

# Displacement of Civilians during Armed Conflict in the Light of the Case Law of the Eritrea-Ethiopia Claims Commission

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## Abstract

The awards on liability and damages for violations of international humanitarian law of the Eritrea-Ethiopia Claims Commission uncover both the extent of state responsibility for unlawful displacement and deportation of civilian population resulting from wrongful actions of belligerents under international law and the availability of remedies for victims of such violations. The Commission reached a number of important decisions based on government-to-government claims brought by Ethiopia and Eritrea for injuries, losses, and damage suffered by individuals and groups uprooted by the war. While these decisions bring to light the potential of international humanitarian law in addressing the plight of the displaced, they also expose the limitations of the tribunal's mandate and its interpretation of existing law. The aim of this essay is to analyse the case law of the Commission in the light of international law applicable to situations of displacement of civilians triggered by international armed conflicts, and evaluate the relevance of the Commission's jurisprudence for the development of the law in the field.

## Key words

compensation for unlawful displacement; deportation; Eritrea-Ethiopia Claims Commission; forced displacement

## I. INTRODUCTION

This article seeks to discuss the problem of forced displacement under international law in the light of the jurisprudence of the Eritrea-Ethiopia Claims Commission (EECC, the Commission). The Commission has been established as a forum to settle claims of damage, injury, or loss incurred by civilians, including victims of displacement, during an international armed conflict involving Ethiopia and Eritrea. It has handed down a number of awards. Some of its significant decisions shed light on the application of existing international law and international humanitarian law with respect to state responsibility for unlawful displacement. The Commission's decisions construct responsibility of a state for unlawful displacement not only in the context of *jus in bello* but also *jus ad bellum*.

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The article covers the different forms of civilian displacement addressed in the Commission's awards. These include the expulsion of nationals of an enemy state considered to be a threat to national security, and the flight of civilians forced to flee as a result both of direct unlawful actions by the belligerents and of the effects of war. Although various terminologies are invoked in these awards, the Commission largely used 'expulsion' and 'unlawful displacement' to refer respectively to the phenomenon of deportation of civilians and the flight of civilians from the effects of war. This article advisedly covers a broad spectrum of civilian displacement, including deportation and internal displacement, in order to evaluate the general relevance of the Commission's case law to the problem of displacement.

The article is structured as follows. Section 2 looks at the treatment of displacement of civilians under international law. Section 3 provides background information on the armed conflict between Ethiopia and Eritrea and its impact on civilian displacement. How addressing this particular problem is incorporated into the jurisdiction of the EECC is dealt with in section 4. Section 5 looks at the EECC's findings on the claims presented by the parties for damages, injuries, or losses related to unlawful deportations and displacement of civilians. Section 6 considers the issue of compensation for those international wrongs by each party resulting in the wrongful displacement of civilian populations. Finally, section 7 attempts to undertake an evaluation of the jurisprudence of the Commission.

## 2. THE DISPLACEMENT OF CIVILIANS UNDER INTERNATIONAL LAW

International human rights law and humanitarian law present relevant rules for the protection of civilians from forced and arbitrary displacement. The prohibition of arbitrary displacement is implicitly recognized under human rights law, particularly in those provisions concerning freedom of movement and choice of residence.<sup>1</sup> It is expressly provided for under international humanitarian law.<sup>2</sup> Both conventional and customary international humanitarian law stipulate rules that seek to prevent unlawful displacement, protect civilians from the effects of hostilities in order to prevent forced displacement, and guarantee minimum protection and treatment for civilians during displacement.<sup>3</sup> Unlike the 1907 Hague Regulations,<sup>4</sup> Geneva Convention IV, commonly considered as declaratory customary law,<sup>5</sup> expressly prohibits the forcible transfer of civilians or deportation by the occupying power during an international armed conflict, and considers such violations to be grave breaches.<sup>6</sup> Additional Protocol II expands similar prohibitions to situations of non-international

1 See F. Deng, Report of the Representative of the Secretary-General submitted pursuant to Commission on Human Rights resolutions 1997/39, *Compilation and Analysis of Legal Norms, Part II: Legal Aspect to the Protection against Arbitrary Displacement*, UN Doc. E/CN.4/1998/53/Add.1 (1998), II A.

2 W. Kalin, *The Guiding Principles on Internal Displacement: Annotations* (2008), at 27.

3 Deng, *supra* note 1, para. 1.1.

4 Although the 1907 Hague Regulations do not explicitly prohibit deportation, it was argued that the practice of deportation will clearly violate the provisions of the regulation. J.-M. Henckaerts, *Mass Expulsion in Modern International Law and Practice* (1995), at 150.

5 *Ibid.*, at 60. See also T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), 48–9.

6 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 75 UNTS 287, Art. 147.

armed conflicts.<sup>7</sup> Geneva Convention IV also stipulates other provisions which, among others, prohibit the transfer of protected persons to a state that has not ratified the Convention or where the individual person may risk persecution for his or her political opinion or religious beliefs.<sup>8</sup> Other rules of international humanitarian law which aim to spare civilians from effects of hostilities are also relevant in preventing the displacement of civilian populations.<sup>9</sup> Geneva Convention IV also lays down rules guaranteeing minimum conditions of treatment relating to hygiene, health, safety, nutrition, and family life.<sup>10</sup> Although these provisions are directly applicable in the context of evacuation under the Convention, it is often argued that the rules may also be applicable a fortiori in cases of unlawful displacement.<sup>11</sup>

International law also protects civilians from forced displacement both at the outset of and during a war.<sup>12</sup> Although these rules do not prohibit expulsion of enemy civilian aliens, they provide that the departure of these civilians 'shall be carried out in satisfactory conditions as regards safety, hygiene, sanitation and food'.<sup>13</sup> Currently, a standard has consolidated which requires expulsion of aliens to be undertaken humanely, allowing due process and individual review.<sup>14</sup>

A growing body of international criminal law and jurisprudence is also entrenching the criminalization of unlawful displacement as a war crime or a crime against humanity, at least in the context of international armed conflict. Article 147 of Geneva Convention IV defines as a 'grave breach' the 'unlawful deportation or transfer' of a protected person. Article 146 of the same convention places on all state parties the duty to provide effective penal sanctions for persons responsible for such a 'grave breach'. The Charter of the Nuremberg Tribunal considered deportation one of the categories of war crimes and crimes against humanity.<sup>15</sup> The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind deals with 'exceptionally serious war crimes', which include deportation.<sup>16</sup> The Statute of the International Criminal Court includes unlawful displacement in the list of war crimes<sup>17</sup> or crimes against humanity.<sup>18</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) has jurisdiction under its Statute to look into situation of unlawful deportation and transfer of civilian populations as grave

7 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Additional Protocol II), 1125 UNTS 609.

8 *Ibid.*, Art. 45.

9 These rules prohibit using civilians as targets, indiscriminate attack, spreading terror among civilian populations, using civilian property as object of attack, using starvation as a method of attack, and collective punishment and reprisals.

10 Fourth Geneva Convention, *supra* note 6, Art. 49.

11 E. Gillard, 'The Role of International Humanitarian Law in the Protection of Internally Displaced Persons' (2005) 24 *Refugee Survey Quarterly* 38, at 41.

12 Henckaerts, *supra* note 4, at 135; see also M. Kamto, Preliminary report on the expulsion of aliens, UN Doc. A/CN.4/554/2005, para. 15.

13 Fourth Geneva Convention, *supra* note 6, Art. 49. See also *In re Krupp and others*, US Military Tribunal, 30 June 1948, 15 AD (1948) 620, Case No. 214.

14 Henckaerts, *supra* note 4, at 141–2.

15 1945 Charter of the International Military Tribunal for the Trial of Major War Criminals of the European Axis, 82 UNTS 279, Art. 6(b).

16 See Draft Code of Offences against the Peace and Security of Mankind, UN Doc. A/CN.4/L.464/Add.4 (1991).

17 Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Arts. 8(2)(b)(viii) and 8(2)(e)(viii).

18 1993 Statute of the International Criminal Tribunal for the former Yugoslavia, 32 ILM 1203, Art. 7(1)(d).

breaches of the Geneva Conventions.<sup>19</sup> The Statute of the International Criminal Tribunal for Rwanda (ICTR) also allows the court to consider deportation as a crime against humanity.<sup>20</sup> Compared with the Statute of the ICTY, however, the ICTR's establishing instrument restricts the jurisdiction of the court to cases of deportation that occur 'as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'.<sup>21</sup>

Existing rules of international humanitarian law do not, however, proscribe absolutely civilian displacement.<sup>22</sup> It is unfortunate, but true, that not all displacements of civilians triggered by armed conflict are unlawful. For example, Article 49 of Geneva Convention IV provides for an exception to the prohibition of deportation and forced movement of populations during armed conflict, allowing 'evacuation' of civilians if military necessity so requires. Within the ambit of Article 49 of Geneva Convention IV, evacuation is permissible only to the extent that it is undertaken within the occupied territory, unless of course doing so is impossible for material reasons.<sup>23</sup> Moreover, the application of such exceptions is allowed only under strict conditions.<sup>24</sup> As will be discussed later, the EECC has looked into cases where it found the evacuation of civilian populations to an area outside the occupied territory to be justifiable.<sup>25</sup> The distinction between lawful and unlawful displacement is inconsequential in terms of the kind of treatment the civilian population should be afforded during their displacement. Regardless of the legality of their displacement, civilians are entitled to a minimum set of guarantees and protection.

International humanitarian law also provides for an obligation to allow the return of displaced persons to their homes once hostilities have ceased. The EECC's case law is also relevant in looking at whether the Convention's provision regarding the obligation of occupying forces to facilitate the return of evacuees from occupied territory can justify inferring a general entitlement of return a fortiori.

Arbitral tribunals with jurisdiction over apportioning compensation with regard to damages, losses, and injuries associated with armed conflicts have existed as disputed settlement mechanisms between and among states under international law. Article 3 of the Hague Convention IV<sup>26</sup> and Article 91 of Additional Protocol I<sup>27</sup> include provisions stating that a belligerent party violating laws governing the conduct of war (the Convention or the Protocol) shall, if the case demands, be liable for a payment of compensation. In more recent years mass claims settlement

19 Ibid., Art. 5. See also decisions of the ICTY such as *Prosecutor v. Radislav Krstić*, Judgement, Case No. IT-98-33, T.Ch. I, 2 August 2001, para. 532, and *Prosecutor v. Blagojević et al.*, Judgement, Case No. IT-02-60-T, 17 January 2005.

20 Statute of the International Criminal Tribunal for Rwanda, 1994, 33 ILM 1602, Art. 3.

21 Ibid.

22 J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005), I, 457–74.

23 Fourth Geneva Convention, *supra* note 6, Art. 49, para. 2.

24 See J. Pictet (ed.), *Commentary IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), 279–80.

25 Partial Award, Ethiopia's Claim 2, paras. 67–68.

26 See 1907 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, USTS 539.

27 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Additional Protocol I), 1125 UNTS 3, 16 ILM 1397.

mechanisms have been established to settle compensation claims regarding damages incurred during armed conflicts.<sup>28</sup> Among these claims processes, the EECC and the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) for the former Yugoslavia<sup>29</sup> stand out as having a specific mandate to address the claims of those who are unlawfully displaced during an international armed conflict.<sup>30</sup> The EECC, however, was uniquely mandated to determine which claims of the parties deserve compensation because they result from violations of international law.<sup>31</sup> Whereas the establishment of international tribunals to determine individual criminal liability for violations of international humanitarian law has become commonplace, setting up similar institutions to ascertain civil liability for violations of international humanitarian law is a rarity.<sup>32</sup> Even in instances where peace agreements included issues of reparations for war-related damages, they are often associated with violations of the prohibition of the use of force rather than with violations of international humanitarian law.<sup>33</sup> In these cases, settlements of claims often involve lump-sum payment without any significant assessment of damages, let alone determination of liability, and the victor state may or may not distribute the amount of money awarded.<sup>34</sup>

### 3. BACKGROUND: THE 1998–2000 ETHIOPIA–ERITREA WAR AND CIVILIAN DISPLACEMENT

Despite its media reputation as a ‘stupid war’, the armed conflict between Ethiopia and Eritrea had serious consequences, including the forced displacement of a great number of people. The civilian impact of the conflict was compounded by the unique historical relationship between the two countries prior to the war, and a particularly close interaction between the populations of both sides. Owing to its magnitude and complexity, the problem of forced displacement generated by the war triggered a prompt international response as reflected in decisions adopted by the UN Security Council, the former Organization of African Unity (now the African Union), and the Intergovernmental Authority on Development (IGAD).

28 For a comprehensive comparative review of these mechanisms, including the EECC, see H. Holtzmann and E. Kristjansdottir (eds.), *International Mass Claims Processes: Legal and Practical Perspectives* (2007).

29 General Framework Agreement for Peace in Bosnia and Herzegovina, initiated in Dayton, 21 November 1995, signed in Paris, Ann.7, 35 ILM.

30 Although the claims of those individuals who, as a result of Iraq’s invasion and occupation of Kuwait, left or fled Iraq or Kuwait during the Gulf was considered by the United Nations Compensation Commission (UNCC), Iraqi nationals were not allowed to bring claims. See Holtzmann and Kristjansdottir, *supra* note 28, at 139.

31 G. A. Aldrich, ‘The Work of the Eritrea-Ethiopia Claims Commission’, (2003) 6 *Yearbook of International Humanitarian Law* 435, at 436.

32 Ibid.; E. Gillard, ‘Reparations for Violations of International Humanitarian Law’, (2003) 85 *International Review of the Red Cross* 851, at 534; W. Kidane, ‘Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Ethiopia Eritrea Claims Commission in the Hague’, 2 *Wisconsin International Law Journal* 24.

33 Gillard, *supra* note 32, at 533.

34 F. Kalshoven, ‘State Responsibility for Warlike Acts of the Armed Forces’, (1991) 40 *International and Comparative Law Quarterly*, at 836.

The war resulted in massive loss of life, destruction of property, and deprivation of nationality. It affected an extensive border area between the two countries. Both Ethiopians and Eritreans living in the border area were directly affected, a majority of them being displaced from their homes and livelihood. In some places evacuations were ordered by belligerents, and civilians were suddenly engulfed in intense fighting. The first serious mass displacement occurred when Eritrea launched its major military offensive in May 1998, thereby occupying boundary areas formerly administered by Ethiopia. By the end of 1999, there were over 390,000 internally displaced persons (IDPs) in the northern part of Ethiopia.<sup>35</sup> There were also IDPs in the eastern part of the disputed boundary area. IDPs in the Afar region of Ethiopia were estimated to number over 30,000.<sup>36</sup> Understanding displacement in this part of the country was made difficult by the pastoral or nomadic nature of the people of Afar. At the peak of the conflict, over a million Eritreans were also internally displaced, a phenomenon which was intensified as Ethiopia launched its massive counter-offensive in May 2000, bringing Ethiopian troops deep into Eritrean territory.<sup>37</sup> Some of these IDPs could not return to their homes or areas of residence long after the official end of the conflict, due to numerous factors including the fact that their areas were infested with landmines. Both Eritrea and Ethiopia established internally displaced camps, where individuals from their territories and those from contested areas are encamped. Eritrea established major IDP camps in areas such as Adi Qeshi, Ham-buka, and Denden. It also moved Ethiopians from the town of Zalambessa into IDP camps after it occupied the area.<sup>38</sup>

The war has also resulted in a significant number of civilian deportations from both countries, and settling claims associated with this practice assumed an important role in the EECC's mandate. More than 100,000 Ethiopians were thought to have been living in Eritrea prior to the war. Ethiopia claimed that a large number of its nationals were forcefully and wrongfully expelled under inhumane conditions from Eritrea.<sup>39</sup> Eritrea also claimed that at least 75,000 Eritreans were expelled from Ethiopia.<sup>40</sup>

#### 4. THE ERITREA-ETHIOPIA CLAIMS COMMISSION

The Commission is located in The Hague and has five members, each state party appointing two members and the president of the Commission selected by the commissioners themselves.<sup>41</sup> It is administered under the auspices of the Permanent Court of Arbitration, and its decisions are both binding and final. The parties are

35 Humanitarian Update: Ethiopia, OCHA, 8 September 1999.

36 Ibid.

37 See I. Fisher, 'Ethiopian Army Slices into Eritrea as Vast Throngs Flee', *New York Times*, 19 May 2000.

38 Eritrea-Ethiopia Claims Commission, Partial Award, Central Front, Eritrea's Claims, 2, 4, 6, 7, 8 and 12 (2004), para. 31.

39 Eritrea-Ethiopia Claims Commission, Partial Award, Civilian Claim, Ethiopian Claim 5 (2004), para. 6.

40 For Eritrea, this number does not include those rural Eritreans who were expelled by Ethiopia but were difficult to account for.

41 Members of the Commission comprise Hans van Houtte (president), George Aldrich (appointed by Ethiopia), John Crook (appointed by Eritrea), James Paul (appointed by Ethiopia), Lucy Reed (appointed by Eritrea).

responsible for organizing and processing all the claims. They also assume the obligation of covering the expenses of running the Commission. Although the EECC manages a comparatively small claims process with a modest budget,<sup>42</sup> financing the Commission and covering the litigation expenses has evidently been burdensome to two of Africa's poorest countries. Article 5(12) of the December agreement provides that the EECC will be the sole arbitrating forum regarding claims falling within its jurisdiction. This provision has been used to resist communications and cases brought in regional judicial mechanisms, for example the Common Market for Eastern and Southern Africa (COMESA) and the African Commission on Human and Peoples' Rights (ACHPR).

#### 4.1. Jurisdiction, procedure, and institutional dimensions

Article 5 of the December 2000 agreement lays out broad principles that govern jurisdictional, procedural, and institutional issues. It defines the EECC's jurisdiction, provides the temporal scope for the submission of claims, determines the procedure for the appointment of commissioners, describes the applicable law on which the Commission will rely, and indicates the type of mass claims procedures the Commission may adopt. The agreement places the broad scope of the Commission's mandate not only in the context of the need to address breaches but also in the commitment of the parties to address the negative socio-economic impact of the war on the civilian populations. The Commission has also considered claims related to economic damage, violations of diplomatic immunity, and the illegal use of force. But its decisions mainly focused on the protection and treatment of persons (prisoners of war (POWs) and civilians) during the conflict.

The EECC is mandated to

decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.<sup>43</sup>

Subject-matter jurisdiction is limited to all damage, loss, or injury that is (a) related to the conflict and (b) result from actions constituting violations of international humanitarian including the 1949 Geneva Conventions and other violations of international law.<sup>44</sup> The Commission, in its early decisions, determined that for the purpose of its jurisdiction, it will consider the conflict to have started in May 1998 and concluded when the December 2000 agreement was signed.<sup>45</sup>

<sup>42</sup> Holtzmann and Kristjansdottir, *supra* note 28, at 355.

<sup>43</sup> Agreement between the Federal Democratic Republic of Ethiopia and the State of Eritrea, 12 December 2000 (December 2000 Agreement), Art. 5(1), available at [www.pca-cpa.org/upload/files/Algiers%20Agreement.pdf](http://www.pca-cpa.org/upload/files/Algiers%20Agreement.pdf).

<sup>44</sup> *Ibid.*

<sup>45</sup> EECC Decision No. 1: The Commission's Mandate/Temporal Jurisdiction.

The Commission is empowered to consider claims presented by both parties on their own and on behalf of their nationals (natural or juridical).<sup>46</sup> Owing to the parties' dispute regarding the nationality of some of the victims, an unusual provision was included in the December 2000 agreement allowing the parties to submit claims on behalf of individuals of Eritrean or Ethiopian origin who may not be their nationals.<sup>47</sup> This allowed parties to pursue claims on behalf of civilians who were living in disputed territories and those whose nationality was in dispute. It was particularly relevant to Eritrea, whose claims are related to deportees from Ethiopia who, it argued, were Ethiopian nationals. Although the Commission, in its Decision No. 2, outlined different categories of claims, including those to be presented by natural persons affected by unlawful expulsion and displacement, it was the parties which finally presented these claims.

The Rules of Procedure incorporate general provisions dealing with evidentiary issues. According to the rules, the party that relies on certain facts for its claims bears the burden of proving them.<sup>48</sup> But there is no explicit provision for the degree of proof that the Commission should require in determining liability for violations.<sup>49</sup> The Commission adopted a standard of 'clear and convincing evidence' for its findings on liability. But it has required a far less rigorous process of quantification of damages, often determining amount of damages on the basis of estimates. Once a party presents clear and convincing evidence of a prima facie violation of international law, the burden of proof shifts to the respondent to rebut the claim.<sup>50</sup> Both parties supported the Commission's approach on the quantum of proof required for determination of liability. The requirement of clear and convincing evidence to support a pervasive and systematic violation, however, significantly influenced the extent of the Commission's findings on liability. The Commission instructed the parties to be particularly sensitive to the quality of evidence they presented to it, and as such instructed them to develop guidelines for their personnel mandated to collect information to give particular importance to evidence, and asked the parties to harmonize their respective tools.<sup>51</sup>

Both parties submitted a limited number of witness declarations, expert statements, photographs, satellite images, video footage, press reports, and reports of international organizations and non-governmental organizations (NGOs) in all their claims. With respect to the nature and quality of evidence presented by the parties, the Commission had to deal with two pressing issues. First, to what extent can the Commission take into account reports by the International Committee of the Red Cross (ICRC)? This question was of particular significance regarding claims relating to the expulsion of civilians, when the ICRC often facilitated civilian movement across the international borders between the two countries. It was also an issue

46 Agreement, *supra* note 43.

47 *Ibid.*, Art. 5(9).

48 EECC Rules of Procedure, Art. 14(1).

49 N. Klein, 'State Responsibility for International Humanitarian Law Violations and the Work of the Eritrea-Ethiopia Claims Commission So Far', (2005) 47 *German Yearbook of International Law* 214, at 238.

50 Partial Award, Prisoner of War, Ethiopia's Claim 4, para. 43; Partial Award, Prisoner of War, Eritrea's Claim 17, para. 49.

51 See Eritrea-Ethiopia Claims Commission, Decision No. 4: Evidence, para. 3.



that was intensely debated during the consideration of the POW claims. The parties had expressed their willingness to allow the Commission to consider such reports, and the Commission undertook to consult with the ICRC on the matter. Citing the confidential nature of its reports and how important this is to the fulfilment of its mandate, ICRC declined the offer and the Commission accepted the latter's explanation. No official report of the ICRC was relied on by the Commission during its proceedings with respect to unlawful displacement and expulsion claims. The second important evidentiary question relates to reports by NGOs and other organizations. The Commission acknowledged the limitations of such reports, but decided to consider them to the extent that they provided credible information.<sup>52</sup> Both parties presented reports of international organizations and NGOs in their claims. NGO reports, for example, were instrumental in the finding of state liability in the only incident in which the Commission found one of the parties liable for the unlawful displacement of civilians.<sup>53</sup>

#### 4.2. The nature and organization of the claims

The December 2000 agreement allows the parties to bring claims on their own behalf and on behalf of their nationals. Individuals or a group of individuals do not themselves have direct access to the Commission. It is a requirement that the claims relate to unlawful actions by the parties that occurred between the start of the war in May 1998 and the date on which the agreement was signed – 12 December 2000. The Commission, in its Decision No. 2, gave six categories for the claims, including claims for unlawful expulsion from the country of residence and claims for unlawful displacement from the place of residence.<sup>54</sup> The Commission also adopted a mass claim procedure, according to which the parties would prepare their claim on the basis of a claim form prepared by the Commission. It also decided that the claims would be made for fixed amount compensation.<sup>55</sup> Ultimately the forms were not used and the parties agreed to present all claims, including those by natural and juridical persons, as government-to-government claims.<sup>56</sup> This was done to avoid a flood of individual claims being submitted to the Commission.<sup>57</sup>

Given that the parties had only one year in which to process the claims, taking advantage of the mass claims procedures envisaged proved to be extremely cumbersome. Decision No. 2's statement that the parties would prepare claim forms based on the format determined by the Commission<sup>58</sup> was also indicated in Article 30(3) of the Rules of Procedure. At the time, what was envisaged was a 'basic form'

52 Partial Award, Civilian Claims, Ethiopia's Claim 5, para. 34.

53 Partial Award, Western Front, Arial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25, and 26, para. 139.

54 The other categories of claims were claims of prisoners of war for injuries suffered from unlawful treatment; claims of civilians for unlawful detention and injuries suffered from unlawful treatment during detention; claims of persons for loss, damage, or injury other than those covered by other categories; and claims of the two party governments for loss, damage, or injury. See Eritrea-Ethiopia Claims Commission: Decision No. 2, Claims Categories, Forms and Procedures.

55 *Ibid.*

56 Holtzmann and Kristjansdottir, *supra* note 28, at 148.

57 *Ibid.*, at 52.

58 Eritrea-Ethiopia Claims Commission, Decision No. 2, Section B.

which would be identical for all claims. Another claim would accompany the basic form with additional specific information. The additional forms were considered in relation to claims by households, a fixed amount for wrongful expulsion and or displacement, and each claim for a fixed amount in claims categories 1–5, including individual claims for unlawful displacement.<sup>59</sup>

The parties by and large submitted claims covering similar legal and factual grounds. They processed the claims of all victims, including those who were victims of forced displacement. The litigants' claims broadly covered injuries, damage, or losses incurred by nationals including those who were unlawfully displaced or expelled as a result of infraction of international law during a defined period of time. This has a direct impact on wrongs with regard to individuals who continued to face the consequences of war-related displacement and those who become displaced after this period, for example owing to the impact of explosives in their areas. Since intense direct military confrontations by the belligerents occurred in the central and western areas of the parties' common border, the claimants' central and western front claims incorporate significant reference to issues of displacement.

Only Eritrea presented separate claims covering issues of internal displacement. Eritrea's Claim 14 was brought on behalf of its nationals in the western border area, who, it argued, were denied by Ethiopia the right to return to some of the occupied areas including the Temporary Security Zone (TSZ) and its adjacent areas. Eritrea's Claim 21, on the other hand, sought relief for injuries and losses caused by direct Ethiopian action in areas covering more than 23 villages. Ethiopia has chosen to include its claim on internally displaced persons in its more broadly prepared claims. The parties' claims revealed, as the Commission found out, a considerable degree of overlap – an issue which, according to the Commission, posed a significant question of admissibility, as claims addressed in other cases were duplicated.<sup>60</sup> For example, attacks on IDP camps were mentioned both in Eritrea's Claim 21, dealing exclusively with internal displacement, and in its aerial bombardment claims. In this case, the Commission decided to treat the question of the aerial bombardment of IDP camps under Claim 26 than rather than Claim 21.<sup>61</sup> Eritrea's Claim 14 argued that Ethiopia forcibly displaced persons from the Eritrean territories which it occupied. Moreover, Eritrea's claims on behalf of those displaced from dispute areas, which later came under the mandate of the United Nations Mission in Ethiopia and Eritrea (UNMEE), were, as the Commission clearly identified, covered in both its Claim 21 and civilian claims. Eritrea's western and eastern front claims also covered claims on behalf of those displaced by the war. When determining Claims 14 and 21, the Commission dismissed those claims insofar as the issues were incorporated in its partial awards on western front and civilian claims.<sup>62</sup>

59 Holtzmann and Kristjansdottir, *supra* note 28, at 155–6.

60 Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25, and 26, para. 136.

61 Partial Award, Western Front, Eritrea's Claims 1, 3, 5, 9–13, 14, 25, and 26, para. 87.

62 Partial Award, Western Front Aerial Bombardment and Other Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25, and 26, para. 36.

Moreover, even when Eritrea's other claims did not cover issues relating to internally displaced persons, they nonetheless were relevant to the protection of the displaced, as they related to issues such as property rights. For example, in Eritrea's western front claims, covering numerous towns, Eritrea claimed that the Ethiopian military had been engaged in looting and destroying the property of those who fled, destroying water supplies, and planting landmines. Eritrea's Claim 26 dealing with Ethiopia's aerial bombardment also covered issues such as the destruction of IDP camps by Ethiopian warplanes.

Ethiopia's claim on this infraction of international law was made part and parcel of its other claims. Claims 1 and 3 covered Ethiopia's claim for the physical abuse of its nationals, property loss through looting and deliberate destruction, indiscriminate aerial bombing, shelling and use of landmines, and the displacement of civilians. Eritrea's civilian claims included Claims 15, 16, 23, and 27–32. Ethiopian civilian claims were referred to in its Claim 5. According to Article 5 of the Algiers Agreement, both parties were obliged to present their claims to the Commission by a cut-off date of 12 December 2001. Ethiopia's Claim 5 dealt with losses, damage, and injuries incurred by its nationals living in Eritrea during 1998–2000, while Claims 1 and 2 covered losses, damage, and injury incurred by Ethiopian nationals directly affected by armed conflict. These Ethiopian claims and the corresponding Eritrean claims cover almost identical circumstances and turns of events.<sup>63</sup>

## 5. CASE STUDY: THE CASE LAW OF THE ERITREA-ETHIOPIA CLAIMS COMMISSION

### 5.1. The contour of applicable law

The EECC rendered a series of partial awards on the merits of the parties' claims. The first set of partial awards addressed the treatment of POWs, while the second set of awards covered issues relating to the conduct of military operations on the central front.<sup>64</sup> The Commission released its home front awards on 17 December 2004; all the remaining awards, including on Ethiopia's *jus ad bellum* claims, were given on 19 December 2005. It published its damages award on 17 August 2009.

The constituting instrument of the Commission required it to determine liability for violations of international humanitarian law before it determined issues of compensation. This allowed the EECC substantial consideration of the law relevant to the determination of liability. Article 5 of the December 2000 agreement authorized the Commission to consider relevant rules of international law. It also stated that the Commission should not make decisions *ex aequo et bono*.<sup>65</sup> The EECC's first challenge was to determine to what extent the four Geneva Conventions and the additional protocols would be applicable in the light of the fact that Eritrea was not a party to these treaties at the time the war broke out. In its maiden award on POWs, the

63 See Partial Award, Eritrea's Claims 1, 3, 5 and 9–13.

64 See Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 and 22; Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 and 22; Partial Award, Central Front, Ethiopia's Claim 2.

65 December 2000 Agreement, Art. 19.

Commission held that the law applicable to those claims prior to 14 August 2000, when Eritrea acceded to the four Geneva Conventions of 1949, was customary international humanitarian law – the *lex specialis* involving rules directly applicable during international armed conflict.<sup>66</sup> It recognized this body of law as ‘the most significant legal component’ in the parties’ relationship.<sup>67</sup> This holding was applicable to all claims that were brought before the Commission.<sup>68</sup>

The parties and the Commission agreed that the conflict was an international armed conflict. The Commission’s consideration of numerous issues including the claims associated with unlawful displacement and expulsion is thus carried out mainly within the framework of international humanitarian law. But the Commission also looked at the relevance of international human rights instruments in some instances. It considered how these instruments might become important in governing the treatment by a government of its own nationals. This became particularly relevant as Eritrea argued that some of the expellees from Ethiopia were Ethiopian nationals of Eritrean extraction. Even though the parties’ memorials made reference to certain provisions of international human rights law, such as the International Covenant on Civil and Political Rights, and regional human rights instruments, such as the African Charter on Human and Peoples’ Rights,<sup>69</sup> their written pleadings generally shied away from making extensive reference to this body of law. Even when reference was made by the parties to international human rights instruments, the Commission noted the limited application of human rights law, owing to the fact that some of the cited instruments were not applicable during the relevant times or were derogated from.<sup>70</sup> But in many instances it did not have to decide on the applicability of provisions of human rights law in determining liability for the damage or loss arising from the 1998–2000 war.<sup>71</sup> For example, it considered the application of the Convention on the Rights of the Child regarding the protection of children during armed conflict.<sup>72</sup> It also made reference to Article 15 of the Universal Declaration of Human Rights. The Commission held that customary international law concerning the protection of human rights would generally be applicable, with particular reference to incidents involving persons not fully protected by international humanitarian law.<sup>73</sup>

The Commission also held that the four Geneva Conventions and core provisions of Protocol I<sup>74</sup> have largely become expressions of binding customary

66 Partial Award, Prisoners of War, Eritrea’s Claim 17, para. 38; Partial Award, Prisoners of War, Ethiopia’s Claim 4, para. 29; Partial Award, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 and 12, para. 21.

67 Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 and 27–32, para. 28.

68 Ibid.

69 Partial Award, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 and 12, para. 23. Eritrea also cited some additional human rights instrument in relations to its claims with respect to what it considers to be Ethiopian nationals of Eritrean extraction. See Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23, and 27–32, para. 27.

70 Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 and 27–32, para. 27.

71 Partial Award, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 and 12, para. 25.

72 Ibid., para. 154.

73 Ibid., XIII Award.

74 Ibid., para. 24. The Commission accepts that some portions of the Protocol are reflections of progressive development of international law. See Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 and 27–32, para. 29. But it did not clearly define the contours of these sections of the Protocol which qualify as expression of binding international customary law (the articles included in this category include Art. 75).

international law. It noted that although some provision of Protocol I involved elements of 'progressive development of the law', most of its provisions are customary law.<sup>75</sup> It relied extensively on Common Article 3 for elaborating relevant international standards. The Commission also held that The Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 and its annexed Regulations (Hague Regulations) constitute customary international law.<sup>76</sup> But there were instances when the parties disagreed whether certain rules became applicable by operation of conventional or customary law.<sup>77</sup>

The Commission's decisions significantly clarified the law of occupation under international humanitarian law. This was clearly important to the application of Article 49 of Geneva Convention IV, which deals with evacuation and transfer of civilians. The first challenge was presented by Eritrea, which, relying on the delimitation decision of the Eritrea-Ethiopia Boundary Commission that awarded some of the disputed territories to it, argued against Ethiopia's claims for damages with respect to violations including the forced displacement of civilians alleged to have occurred within the central front. It specifically stated that 'because the Boundary Commission determined the territory to be Eritrean, it could not be subject to belligerent occupation by Eritrean forces'.<sup>78</sup> However, the Commission, citing Article 4 of Protocol I,<sup>79</sup> rejected Eritrea's argument holding that responsibility of states for violations for humanitarian law does not shift based on a dispute over the title of the particular boundary within which a violation has allegedly occurred.<sup>80</sup> Another challenge to applying international humanitarian law on occupation emerged from the difficulty of determining the length of time belligerent forces have to be present in an area for that phenomenon to count as an occupation. For example, Ethiopia argued that the provisions of the Geneva Conventions with respect to occupation might not be applicable where its troops were present in an area for only a few days and were on their way to other locations.<sup>81</sup> The Commission agreed that the law of occupation would not be applicable if there was ongoing fighting and the attacking forces had not yet established themselves.<sup>82</sup> However, it held that in a situation

75 Partial Award in Eritrea's POW Claim, paras. 29, 38; Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 and 22 Between the State of Eritrea and the Federal Democratic Government of Ethiopia (28 April 2004), para. 21; Partial Award, Central Front, Ethiopia's Claim 2, para. 15; Partial Award in Eritrea's Civilians Claims.

76 Partial Award, Central Front, Eritrea's Claims, 2, 4, 6, 7, 8 and 12, para 23. The Commission made reference to the Hague regulations, for example in the context of protection of enemy property (Partial Award, Central Front, Ethiopia's Civilian Claim 5, para. 123).

77 Partial Award, Western Front, Arial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 and 26, para. 11.

78 Partial Award, Central Front, Ethiopia's Claim 2, para. 77.

79 It states, 'Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.'

80 'The alternative could deny vulnerable persons in disputed areas the important protections provided by international humanitarian law. These protections should not be cast into doubt because the belligerents dispute the status of territory. The alternative would frustrate essential humanitarian principles and create an *ex post facto* nightmare. Moreover, respecting international protections in such situations does not prejudice the status of the territory.' Partial Award, Central Front, Ethiopia's Claim 2, para. 28.

81 Partial Award, Eritrea's Claims 2, 4, 6, 7, 8 and 22, para. 57.

82 Ibid.

where there was no ongoing fighting, international humanitarian law regarding occupation would be applicable even if the occupation was for only a few days.<sup>83</sup>

The decision of the Commission with respect to the status of treaties governing the use of landmines and other explosives was also significant. It held that international instruments such as the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II of 1980 as amended on 3 May 1996), and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction were not in force between the parties.<sup>84</sup> None of these treaties was considered by the Commission as constituting customary international law. Often state practice in areas covered by the instruments was 'sporadic and varied'. Nevertheless, the Commission held that provisions of Protocol II dealing with the recording of explosives and the prohibition of discriminatory use are expressions of customary international law.<sup>85</sup>

The EECC determined that large sections of the four Geneva Conventions and Protocol I constitute customary law. It also held that whenever one of the parties challenges the status of a certain provision as customary international law, the burden of proof is on that particular party to prove such a claim. One commentator found this holding to depart from the decisions of other tribunals such as the International Court of Justice, which in a number of cases determined that when a state bases its arguments on the application of certain customary international law, it shall prove the existence of such custom.<sup>86</sup> The same writer, who was a member of the Eritrean legal counsel team, held that some of the decisions of the Commission relating to the POW awards, which did not favour Eritrea, were made based on this unorthodox decision on burden of proof, and this might have undercut the authority of the Commission. This is a rather curious conclusion, given that generally there were few disagreements regarding the status of provisions of the four Geneva conventions and the Protocol, on which the parties and the Commission relied. The parties generally did not disagree on the status of applicable law regarding numerous issues, including unlawful displacement and expulsion.

The Commission relied on the aforementioned sources of law in determining the legality of treatment of civilians within the occupied territories in general and the legality of expulsion and displacement in particular. Citing provisions of Geneva Convention IV and Additional Protocol I, it held that even lawful expulsions should meet the minimum level of protection and treatment envisaged under these instruments. For example, Articles 36 and 75 of Geneva Convention IV and Additional Protocol I respectively require that expulsions of civilians by the belligerent parties, whether lawful or unlawful, should be conducted in a manner which protects their safety and ensures access to basic amenities such as hygiene, sanitation, and food.

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83 Ibid.

84 Partial Awards, Western and Eastern Fronts, Ethiopia's Claims 1 and 3, para. 19.

85 Ibid.

86 Klein, *supra* note 49, para. 235.

Both parties argued and the Commission accepted that the presence of ICRC was an important guarantor or indication that such minimum standard was met. The Commission relied on Article 75 of Additional Protocol I as ‘constituting a summary of human rights’ relevant not only to the treatment of the national of an enemy state, but also to one’s own, and with the potential to fill gaps in international humanitarian law.<sup>87</sup> It also held that the same provision is a part of customary international law. Other provisions which the commission clearly identified as expressions of elements of customary international humanitarian law include Articles 48, 51, 52, 57, and 58.

To a certain extent the Commission also looked at the jurisprudences of international tribunals and arbitration bodies. The jurisprudence of the Iran–United States Claims Tribunal in particular, as it related to forced expulsion of aliens as a result of indirect government action, was discussed.<sup>88</sup>

### 5.2. Unlawful expulsion of civilians (deportation)

Ethiopia’s and Eritrea’s claims alike included a request for relief in connection with the forced expulsion of their own nationals from the territory of the other.<sup>89</sup> Their claims also covered damage, losses, and injuries suffered by their nationals who were forcibly displaced within their countries’ border areas. Thus the parties’ claims included both deportation and forced (internal) displacement resulting from the armed conflict. The Commission readily denied any claims on unlawful expulsion and displacement that it considered to fall outside its jurisdiction. For example, it ruled that a claim regarding the alleged illegal expulsion of 770 Eritreans in July 2001 fell outside its temporal jurisdiction. It also rejected Eritrea’s claim with respect to persons allegedly denied return to the TSZ and the adjacent areas (Eritrea’s Claim 14). Eritrea’s claims on unlawful expulsion present a rather complex set of claims, including those related to damage, losses, and injuries suffered by what Eritrea attempted to portray as Ethiopia’s nationals of Eritrean origin. Such complexity stems from Eritrea’s argument that Ethiopia not only illegally expelled masses of Eritrean nationals, but also forced its own nationals of Eritrean extraction to leave their country, and even alleged that Ethiopia’s action might amount to ‘ethnic cleansing’. The Commission, in its relevant awards, accepted the right of belligerents, under international law and international humanitarian law, to order nationals of an enemy state to leave its territory, but reiterated that the implementation of such authority should follow specifically defined procedures and could not be delegated to non-state actors. Noting the presence of multiple causes for damages and losses operating at different times, the Commission apportioned liability based on ‘best estimates’.<sup>90</sup>

87 Partial Award, Central Front, Ethiopia’s Civilian Claim, 5, para. 29.

88 *Ibid.*, para. 123.

89 As indicated, Eritrea’s claim includes those made on behalf of those whom it considers to be Ethiopians of Eritrean heritage.

90 Partial Award, Central Front Claims, Eritrea’s Claims 2, 4, 6, 7, 8 and 12, para. 29; Partial Award, Central Front Claims, Ethiopia’s Claim 2, para. 23.

### 5.2.1. *The deportation of Ethiopians from Eritrea*

The Commission, basing itself on a standard of ‘clear and convincing evidence’, partly accepted Ethiopia’s claims that Eritrea wrongfully expelled Ethiopians under improper conditions. Many of Eritrea’s expulsions of Ethiopians followed Ethiopia’s military counter-offensive in May 2000. The Commission found Eritrea liable for expelling thousands of Ethiopians under conditions that did not afford them opportunity to protect their interests and property,<sup>91</sup> for failing to ensure safe and humane repatriation of departing Ethiopians under the supervision of the ICRC,<sup>92</sup> for allowing the seizure of property of Ethiopians departing from other than detention centres, and for otherwise interfering in their effort to secure or dispose of their property.<sup>93</sup> It rejected, however, Ethiopia’s argument that Ethiopians who fled Eritrea prior to May 2000 were forced to leave. It did not find compelling evidence that Ethiopians who left Eritrea during that period did so as a direct result of action by the Eritrean government. For example, Eritrea did not force or compel those who were not under detention to leave the country.<sup>94</sup> Regarding those Ethiopians who were not under detention, the Commission noted that they faced economic difficulties as a result of the Eritrean government’s policies and actions and that they were subjected to unfavourable public sentiment. But this, according to the Commission, cannot be interpreted as presenting no alternative to departure for the Ethiopians, since many chose to remain behind.<sup>95</sup>

The EECC’s award accepted the proposition that belligerents under the *jus in bello* possess ‘broad powers’ to require nationals of an enemy state to leave their territory.<sup>96</sup> Even if ‘enforced departures’ are sometimes undertaken in harsh conditions, the Commission held that this does not necessarily undermine belligerents’ prerogative under international law to expel nationals of the enemy, but that the minimum guarantees for their physical protection and property as outlined under Geneva Convention IV should be protected.<sup>97</sup>

With respect to Ethiopia’s claim that Eritrea had forcibly transferred civilians from occupied areas such as Zalambessa and placed them in IDP camps, often in conditions in violation of international law, particularly Article 49 of Protocol I, the Commission admitted the difficulty of evaluating whether the risk of Ethiopia’s shelling warranted such liability, but noted that if any evacuation had to be made, it had to be to Eritrea and hence dismissed the charges.<sup>98</sup> The Commission cited Article 49 but did not analyse its content and its implications for Eritrea’s contention that Ethiopia’s attack of the area warranted such evacuation. Accordingly the

91 Partial Award, Central Front, Ethiopia’s Civilian Claim 5, VIII Award., para. 10.

92 Ibid., para. 11.

93 Ibid., para. 12.

94 Partial Award, Central Front, Ethiopia’s Civilian Claim 5, paras. 123, 127.

95 Ibid., para. 127.

96 Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 and 27–32, part VIII; also Partial Award, Central Front, Ethiopia’s Civilian Claim, 5, para. 120.

97 Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 and 27–32, part VIII; also Partial Award, Central Front, Ethiopia’s Civilian Claim 5, para. 121.

98 Partial Award, Eritrea Civilian Claims 15, 16, 23 and 27–32, para. 68.



Commission held that Article 49 significantly limited, but did not preclude, the right of belligerents to evacuate residents.<sup>99</sup>

### 5.2.2. *The deportation of Eritreans from Ethiopia*

Eritrea's claim challenged both the grounds for Ethiopia's decision to expel Eritreans and Ethiopians of Eritrean origin, and the manner in which such expulsions were undertaken. Regarding Eritreans who were expelled from Ethiopia, the issue was made more complex, partly by Eritrea's argument that some of the expellees were Ethiopian nationals of Eritrean origin and that Ethiopia had deprived them of their nationality prior to their unlawful expulsion. Eritrea also claimed that Ethiopia had illegally expelled the family members of original expellees, that it had illegally detained Eritreans while awaiting their expulsions, that it had seized the property of Eritrean nationals, and that it had expelled these civilians in a manner that did not ensure minimum guarantees under international humanitarian law. Ethiopia denied all these charges, arguing that based on existing nationality law in Ethiopia, those expellees were Eritrean nationals and that it had the right to expel them as nationals of an enemy state in a situation of international armed conflict.<sup>100</sup> Eritrea also accused Ethiopia of committing 'ethnic cleansing' where Eritreans and Ethiopians of Eritrean extraction were deliberately targeted purely on the basis of their ethnicity.

Despite the existence of a 1931 Ethiopian law prohibiting double nationality, the Commission was convinced, by Ethiopia's subsequent treatment of expellees, especially those who had acquired Eritrean nationality, that they possessed double nationality.<sup>101</sup> Although Ethiopia did not agree with the view that some of the expellees might well be considered Ethiopian nationals, it contended that expulsions of aliens and persons with double nationality involving citizenship of an enemy state may be legitimate. It also argued that its expulsion of individuals was based on a deliberative and well-considered procedure that identified some of them as being a serious threat to Ethiopia's security. The Commission held that the loss of nationality after going through this process cannot be considered infringement of international law.<sup>102</sup> The Commission held that Ethiopia's measures had resulted in the deprivation of their Ethiopian nationality of some individuals who did not go through Ethiopia's screening process, and held Ethiopia liable for that. It also held that Ethiopia had unlawfully deprived of Ethiopian nationality dual nationals who remained in Ethiopia during the war, dual nationals who were present in third countries during the war, and dual nationals who were expelled to Eritrea but who did not pass through the screening process.<sup>103</sup>

In addition to the issue of legality of expulsion, another important element of Eritrea's claim related to the private property of the expellees. The Commission

99 Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 and 26, para. 140.

100 Partial Award, Eritrean Civilian Claims 15, 16, 23 and 27–32, para. 11.

101 *Ibid.*, s. D.

102 Partial Award, Central Front, Eritrea's Claim, 2, 4, 6, 7, 8 and 12, para. 72.

103 *Ibid.*, Award XIII.

acknowledged that belligerents possess broad powers even to seize the private property of nationals of the enemy state, but held that this ought to be undertaken on the basis of certain well-defined procedures. It held that the cumulative effect of Ethiopia's measures, both lawful and unlawful, was that nationals of the enemy state were dispossessed of their assets, and that Ethiopia had failed to live up to its obligation under international law to ensure the protection of civilian assets.<sup>104</sup> It also held Ethiopia liable for limiting to one month the period available for the compulsory sale of Eritrean expellees' real property, for the discriminatory imposition of a 100 per cent 'location tax' on proceeds from some forced sales of Eritrean expellees' real estate, for maintaining a system for collecting taxes from Eritrean expellees that did not meet the required minimum standards of fair and reasonable treatment, and for creating and facilitating a cumulative network of economic measures, some lawful and others not, that collectively resulted in the loss of all or most of the assets in Ethiopia of Eritrean expellees, contrary to Ethiopia's duty to ensure the protection of aliens' assets.

Eritrea also claimed that Ethiopia's expulsion of civilians had led to the unlawful separation of families. Ethiopia, on the other hand, argued that it allowed the expellees to leave the country with their family members and dependents. The Commission rejected Eritrea's claim on account of lack of evidence,<sup>105</sup> but held Ethiopia liable for expelling the families of those who did not possess 'Eritrean nationalities'.<sup>106</sup>

Regarding the allegation of ethnic cleansing, the Commission, without defining the term or clarifying its elements, noted the absence of any proof on the part of Eritrea to show that Ethiopia had in fact instituted a national policy of driving all people of Eritrean extraction from Ethiopia. Noting in particular that the number of those who were alleged to have been expelled was far smaller than that of Eritreans who remained behind, it rejected Eritrea's contention for lack of proof.<sup>107</sup>

The Commission also considered Eritrea's claim that a large number of Ethiopians of Eritrean origin living along the border were forcibly displaced from their homes into Eritrea. It argued that Ethiopia, mainly through its local agents, farmers, and local police, intentionally detained and expelled these rural residents without undertaking its declared security clearance procedure and after depriving them of their nationality. Ethiopia countered that their displacement was an unavoidable consequence of the armed conflict, and that it did not implement an intentional policy of forcing these people to leave. The Commission agreed with Ethiopia that there was no evidence which suggested that it had implemented a national policy of expelling Eritreans.<sup>108</sup> But it also held that local farmers, police officers, and officials rounded up Ethiopians of Eritrean origin who posed no serious threat to Ethiopia and expelled them because of their Eritrean ethnicity. It held Ethiopia responsible for the actions of its official agents.<sup>109</sup> The Commission also held that it

<sup>104</sup> *Ibid.*, para. 150.

<sup>105</sup> *Ibid.*, para. 157.

<sup>106</sup> Partial Award, Eritrean Civilian Claims 15, 16, 23, and 27–32, s. VIII.

<sup>107</sup> *Ibid.*, para. 80.

<sup>108</sup> Partial Award, Central Front, Eritrea's Claim, 2, 4, 6, 7, 8 and 12, para. 89.

<sup>109</sup> *Ibid.*, paras. 88 and 89.

was unlikely that individuals from rural parts of Ethiopia had ever participated in the Eritrean referendum, and hence did not acquire double nationality. But could Eritrea claim damages for losses suffered by individuals who were not its nationals? The Commission held that even though the Algiers agreement empowers Eritrea to bring claims on behalf of these categories of individual who are not its nationals, Eritrea can submit claims as its own and hence could not request damages.<sup>110</sup> Even when the expulsions were lawful and made on the basis of elaborate processes and procedures, the Commission held that the condition of Eritrean expellees did not meet the minimum standard under international law.<sup>111</sup> Regarding the detention of Eritreans prior to their expulsion, the Commission, noting the fact that the duration of the detention was generally short and that there was little evidence showing the presence of physical abuse during the detention period, rejected Eritrea's claim.<sup>112</sup>

### 5.3. The unlawful displacement of civilians

Earlier, in its Decision No. 2 regarding the organization of claims, the Commission had determined that one category of claims it would look into would be 'claims of natural persons for unlawful displacement from their residence'. However, Decision No. 2 did not elaborate, nor has the Commission clarified, the ambit of what will be compensable displacement. Should a particular incident of unlawful displacement result from an action by one of the parties which is a violation of international law? Should it be 'pervasive, systematic, and frequent' to result in state responsibility? Or will all incidents of displacement associated with the war be considered unlawful since the Commission has ruled, in its decision on *jus ad bellum*, that Eritrea unlawfully used force to settle its dispute with Ethiopia?

The Commission had its first opportunity to clarify its position regarding state responsibility with respect to unlawful displacement in its partial award on Ethiopia's central front claim. It noted,

The flight of civilians from the perceived danger of hostilities is a common, and often tragic, occurrence in warfare, but it does not, as such, give rise to liability under international humanitarian law. While Protocol I prohibits 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population', it implicitly recognizes that civilians may, nevertheless, be terrorized because of the hostilities. Moreover, Ethiopia does not allege or prove that Eritrea deliberately tried to cause the civilian inhabitants of the *wereda* to flee by terrorizing them, let alone that spreading terror was the primary purpose of its acts during the invasion and occupation.<sup>113</sup>

The flight of civilians and incidental destruction during armed conflicts does not bring international liability under international humanitarian law.<sup>114</sup> In its partial decision on Ethiopia's western and eastern front, it rejected Ethiopia's claim over civilian displacement, arguing that Ethiopia's evidence did not establish that

<sup>110</sup> *Ibid.*, paras. 19 and 20.

<sup>111</sup> *Ibid.*, para. 106.

<sup>112</sup> *Ibid.*, para. 110.

<sup>113</sup> Partial Award, Central Front Claims, Ethiopia's Claim 5, para. 53.

<sup>114</sup> *Ibid.*, para. 53.

infractions in this regard were well beyond what is permissible under existing international humanitarian law.<sup>115</sup> A similar position was reiterated in the Commission's award over Eritrea's western front claims, where it determined that the 'indirect displacement' of civilians, caused by fear, did not on its own constitute violation of international law as alleged by Eritrea.<sup>116</sup>

Eritrea's aerial bombardment claims argued that Ethiopia undertook a series of aerial attacks which resulted in the unlawful destruction of civilian property and the death of civilians. It also alleged that these attacks included the targeting of IDP camps. Ethiopia, on the other hand, claimed that Eritrea had failed to locate these IDP camps and other civilian objects at a reasonable distance from military objectives, as required under Article 58 of Geneva Convention IV. The Commission held that the number of Ethiopian air strikes was limited, that some civilian losses would have been avoided if Eritrea had located civilian and military objectives further apart, and that Eritrea did not provide sufficient evidence to substantiate its claim that Ethiopia's measures were excessive and indiscriminate.<sup>117</sup>

Eritrea's Claim 21 related to losses, damage, or injuries incurred by its nationals as a result of their displacement from their homes, due not only to the direct military actions of Ethiopia but also to 'other conditions that made it impossible for them to remain'. Eritrea's claims for direct displacement covered 23 villages. The Commission did not find Eritrea's evidence to be convincing and clear in providing the Commission with relevant information to evaluate and assess these elements. It determined that Eritrea's evidence should have shed light regarding three sets of tests: whether the alleged expulsions took place in the course of fighting for control of a village, whether there were any military justifications for the actions that caused the displacement, or whether the declarants fled the area voluntarily, fearing the danger of attack or impending military occupation.<sup>118</sup> Like Ethiopia's legal theory, which highlighted the distinction between constructive and positive displacement, Eritrea's claim involved categories of what it called 'direct' and 'indirect' displacements. Its Claim 14 addressed civilian flight due to the fear of alleged violations of international law by Ethiopia, whereas Claim 21 covered claims of direct displacement resulting from 'orders and forceful' actions by Ethiopian armed forces designed to compel civilians to flee.<sup>119</sup>

Eritrea also claimed in its Claim 14 that Ethiopia should be found liable for preventing Eritrean IDPs from returning to Eritrean territory occupied by Ethiopia. Although the Commission dismissed the claim for lack of jurisdiction and for lack of specificity in terms of the time and space in which the alleged action took place, its decision reveals the Commission's interpretation of relevant provisions of Geneva Convention IV, particularly Article 49. Eritrea argued that since the displacement was caused by the war, parties had the obligation to ensure that IDPs were returned

<sup>115</sup> Partial Award, Western and Eastern Front, Ethiopia's Claims 1 and 3, para. 37.

<sup>116</sup> Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 and 26, para. 140.

<sup>117</sup> *Ibid.* para. 97.

<sup>118</sup> *Ibid.*, para. 135.

<sup>119</sup> *Ibid.*, para. 131.

to their homes. The Commission found that Geneva Convention IV does not put an obligation on the parties to 'repatriate displaced civilians'.<sup>120</sup> Its decision to dismiss this claim on the basis of limitation of its jurisdiction is a reflection of its limited interpretation of its temporal remit. It held that return and resettlement would take a considerable period of time which would exceed the limited temporal scope of the Commission's jurisdiction. It also rejected Eritrea's contention that the lack of suitable conditions for the return of IDPs to their areas was not directly related to the conflict, as was the repatriation of POWs. This limited interpretation of the temporal scope of its jurisdiction was somehow at variance with a more expansive interpretation of its competence as shown in its decision on POW claims.<sup>121</sup>

Eritrea's claim with respect to Awgaro village in Eritrea represents the only instance where the Commission found one of the parties liable for unlawful displacement under international law. This incident relates to the displacement of over 600 village families, and provided the Commission with the opportunity to answer some important questions, including that of the standard of proof the Commission should adopt if Ethiopia were to be found liable. As for claims involving rape, the Commission held that, though the Awgaro incident did not establish a pattern of frequent and pervasive violations of international law, it constituted a serious violation for which Ethiopia should be liable.<sup>122</sup> An Ethiopian military officer had ordered civilians to leave the village, and the Commission accepted Eritrea's evidence that villagers were not allowed to carry with them anything other than their personal belongings. Eritrea also presented declarations showing that Ethiopian soldiers had looted civilian property, burned houses, and confiscated properties of those who were displaced.<sup>123</sup> The Commission stated that the evidence suggested a forced displacement based solely on ethnicity,<sup>124</sup> and Ethiopia did not show military justification for ordering the civilians to leave. While Ethiopia's violations of international humanitarian law in the town did not meet the criteria for being found to be pervasive, frequent, and systematic, the Commission found that they were indeed serious enough to render Ethiopia liable under international law.

## 6. COMPENSATION FOR DISPLACEMENT CAUSED BY BREACHES DURING ARMED CONFLICTS

Determining the amount of compensation for infringements of international law is the central aspect of the second phase of the commission's competence. The Commission announced its final awards for the damages phase on 17 August 2009. The December 2000 agreement does not specify the process of fixing the amount of compensation to be paid, but the parties have agreed to honour all decisions and

<sup>120</sup> *Ibid.*, para. 127.

<sup>121</sup> Kidane, *supra* note 32, at 48.

<sup>122</sup> Partial Award, Western Front, Aerial Bombardment and Other Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25, and 26, para. 142.

<sup>123</sup> *Ibid.*, para. 139.

<sup>124</sup> *Ibid.*, para. 139.

to pay promptly any monetary award rendered against them. The Commission has referred to the parties' 'responsibility to take effective measures, within the scope of resources available to them, to ensure that their nationals who are victims of armed conflicts receive relief'.<sup>125</sup>

The Commission reached a number of decisions, including on the appropriate remedies for infractions of international law. It also held internal debate regarding what types of remedy would be reasonable in this context.<sup>126</sup> Some members of the Commission, for example, considered whether it is preferable to look at mechanisms for providing infrastructure and social services rather than awarding cash for claimants.<sup>127</sup> This is notably important to victims of displacement who have not returned to devastated areas such as Zalambessa, or who have returned but whose livelihood is very much challenged. But it is not clear how such general mechanisms could effectively have addressed the concern of those who have lost property or meet needs for effective individualized relief.

In its decision reached on 24 July 2001, the Commission held that, in principle, monetary compensation is the appropriate form for valid claims.<sup>128</sup> However, it did not rule out the possibility of providing other forms of remedy as appropriate. But it held that requests for other types of remedy should meet the following requirements: the remedies should be in accordance with international practice, and the Commission should be convinced that the remedy is appropriate and necessary in the circumstances.<sup>129</sup> For example, Eritrea's request for an apology as a form of relief for damage to the stela of Metera, an obelisk of archaeological value, was rejected by the Commission, which found that the party concerned had failed to show that its request was consistent with international practice. None of the parties requested restitution as a relief for liability regarding unlawful expulsion and displacement, which often leads to a loss of property. This is notable, since restitution often offers important redress for displaced persons who have lost their property during armed conflict.

The Commission also indicated that the parties may avail themselves of the mass claims procedure to quantify the damages.<sup>130</sup> Ethiopia did not use mass claims procedures during this phase, whereas Eritrea attempted to use it in a limited way. While entering into the second phase of its work the Commission requested the parties to address a number of questions in their filing for this stage. It specifically asked them to inform the Commission regarding 'existing or anticipated structures and procedures' of which they intended to avail themselves in distributing damages received to the victims.<sup>131</sup> On the question of whether compensation should be paid directly to victims, or whether the activity of distributing the compensation be left to each government, the Commission acknowledged the authority of the

<sup>125</sup> Eritrea-Ethiopia Claims Commission, Decision No. 8, para. 1.

<sup>126</sup> Holtzmann and Kristjansdottir, *supra* note 28, at 148

<sup>127</sup> *Ibid.*

<sup>128</sup> Eritrea-Ethiopia Claims Commission, Decision No. 3: Remedies, issued 24 July 2001.

<sup>129</sup> *Ibid.*

<sup>130</sup> Holtzmann and Kristjansdottir, *supra* note 28, at 156.

<sup>131</sup> Letter addressed to the parties, 13 April 2006, quoted in Decision No. 8.

parties to determine the use and distribution of any damages awarded by it, and noted that the aforementioned instruction was not an abrogation of that authority. It also shared the parties' perspective that in most cases of violations, it would be impossible or very expensive to identify individual victims, and hence invited the parties to consider alternative means of compensating the victims.<sup>132</sup> The EECC's Decision No. 8 is notable in two important aspects. First, it acknowledged the responsibility of the states to take effective measures to ensure that their nationals who became victims of armed conflict get relief 'within the scope of resources available to them'. Second, it granted the parties a great degree of discretion in determining the use and disposition of damages awarded. In so doing, the Commission relied heavily on Article 5(1) of the December 2000 agreement and suggested that the humanitarian emphasis in that provision could be taken up by the parties by using damages awarded to provide education, health, and agriculture programmes for victims.

The Commission has often emphasized, including in its final awards on damages, the problem of identifying and compensating individual victims. Although it has made several decisions determining the amount of compensation to be paid to individuals, it is extremely unclear how these decisions will be implemented.

Accordingly, each state may request compensation for damage, loss, and injury incurred by it and its Ethiopian nationals of Eritrean extraction. The Commission's decision regarding those who did not have dual nationality made it impossible for Eritrea to claim compensation on their behalf, the Commission having barred Eritrea from making such claims during the damages phase. This anomaly created a situation whereby the nationality of a victim may affect his or her capacity to benefit from compensation.

## 7. AN EVALUATION OF THE FINDINGS OF THE ERITREA-ETHIOPIA CLAIMS COMMISSION

The EECC's decisions present a web of very complex and interesting legal questions.<sup>133</sup> This assessment also holds true of those decisions that have directly addressed protection issues relating to victims of displacement. In this section an attempt will be made to identify some of the issues with respect to which the tribunal's holdings are significant.

### 7.1. Unlawful displacement

The Commission in its decisions and awards used terminologies such as 'unlawful expulsion' and 'displacement' to describe situations which concern the forced displacement of people across an international boundary or within the territory of one of the belligerent states. On the other hand, it avoided a frequent use of terms such

<sup>132</sup> Eritrea-Ethiopia Claims Commission, Decision No 8: Relief to War Victims.

<sup>133</sup> T. Van Den Hout, 'Resolution of International Disputes: The Role of Permanent Court of Arbitration: Reflections on the Centenary of the 1907 Convention on the Pacific Settlement of International Disputes', (2008) 21 *Leiden Journal of International Law* 643, at 658.

as ‘deportation’, ‘evacuation’, ‘transfer’ or ‘internal displacement’. Even when such terms were used, the Commission did not clarify what the differences or similarities were between them.<sup>134</sup> Although the EECC’s decisions do not provide sufficient explanation as to why the Commission might have preferred certain terminologies to others, they do indicate the Commission’s consistent view that any form of displacement, to result in a liability, should be linked directly with a violation of international law. The jurisprudence of the Commission also provides substantial information on the responsibility of states for international wrongful acts, including those that result in displacement of populations.<sup>135</sup>

Whereas the EECC made important determinations as to the liability of the parties with respect to unlawful deportation, its proceedings resulted in far fewer findings of liability for unlawful internal displacement associated with the armed conflict than one would have expected. Both procedural and substantive factors influenced such an outcome. It is notable that the Commission found no state liability in all the claims relating to unlawful displacement except one – the incident in the Eritrean village of Awgaro – in which Ethiopian forces were held liable for ordering in violation of international law the displacement of all villagers. The explanation for this strikingly diminished level of liability is locked in three important factors. First, as the Commission itself often admitted, the quality of evidence presented by the parties resulted in far fewer determinations of liability than the parties had expected. The stringent evidentiary requirement adopted by the Commission meant that a large component of the claims presented by the parties was rejected. Often the awards of the Commission do not explain sufficiently why it had decided that the information or evidence presented by the party was not acceptable.

Second, the Commission’s narrow interpretation of its mandate under the December 2000 agreement meant that it rejected a great many claims on procedural and evidentiary grounds. The implication of this limited jurisdictional scope for claims related to unlawful displacement and expulsion was that incidents of displacement and violations of the ‘right to return’ following the conclusion of the December agreement were not covered. The Commission was inconsistent as to which incidents outside the jurisdictional time frame should in certain contexts be considered as being ‘related to the conflict’, and relied on a very restrictive interpretation of existing laws. The limited nature of the Commission’s temporal jurisdiction meant that only claims in relation to events which occurred during that period can be brought to it. For example, the Commission held that it did not have jurisdiction with respect to Eritrea’s Claim 14, arguing that events incorporated in the claims such as alleged prevention by Ethiopia of the return of Eritrean displaced persons into the TSZ and adjacent areas occurred after the conclusion of the peace agreement.

Third, the Commission also adopted an interpretation of existing law which suggested that even when civilian displacements are at their most unpleasant, they

<sup>134</sup> ICTY, *Prosecutor v. Milorod Krnojelac*, Trial Judgement, Case No. IT-97-2S-T, 15 March 2002, para. 476 (‘insofar as it requires the forcible displacement of persons across a national border, expulsion may be treated in the same way as deportation’).

<sup>135</sup> Partial Award, Eritrea’s Claims 15, 16, 23 and 27–32, paras. 79–106; Partial Award, Civilians Claims, Ethiopia’s Claim 5, paras. 128–131.



may yet be permissible consequences of war. It denied all Ethiopia's claims for unlawful displacement in Woredas, which fell under the central front, despite the fact that Ethiopia's sworn declarations showed that civilians were targets of Eritrean shelling and that, in the Commission's own words,

[T]hese military operations by Eritrea resulted in substantial numbers of Ethiopian civilians suffering prolonged danger, deprivation and sometimes injury or death, first, while fleeing under fire, second, as displaced persons in caves and camps and, finally, from the presence of landmines when eventually they were able to return to their villages.<sup>136</sup>

### 7.2. Expulsion or deportation

The Commission's biggest challenge with respect to its decisions on illegal expulsion was to keep the balance between what it calls 'broad powers of belligerent forces' to expel nationals of an enemy state and in certain conditions dual nationals from their territory, and the right of civilians to be protected from forced displacement and the need to ensure that such measures do keep to minimum guarantees as stipulated in the Geneva Conventions. The Commission rightly stated that mass expulsion of all nationals of an enemy state at the outset of a war is inconsistent with international humanitarian law.<sup>137</sup> It also underlined this prohibition with particular reference to such expulsions being made on the basis of any ethnic grounds.<sup>138</sup>

The Commission's interpretation of the exceptions to prohibition of deportation under Article 49 of Geneva IV is instructive. By holding that Eritrea's mass expulsion of Ethiopians from an Ethiopian territory it occupied does not constitute a violation, it unmasks what constitutes a material reason justifying the evacuation of enemy civilians deep into the territory of the occupying belligerent state.<sup>139</sup> The Commission also considered the conditions for these civilians in IDP camps, and decided that the fact that conditions were difficult and grim does not make them unlawful. For these conditions to be in breach of existing international obligations, the alleged violations need to indicate a pattern of abuse.<sup>140</sup>

### 7.3. Ethnic cleansing

The Commission's awards also shed light on issues that may be relevant in determining liability for breaches of 'ethnic cleansing'. This claim was brought to the Commission based on Eritrea's contention that Ethiopia had indeed deported Eritreans for reasons of ethnicity. The Commission, without attempting to define 'ethnic cleansing' or elaborate on its constituting elements, seemed to be satisfied that at least one important condition should be met: the existence of a national policy to deport all Eritreans from the country. The question was whether Eritreans still continue to live in the country.

<sup>136</sup> Partial Award, Civilians Claims, Ethiopia's Claim 2, para. 47.

<sup>137</sup> Eritrea's Claims 15, 16, 23 and 27–32, para. 79.

<sup>138</sup> *Ibid.*

<sup>139</sup> Partial Award, Central Front Claims, Ethiopia's Claim 2, para. 68.

<sup>140</sup> *Ibid.*

There were instances, particularly in cases of the expulsion of rural Eritreans or of Ethiopians of Eritrean extraction from Ethiopia and the expulsion of Eritreans from Awgato, where the Commission found the expulsion to be based on ethnicity. But it denied Eritrea's submission that Ethiopia was guilty of ethnic cleansing, finding that the measures taken by the Ethiopian state and sometimes its local agents did not indicate the existence of a national policy to force all Eritreans to flee the country.

#### **7.4. The forced nature of expulsion or displacement**

The forced nature of the displacement was an important consideration for the Commission in finding liability for unlawful expulsion and displacement. With respect to Ethiopia's claim of unlawful expulsion of Ethiopians from Eritrea, the Commission held that, despite the fact that Eritrea's government action might have made conditions difficult and harsh for Ethiopians, these conditions did not render the subsequent displacement of Ethiopians unlawful, since these Ethiopians still had alternatives to departure. It found a 'spectrum of voluntariness' in the departure of Ethiopians and that the growing economic difficulty, family separation, harassment, sporadic discrimination, and even attacks by Eritrean civilians did not make the Eritrean government liable for their flight.<sup>141</sup> It also rejected the legal contention of 'indirect' or 'constructive' expulsion of Ethiopians who were allegedly forced to leave by the policies and decisions of the Eritrean government. Thus the Commission held that for a claim of an indirect or constructive expulsion to hold any water, it must meet two criteria: harm or the threat of harm to the population must present no realistic alternative to departure, and the measures giving rise to departure must have been undertaken with the intention of making people leave the country.<sup>142</sup>

Regarding those civilians who fled their area having been affected by the actual fighting, the Commission held that civilian flight from the dangers of war does not on its own result in liability. It is necessary to show that the state accused of conducting the illegal displacement did so by deliberately terrorizing civilians with a view to making them flee their areas. Thus the subjective experience and perception of civilians who might flee due to a perceived danger of hostility do not make their flight the result of illegal action.

At least on the face of it, other tribunals such as the ICTY seem to have adopted a much broader definition of forced displacement. For example, in *Prosecutor v. Milomir Stakić*, the court held that

[T]he term 'forced', when used in reference to the crime of deportation, is not to be limited to physical force but includes the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.<sup>143</sup>

Accordingly, forced displacement may involve, in addition to actual physical coercion, additional elements such as psychological oppression, the threat of force,

<sup>141</sup> *Ibid.*, para. 93.

<sup>142</sup> Partial Award, Central Front, Ethiopia's Civilian Claim 5, para. 123.

<sup>143</sup> *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Appeals Chamber, Judgement, 22 March 2006, para. 281.

or any other measures that render displacement involuntary. But even *Stakić* clearly establishes that the coercion need not as such be generalized, but should target the person who is claiming that his or her right is violated.

### 7.5. Remedies for displacement

The EECC's jurisprudence and the claims process in general provide insights into how a procedure designed to filter civilian liability for international wrongs may address the plight of those who are uprooted by an international armed conflict. Although provision of compensation for violations of humanitarian law has not been used frequently by international tribunals and courts, the EECC's experience suggests the possibility of revitalizing such remedial mechanisms. This promise, however, is threatened by the Commission's uncertainty regarding how it intends to move forward on this very important question in the light of the size of population affected by displacement, the difficulty of identifying individual claims, and the resource constraints the parties face.

It is also not yet clear how the Commission's financial awards may finally reach those who were directly affected by the war. EECC's Decision No. 8 reaffirms two important principles. On the one hand, it underlines the responsibility of states to take measures with a view to making sure that their nationals who are victimized by breaches of international humanitarian law are properly compensated. On the other hand, it recognizes a wide discretion on the part of the parties on the disposition and use of damages. The Commission even acknowledged the authority of the parties to bypass individual compensation if they are convinced that the humanitarian objectives of the December 2000 agreement can be achieved by alternative relief programmes such as education, health, agriculture, and so on. This position was reiterated in the Commission's final awards on damages. Relief understood so broadly, however, may be difficult to implement and monitor. It is far less clear how this expansive approach to compensation is compatible with the right of individuals to an effective remedy.

### 7.6. *Jus ad bellum*, liability, and compensation for forced displacement

The nature and consequences of the Commission's *jus in bello* decision with respect to actions taken by states mainly during the conflict were largely precise. The implications of its *jus ad bellum* decisions against Eritrea, however, are far less clear. Eritrea's position has been that the Commission cannot make provision for a responsibility to compensate in addition to what has been provided in its specific awards, and that the Commission's decision on the use of force shall be declaratory in nature. Ethiopia, on the other hand, argued that the decision should result in compensation for losses connected with a wide spectrum of consequences of the conflict.

Early on the Commission showed an inclination to consider compensation for violation of the law on use of force.<sup>144</sup> In its *jus ad bellum* award which found Eritrea liable for violating the prohibition on the use of force, it held that its damages

<sup>144</sup> Partial Awards, Western and Eastern Fronts, Ethiopia's Claims 1 and 3, note 19.

phase would uncover the scope of damages for which Eritrea is liable because of its violation.<sup>145</sup> Ethiopia's position has been that Eritrea's violation should result in compensation for the loss, damage, and injuries that are linked to this original violation. The Commission rendered damages decision awarding Ethiopia US\$45 million for internal displacement. It communicated to the parties that only damages that are reasonably foreseeable or proximately caused by specific findings of liability identified by the Commission in its *jus ad bellum* decision will be examined. This means that victims of displacement will not win relief simply because their displacement is linked to a war that was generated by Eritrea's illegal use of force.<sup>146</sup>

### **7.7. The EECC as a forum to address general protection and assistance needs of victims of forced displacement**

The procedure followed by the EECC excluded a great number of affected communities from the Commission's mandate, made the Commission adopt a rather restrictive interpretation of existing law as it relates to displacement during an international armed conflict, and resulted in a compensation regime whose direct relevance to the victims is far from certain. The legal proceeding of the claims process is also overshadowed by the politically weighty decisions of the Eritrea-Ethiopia Boundary Commission, whose implementation is undermined by serious differences between the parties. These dispute settlement mechanisms are markedly legalistic and have been undertaken in an environment where there is no political contact between the parties.

There is also a more structural underpinning of the Commission's limitations. The December 2000 agreement is not designed in such a way as fully to take into account the unique challenges of forced displacement and how it should be addressed by the Claims Commission. Addressing the 'negative socio-economic impact of the war on civilian population' is an important aspect of the EECC's mandate. But, as this article attempts to show, the agreement lacks sufficient, clear provisions on how the particular needs of civilians affected by the war will be addressed comprehensively and meaningfully.<sup>147</sup> No representatives of victims of the conflict had access to influence the negotiations over the agreement. Even now, long after the agreement was concluded, there are no victims' associations in either Ethiopia or Eritrea. Linking compensation to those who have been affected directly by a specific infraction of international humanitarian law means that a great many people who were generally displaced by the war have been left unprotected. Both in the negotiation of the December 2000 agreement and in the claims process itself, the participation of victims or their representatives was minimal. Only the state parties could have direct access to the Commission. The Commission has now acknowledged the authority

<sup>145</sup> Partial Award, *Jus ad Bellum*, Ethiopia's Claims 1–8, IV.

<sup>146</sup> Eritrea-Ethiopia Claims Commission, Decision No. 7: Guidance Regarding *Jus Ad Bellum* Liability, para. 5.

<sup>147</sup> The United Nations Secretary-General's Special Representative for the Human Rights of Internally Displaced Persons has considered the issues of how peace agreements should take into account the particular needs of victims of forced displacement. See W. Kalin, Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, UN Doc. A/HRC/10/13.

of each government to determine how the compensation awarded to the victims should be distributed.

## 8. CONCLUSION

The protection of civilians who are forced to flee from their homes and livelihoods owing to both natural and man-made factors has increasingly become a subject of inquiry. International humanitarian law stipulates several important norms that seek to protect victims of displacement during armed conflicts. This article has attempted to discuss these norms in the light of the case law of the Eritrea-Ethiopia Claims Commission. The war between Ethiopia and Eritrea between 1998 and 2000 resulted in the deportation and displacement of a great number of people. The Commission reached a number of consequential decisions which addressed the problem of displacement. These decisions, however, have received limited scholarly analysis and commentary. The Commission has also been overshadowed by the Eritrea-Ethiopia Boundary Commission, also established under the December 2000 agreement, whose decisions received much more weighty consideration by and attention from the parties and the international community. The discrepancy in visibility is explained by widespread thinking that implementation of the decision on the border delimitation process is vital for restoring peace between the parties. Such a mindset has unfortunately relegated the EECC's important activities to a secondary position.

The December 2000 agreement between Ethiopia and Eritrea significantly limited the mandate and jurisdiction of the Commission. The tribunal itself held to a rather restrictive interpretation of its mandate, often arguing that it did not have a supervisory role in interpreting the peace agreement. This narrow jurisdictional scope, coupled with a very high evidentiary threshold used during the proceedings, led, by the Commission's own admission, to fewer findings of liability for violations of unlawful displacement than had been expected. The Commission's *jus ad bellum* award and subsequent decision indicate its strict interpretation of state responsibility.

But the EECC's awards have clarified a number of important international humanitarian norms governing the question of civilian displacement during armed conflicts. The Commission considered a substantial body of Geneva Convention IV and Protocol I reflecting customary international law. Its jurisprudence on the expulsion of aliens during a situation of armed conflict is also an important contribution. Overview of the EECC's work so far does not provide sufficient information to evaluate the adequacy of inter-state claim procedures in providing relief to victims. The Commission has not yet rendered its decision on compensation, and its much-anticipated decision on relief will show how it intends to award remedies to those who are displaced by the actions of each party in violations of international law. The Commission's delay in finalizing this task is indicative of the complex nature of the issues involved.