that complicates some key judgements by the Commission. As noted, until the eve of the hearing, Eritrea's emphasis was on the release of POWs still being held, while Ethiopia argued that the whole matter was outside the jurisdiction of the Commission. [...] [T]he Parties, acting with the assistance of the ICRC, began a substantial process of repatriation in both directions promptly after December 12, 2000. Between December 2000 and March 2001, Ethiopia repatriated 855 Eritrean POWs, 38 percent of the total number it eventually repatriated. Eritrea repatriated a smaller number of Ethiopian POWs (628), but they constituted 65 percent of the total eventually repatriated by Eritrea.
151. After March 2001, the process halted for a substantial period. It then resumed in October 2001 with two small repatriations by each Party. Eritrea repatriated all remaining Ethiopian POWs in August 2002. This was followed by the November 2002 Ethiopian repatriation noted above. (The only repatriation of POWs prior to December 2000 was in August 1998 when Eritrea repatriated seventy sick or wounded POWs to Ethiopia.) [...]
153. The record is unclear regarding the circumstances of the interruption and eventual resumption of repatriations. The record includes an August 3, 2001, press report that the Ethiopian Ministry of Foreign Affairs had stated that Ethiopia was suspending the exchange of POWs with Eritrea until Eritrea clarified the situation of an Ethiopian pilot and thirty-six militia and police officers who it understood had been captured by Eritrea in 1998, but whose names were not included in the lists of POWs held by Eritrea that it had received from the ICRC. Eritrea responded that it would also halt further repatriation of Ethiopian POWs but that it was willing to resume repatriations when Ethiopia did so. [...]
[T]here were several small repatriations of POWs in October and November 2001 and in February 2002, but it seems clear that the repatriation of the bulk of the remaining POWs was held up for twelve months or more by a dispute over the accounting for these missing persons or other matters not in the record before this Commission.
154. There was conflicting evidence regarding the details of the pilot's capture, but it was

common ground that he had been captured and made a POW. The Commission received no direct evidence concerning his fate. Eritrea's Memorial states that "Ethiopia was repeatedly informed about the death of the individual in question by the facilitators in the peace process." The Memorial does not indicate when Eritrea believes that may have occurred, nor does it provide evidence that it, in fact, did occur. Ethiopia's Counter-Memorial does not respond to that statement or directly address the fate of the pilot and other personnel. Neither Party offered documentary or testimonial evidence on this point.

155. Communications between the Parties concerning the delay in repatriations were presumably transmitted through the ICRC but, unfortunately, they have not been made available to the Commission. However, press reports in the record suggest that, at some point, the dispute may have been narrowed to the missing pilot. In particular, documents introduced by Eritrea indicate that, on May 8, 2002, Professor Jacques Forster, Vice President of the ICRC, stated at a press conference at the end of a visit in Ethiopia that the ICRC was concerned by a "slowdown on the part of both countries" in the repatriation of POWs. However, as of that time, in the ICRC's view, "Ethiopia was not in violation of the four Geneva Conventions by failing to repatriate POWs."
156. On July 16, 2002, the Prime Minister of Ethiopia confirmed in a press conference that the "stumbling block" to the completion of the exchange of POWs was the lack of response by Eritrea to what happened to the pilot. The next month, the dispute was evidently resolved. An ICRC press release, dated August 23, 2002, states the following:

Geneva (ICRC) – The President of the International Committee of the Red Cross (ICRC) Mr Jakob Kellenberger, has today completed his first visit to the region since the end of the international armed conflict between the two countries in 2000.

During his official visits to Eritrea and Ethiopia, Mr Kellenberger met Eritrean President Isaias Afewerki in Asmara on 20 August, and Ethiopian President Girma Wolde Georgis and Prime Minister Meles Zenawi in Addis Ababa on 22 August.

The ICRC President's main objective in both capitals was to ensure the release and repatriation of all remaining Prisoners of War (POWs) in accordance with the Third Geneva Convention and the peace agreement signed in Algiers on 12 December 2000.

During his meeting with Eritrean President Isaias Afewerki, Mr Kellenberger took note of Mr Afewerki's commitment to release and repatriate the Ethiopian POWs held in Eritrea. The release and repatriation of the POWs, registered and visited by the ICRC, will take place next week.

During his meeting with Mr Kellenberger, Ethiopian Prime Minister Meles Zenawi expressed his government's commitment to release and repatriate the Eritrean POWs held in Ethiopia and other persons interned as a result of the conflict. Release and repatriation will take place upon completion of internal procedures to be worked out with the ICRC.

In both capitals, Mr Kellenberger reiterated the ICRC's strong commitment to helping resolve all remaining issues related to persons captured or allegedly captured during the conflict.

The ICRC welcomes the decisive steps taken towards the prompt return of the POWs to their home country and to their families, and looks forward to facilitating the release and repatriation they have been so anxiously awaiting for close to eighteen months.

157. While Eritrea promptly released and repatriated its remaining POWs in late August 2002, Ethiopia waited three months, until November 29, 2002, to release the remainder of its POWs and to repatriate those desiring repatriation. This three-month delay was not explained.
158. In these circumstances, the Commission concludes that Ethiopia did not meet its obligation promptly to repatriate the POWs it held, as required by law. However, the

problem remains to determine the date on which this failure of compliance began, an issue on which Eritrea has the burden of proof. Eritrea did not clearly explain the specific point at which it regarded Ethiopia as having first violated its repatriation obligation, and Ethiopia did not join the issue, in both cases for reasons previously explained. The lack of discussion by the Parties has complicated the Commission's present task.

159. Eritrea apparently dates the breach from Ethiopia's decision in August 2001 to suspend further repatriation of POWs until Eritrea clarified the fate of a few persons who Ethiopia believed to have been captured by Eritrea in 1998 but who were not listed among POWs held by Eritrea. Eritrea argues that concerns about the fate of a relatively few missing persons cannot justify delaying for a year or more the release and repatriation of nearly 1,300 POWs. It also asserts that Ethiopia's suspension of POW exchanges cannot be justified as a non-forcible counter-measure under the law of state responsibility because, as Article 50 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts emphasizes, such measures may not affect "obligations for the protection of fundamental human rights," or "obligations of a humanitarian character prohibiting reprisals." Likewise, Eritrea points out that this conduct cannot be a permitted reprisal under the law of armed conflict; Article 13 of Geneva Convention III emphasizes that "measures of reprisal against prisoners of war are prohibited." As noted, Ethiopia defended this claim on jurisdictional grounds and consequently has not responded to these legal arguments.
160. Eritrea's arguments are well founded in law. Nevertheless, they are not sufficient to establish that Ethiopia violated its repatriation obligation as of August 2001. In particular, the Commission is not prepared to conclude that Ethiopia violated its obligation under Article 118 of Geneva Convention III by suspending temporarily further repatriations pending a response to a seemingly reasonable request for clarification of the fate of a number of missing combatants it believed captured by Eritrea who were not listed as POWs. Eritrea presented no evidence indicating that it sought to respond to these requests, or to establish that they were unreasonable or inappropriate.
161. In this connection, the Commission must give careful attention and appropriate

weight to the position of the ICRC. As noted above, ICRC Vice-President Forster stated in May 2002 that, as of that time, the ICRC did not regard Ethiopia as being in breach of its repatriation obligation. Eritrea did not address that statement. The ICRC's conclusion is particularly worthy of respect because the ICRC was in communication with both Parties and apparently had been the channel for communications between them on POW matters. Consequently, the ICRC presumably had a much fuller appreciation of the reasons for the delay in repatriations than is provided by the limited record before the Commission.

162. While the length of time apparently required to resolve this matter is certainly troubling, on the record before it the Commission is not in a position to disagree with the conclusion of the ICRC or to conclude that Ethiopia alone was responsible for the long delay in the repatriations that ended when Eritrea repatriated its remaining Ethiopian POWs in August 2002. Consequently, the claim that Ethiopia violated its repatriation obligation under Article 118 of Geneva Convention III by suspending repatriation of POWs in August 2001 must be dismissed for failure of proof.
163. However, in view of the ICRC press release of August 23, 2002, and the repatriation of all remaining Ethiopian POWs in that same month, the Commission sees no legal justification for the continued prolonged detention by Ethiopia of the remaining Eritrean POWs. Ethiopia waited until November 29, 2002, to release and repatriate the remaining Eritrean POWs. Ethiopia has not explained this further delay, and the Commission sees no justification for its length. While several weeks might understandably have been needed to make the necessary arrangements with the ICRC and, in particular, to verify that those who refused to be repatriated made their decision freely, the Commission estimates that this process should not have been required more than three weeks at the most. Consequently, the Commission holds that Ethiopia violated its obligations under Article 118 of Geneva Convention III by failing to repatriate 1,287 POWs by September 13, 2002, and that it is responsible to Eritrea for the resulting delay of seventy-seven days.

V. AWARD

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

[...]

B. Applicable Law

1. With respect to matters prior to Eritrea's accession to the Geneva Conventions of 1949 on August 14, 2000, the international law applicable to this claim is customary international law, including customary international humanitarian law as exemplified by relevant parts of the four Geneva Conventions of 1949.
2. Whenever either Party asserts that a particular relevant provision of those Conventions was not part of customary international law at the relevant time, the burden of proof will be on the asserting Party.
3. With respect to matters subsequent to August 14, 2000, the international humanitarian law applicable to this claim is relevant parts of the four Geneva Conventions of 1949, as well as customary international law. [...]

D. Findings of Liability for Violation of International Law

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

1. For failing to take effective measures to prevent incidents of beating or other unlawful abuse of Eritrean POWs at capture or its immediate aftermath;
2. For frequently depriving Eritrean POWs of footwear during long walks from the place of capture to the first place of detention;
3. For failing to protect the personal property of Eritrean POWs;
4. For subjecting Eritrean POWs to enforced indoctrination from July 1998 to November 2002 in the camps at Bilate, Mai Chew, Mai Kenetal and Dedessa;
5. For permitting health conditions at Mai Kenetal to be such as seriously and adversely to affect or endanger the health of the Eritrean POWs confined there;
6. For providing all Eritrean POWs prior to December 2000 a diet that was seriously deficient in nutrition;
7. For failing to provide the standard of medical care required for Eritrean POWs, particularly at Mai Kenetal, and for failing to provide required preventive care by segregating from the outset prisoners with infectious diseases and by conducting

- regular physical examinations, from May 1998 until December 2000; and
8. For delaying the repatriation of 1,287 Eritrean POWs in 2002 for seventy-seven days longer than was reasonably required. [...]

Discussion

A. Prisoners of War, Ethiopia's Claim 4

1.
 - a. Was the IHL of international armed conflicts applicable to the conflict between Eritrea and Ethiopia? Even though Eritrea was not a party to the Geneva Conventions? (GC I-IV, Art. 2 ^[4])
 - b. Was Convention III applicable to that conflict even before 14 August 2000, the date of Eritrea's accession to the Geneva Conventions? Did at least Ethiopia, as a party to the Convention, have to respect it? (GC I-IV, Art. 2 ^[4])
 - c. Why did Eritrea not succeed to Ethiopia as a party to the Geneva Conventions?
 - d. Are there specific criteria for assessing whether Convention III corresponds to customary international law? Why? Do you agree that the examples offered by Eritrea, mentioned in para. 29 of the Award, do not correspond to customary international law? What requirements of Convention III does the Commission find are not requirements of customary international law?
2.
 - a. What is the legal basis and purpose of the ICRC's right to visit POWs? Does such a right exist even in conflicts where the parties are represented by Protecting Powers? (GC III, Arts 10(3) ^[5] and 126 ^[6]; CIHL, Rule 124 ^[7])
 - b. Are procedural rules, mechanisms or institutions for implementation prescribed by treaties particularly unlikely to become part of customary international law? Is the ICRC's right to visit POWs such a procedural rule or mechanism of implementation? Why does it nevertheless correspond to customary international law? Is the Commission's conclusion on this issue based on an analysis of State practice? (GC III, Art. 126 ^[6]; CIHL, Rule 124 ^[7])
 - c. What impact of ICRC visits upon respect for IHL is shown by the Commission's findings?
3. May persons be protected by both Convention I and III? In which circumstances? (GC I, Art. 14

[8])

4. Is Article 121 of Convention III applicable to the killing of enemy soldiers at the time of capture? Immediately before capture? (GC III, Arts 4 ^[9] and 13 ^[10]; P I, Art. 41 ^[11])
5. Must the medical care required for POWs be provided according to one single standard or does the standard vary according to the general health standards and resources of the parties involved? In this regard, are your thoughts in terms of housing, clothing, food, conditions of evacuation, working conditions or criminal proceedings similar to those in terms of medical care? (GC III, Arts 15 ^[12], 20 ^[13], 25 ^[14], 26 ^[15], 27 ^[16], 30 ^[17], 51 ^[18], 82 ^[19], 87 ^[20], 102 ^[21] and 105 ^[22])
6. In which main fields has the Commission found that Eritrea violated IHL? Which of Ethiopia's claims were rejected? For reasons relating to the interpretation of Convention III? For reasons relating to the insufficient severity of the violations? Because the factual basis of those claims could not be established?
7. Is it lawful and appropriate for the Commission not to establish all the violations committed by the parties, but only serious violations? What are the reasons for such a limitation? What do those reasons indicate about Convention III?
8. What are the reasons for the ICRC's refusal to give its consent to the parties to provide the Commission access to its reports? Could the parties have provided those reports to the Commission despite the ICRC's refusal? On what basis do parties to an armed conflict have an obligation to respect the ICRC's confidentiality?

B. Prisoners of War, Eritrea's Claim 17

1.
 - a. Was the IHL of international armed conflicts applicable to the conflict between Eritrea and Ethiopia?
 - b. Was Convention III applicable to that conflict even before 14 August 2000, the date of Eritrea's accession to the Geneva Conventions? Did at least Ethiopia, as a party to the Convention, have to respect it? (GC I-IV, Art. 2 ^[23])
2. In which main fields has the Commission found that Ethiopia violated IHL? Which of Eritrea's claims were rejected? For reasons relating to the interpretation of Convention III? For reasons relating to the insufficient severity of the violations? Because the factual basis of those claims could not be established?
3.
 - a. Must the medical care required for POWs be provided according to one single

standard or does the standard vary according to the general health standards and resources of the parties involved? In this regard, are your thoughts in terms of housing, clothing, food, conditions of evacuation, working conditions or criminal proceedings similar to those in terms of medical care? (GC III ^[24], Arts 15 ^[25], 20 ^[26], 25 ^[27], 26 ^[28], 27 ^[29], 30 ^[30], 51 ^[31], 82 ^[32], 87 ^[33], 102 ^[34] and 105 ^[35])

- b. What do you think of the Commission's statement in para. 138 that "scarcity of finances and infrastructure cannot excuse a failure to grant the minimum standard of medical care required by international humanitarian law. The cost of such care is not, in any event, substantial in comparison with the other costs imposed by the armed conflict"?
4.
 - a. When should Ethiopia have repatriated all Eritrean POWs? According to the Commission? According to Art. 118 of Convention III?
 - b. When do active hostilities cease, making the repatriation of POWs compulsory under Art. 118 of Convention III? Is a cease-fire agreement sufficient? Must it actually be implemented? What if hostilities cease without an agreement?
 - c. Do you agree with the findings of the Commission in paras 145 and 160? Are they compatible with the wording of Art. 118 of Convention III? Has "state practice" (the Commission refers to it in para. 148) modified the sense of Art. 118? Does the Commission consider that repatriations may be lawfully suspended if the enemy fails to comply with its repatriation obligations? Is that compatible with Art. 13 of Convention III? Justified under the law of treaties? (See Art. 60 of the Vienna Convention on the Law of Treaties, quotation above in Part I, Chapter 13. IX. 2 c) dd)) May this be justified under the law of State responsibility [See International Law Commission, Articles on State Responsibility ^[36] [Art. 50 ^[37]]]
 - d. Assuming, like the Commission, that the obligation to repatriate POWs may be subject to certain considerations of reciprocity, may a State temporarily suspend repatriations of POWs who were registered by the ICRC, pending clarification by the enemy of the fate of missing servicemen who were not registered by the ICRC, if it believes those persons to have been captured by the enemy? According to para. 160 of the Award? In your opinion? What is the risk for the prisoners if their repatriation is linked to clarification of the fate of missing

persons? How long does it usually take to clarify the fate of persons who went missing during a conflict? Is the obligation to repatriate POWs an obligation of result? Is the obligation to provide information on persons reported as missing an obligation of result? (GC III ^[24], Arts 13 ^[38], 118 ^[39] and 122(7) ^[40]; P I ^[41], Art. 33 ^[42])

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[7] https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule124

[8]

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