

Eritrea-Ethiopia Claims Commission: Damage Awards

By [Michael J. Matheson](#)

Background



In May 1998 an armed conflict broke out between Eritrea and Ethiopia that extended over two years and caused substantial loss of life, personal injury and economic damage. Through the work of the UN, the Organization of African Unity, the United States and others, the conflict was finally brought to a close in June 2000 with the signature of an agreement for the cessation of hostilities, which established a security zone separating the opposing forces and requested the UN to deploy a peacekeeping force to help

implement the agreement. This was followed in December 2000 by a permanent peace agreement, which among other things established two arbitral bodies: a Boundary Commission to delimit and demarcate the disputed border; and a Claims Commission to decide claims for loss, damage and injury resulting from the conflict. Each Commission consisted of five members, two appointed by each of the parties and the fifth selected by the other four.^[1] The members chosen were a very eminent group, with impressive records of public and academic service.^[2] The two Commissions had their seat in The Hague and worked with the assistance of the Permanent Court of Arbitration.^[3]

The Claims Commission began its work with the issuance of rules of procedure and a series of decisions defining such matters as the scope of its jurisdiction, claims categories and remedies. After extensive briefing and hearings, the Commission issued a series of partial awards in 2003-05, ruling on the merits of the claims of each party against the other. These awards covered such issues as the lawfulness of the initial resort to force, the treatment of prisoners of war and civilian internees, the legality of means and methods of warfare used in various localities, the treatment of diplomatic premises and personnel, the seizure and destruction of private property, and the treatment by each side of the nationals of the other.^[4] All but one were unanimous.

Among the more significant holdings of the Commission were: that Eritrea unlawfully invaded Ethiopian-controlled territory at the start of the conflict,^[5]

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[Agreement on Cessation of Hostilities \(June 18, 2000\)](#)

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[Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia \(April 13, 2002\)](#)

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unlawfully conducted or permitted the killing, rape or abduction of civilians and the looting of property,^[6] abused or provided improper care and treatment to Ethiopian prisoners of war,^[7] and failed to provide expelled civilians with appropriate protection and treatment;^[8] and that Ethiopia failed to give proper treatment and protection to Eritrean prisoners of war,^[9] engaged in looting and unlawful destruction of property,^[10] and improperly detained or expelled civilians.^[11] Many other claims were dismissed for lack of jurisdiction, failure of proof, or disagreement that the conduct in question was unlawful.^[12]

During this liability phase, the Commission made a number of findings of potentially great importance with respect to the use of force and the rules of warfare. On substantive law, these have included: an elaboration of what provisions of existing agreements on international humanitarian law have become part of customary law;^[13] guidance on the application of various norms to wartime circumstances, such as target selection,^[14] treatment of prisoners,^[15] and actions against civilian property and economic activity;^[16] findings on the applicability in wartime of peacetime treaties and human rights norms;^[17] and the lawfulness of the use of force in connection with boundary disputes.^[18] On procedure, the Commission's contributions included: the adoption of a standard of proof for serious allegations;^[19] a balanced approach towards the use of various forms of evidence;^[20] significant guidance on handling of allegations of rape;^[21] and a pragmatic and proactive attitude towards resolving factual disputes.

The Commission's Methodology

Having determined the substantive responsibility of the two sides for these actions, the Commission then proceeded with the task of determining the amounts of compensation to be paid as a result. It issued further guidance, ordered further briefing and conducted further hearings on the quantum of damage and compensation to be awarded. On August 17, 2009, the Commission issued its final awards, which ordered the payment of compensation by each side to the other for the violations of law previously found in the partial awards.

Over the course of the proceedings, various proposals were made to provide relief through means other than monetary compensation for specific unlawful acts. For example, the Commission had proposed at the outset a mass claims process under which the parties might file claims for fixed amounts for different categories of individual claimants;^[22] Ethiopia proposed that, instead of giving damage awards, the Commission should create a mechanism "to increase the flow of relief and development funds from international donors to alleviate the consequences of the war in both countries";^[23] and Eritrea proposed that, instead of seeking damage awards for rape, each party set aside an amount for women's health care and support services.^[24] However, none of these alternatives were adopted, and the Commission was left with the very difficult task of deciding on appropriate specific monetary awards for the many violations.

The Commission recognized from the outset that it faced a difficult and unusual situation: it was "mindful of the harsh fact that these countries are among the poorest on earth" and that the parties both sought amounts "that

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were huge, both absolutely and in relation to the economic capacity of the country against which they were directed.”^[25] Further, having been obligated by the 2000 Agreement to complete its work in a relatively short period, the Commission adopted expedited procedures for briefing and considering claims which it recognized might produce “less informed and precise” assessments of damage.^[26] It pointedly noted that its own resources and capabilities were limited.^[27] Recognizing that the parties also had time constraints and limited capabilities in producing evidence, the Commission would not require “evidence regarding thousands of individual events, evidence that the Parties could not assemble and present, and that the Commission could not address, without unacceptable cost and delay.”^[28] The Commission said that it saw its task “not as being able to determine liability for each individual incident of illegality suggested by the evidence,” but rather to determining liability for illegal acts “that were frequent or pervasive and consequently affected significant numbers of victims.”^[29]

This sense of limitations and the need for pragmatic approaches is evident throughout the Commission’s work on damages. As for the standard of proof required, the Commission had, in the liability phase, required “clear and convincing proof” of liability.^[30] Eritrea argued that the same standard should apply in the damages phase as well. The Commission disagreed, judging that, in light of the “enormous practical problems” faced by both parties in quantifying damages under the difficult circumstances of the war, adopting such a rigorous standard “would often – perhaps almost always – preclude any recovery.”^[31] Instead, the Commission decided that it would make “the best estimates possible on the basis of the available evidence . . . even if the process involves estimation, or even guesswork, within the range of possibilities indicated by the evidence.”^[32]

Nonetheless, the Commission demanded some form of reasonable evidence for the elements of damage claimed, rejecting unsubstantiated claims forms, patently exaggerated valuations, and the like. It denied recovery in cases where there was no showing of specific loss to the aggrieved individuals,^[33] or the evidence presented was insufficient to support the claim.^[34] However, in many cases, the Commission granted compensation notwithstanding limited proof, where serious losses had been suffered or due to special humanitarian circumstances – for example, in the case of civilian deaths, rape, personal violence and wrongful detention, and of losses to houses, farms and personal property of individuals.^[35] In many of these situations, the Commission reverted to the factual record in the earlier liability proceedings to seek to estimate the frequency or extent of injuries. In such cases, the awards given seem to have been rough estimates based on the Commission’s own pragmatic appraisal of the evidence and the relevant circumstances.^[36]

Elements of Damage

Among the specific elements of claimed damage that were accepted or rejected by the Commission, the following are of particular note:

- The Commission awarded compensation for mental and emotional harm suffered by prisoners (for forced indoctrinations) and rape victims.^[37]

-- The Commission rejected an Ethiopian claim of billions of dollars for “moral damages” suffered by more than a million Ethiopian nationals as a result of physical pain, mental anguish and the disruption of their lives; and by Ethiopia itself as a result of harm to its territorial integrity, security and international standing. The Commission recognized that some of these factors might be taken into account in damage awards in specific cases, but not “in a claim involving huge numbers of hypothetical victims”.^[38]

-- Although both parties asked for awards of interest, the Commission decided not to do so.^[39] Neither side requested payment of attorneys’ fees or costs.^[40]

-- The Commission seemed to take a skeptical attitude toward expansive claims for lost profits and revenues that were not the clear consequence of war damage.^[41] In a few cases, awards for lost profits were granted.^[42] The Commission declined to say whether or under what circumstances a loss of tourism revenues might be compensable, but denied claims for lost tourism that it regarded as speculative and unsupported.^[43] It also rejected claims based on reductions of development assistance from foreign donors and investment from foreign and domestic investors.^[44] It denied some claims for damages on the ground that they resulted from “the general disruption of the civilian economy” due to wartime conditions.^[45]

-- The Commission agreed in principle that environmental damage was compensable, but rejected claims that were unsubstantiated or speculative.^[46]

-- The Commission declined to award damages for disruption to the lives and financial prospects of students because of the destruction of schools, but was more amenable to awarding compensation for the presumed injury to civilians denied medical care because of damage to hospital facilities.^[47]

-- The Commission awarded damages for damage to an ancient stone obelisk that went beyond the actual costs of restoration and included an amount to reflect its “unique cultural significance.”^[48]

-- The Commission awarded damages for the seizure of diplomatic property, but declined to give monetary relief wrongful searches of diplomatic personnel where there was no material damage, judging that a declaration of wrongfulness was sufficient.^[49]

***Jus Ad Bellum* Claims**

In the liability phase, the Commission found Eritrea and Ethiopia each liable for violations of the *jus in bello* – violations of the rules of warfare, such as violations of the rights of civilians and prisoners of war, and (in a few cases)

improper targeting and excessive civilian damage in the conduct of military attacks. It also found Eritrea liable for violation of the *jus ad bellum* – the unlawful resort to force – in its initial invasion of Ethiopia.

Shortly after its partial awards in the liability phase, the Commission had issued guidance on the scope of Eritrea's *jus ad bellum* liability to pay damages and the standard for assessing that liability. Basically, the Commission indicated that it would not hold Eritrea responsible for the entirety of the losses caused by the war that followed its unlawful invasion, but rather would award damages only with respect to those losses for which Eritrea's initial invasion were the "proximate cause".^[50] Nonetheless, in the damages phase, Ethiopia sought very large amounts for damage caused during the whole range and duration of hostilities, arguing that these were foreseeable consequences of Eritrea's initial invasion.^[51]

In response, the Commission reiterated its view that a state's responsibility for *jus ad bellum* violations does not extend to all the losses suffered in the conflict that started as a result of those violations. It then determined which aspects of the fighting and losses at various times on the different fronts of the Eritrean-Ethiopian conflict were foreseeable results of the Eritrean invasion and therefore compensable.^[52] In some cases, compensation was awarded under *jus ad bellum* with respect to operations or elements that were found not to have violated *jus in bello*, such as the use of land mines, artillery damage, and attacks on airports.^[53] In other cases, compensation was denied on the grounds that there was not "a sufficiently clear and direct causal connection" with the initial Eritrean invasion.^[54]

The End Result

In total, the Commission awarded about \$161 million to the Government of Eritrea and about \$2 million to individual Eritreans.^[55] It awarded about \$174 million to the Government of Ethiopia.^[56] In other words, Ethiopia would net roughly \$10 million. The Eritrean Government stated that it accepted the award "without any equivocation", while the Ethiopian Government complained that the award was "a very small amount given the gravity of the crime of aggression committed by Eritrea as determined by the commission itself."^[57]

At this point, it is not clear what the practical results of the Commission's final awards will be. Unlike some other recent international claims processes (such as the Iran-U.S. Claims Tribunal and the UN Compensation Commission), there is no dedicated source of funding that will automatically pay awards, and satisfaction will depend on the willingness and ability of governments with very limited resources to pay. If the awards are not promptly paid, the two governments might negotiate some mutually-acceptable offset or compromise, or each might seek to enforce its own award by attachment or suit in jurisdictions where the other has assets. Even if the awards are promptly paid, they are predominantly state-to-state claims that are not directed at specific recipients; the payments would be received by the two governments, which technically would have discretion as to whether to keep the funds, provide them to affected individuals, or use them for alternative forms of assistance or relief to the affected population groups. (In this respect, the process is also unlike those of the Iran-U.S. Claims

Tribunal and the UN Compensation Commission, where specific awards were made for specific recipients.)^[58] In any event, the net amount of \$10 million owing to Ethiopia is not large compared to the overall losses suffered in the war.

Leaving aside the question of payment, hopefully the most important consequence of the process will be that the two parties will accept the results of the claims adjudication – along with the results of the border delimitation and demarcation – and consider that this unfortunate chapter in their mutual relations is closed. In a sense, the most important contribution of the creation of the two commissions was that it enabled the two sides to end their armed conflict, and it would be regrettable if any disagreement about the results reached by the two commissions were to contribute to a resumption of antagonistic relations.

But whatever the practical consequences, the final awards are likely to be an important source of jurisprudence and practical guidance for future international claims processes. Not all of the specific amounts awarded were explained in detail, reflecting the fact that the Commission found it necessary to make rough and subjective estimates of losses because of the lack of definitive evidence, the chaotic conditions of the conflict, and constraints of time and resources. Nevertheless, the final awards included many significant findings, as described above, which could have an important influence on other disputes about armed conflict situations.

About the Author

Michael Matheson, a member of ASIL and the AJIL Board of Editors, is on the international law faculty of the George Washington University Law School. He was formerly Acting Legal Adviser at the U.S. State Department and a member of the UN International Law Commission.

Endnotes

^[1] Agreement on Cessation of Hostilities between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Eth.-Erit., June 18, 2000, 2138 U.N.T.S. 86, *available at* http://untreaty.un.org/unts/144078_158780/17/8/8238.pdf (last visited September 2, 2009); Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Eth.-Erit., Dec. 12, 2000, 2138 U.N.T.S. 94, *available at* http://untreaty.un.org/unts/144078_158780/17/8/8240.pdf (last visited Sept. 2, 2009)

^[2] The Boundary Commission consisted of Bola Ajibola, Elihu Lauterpacht (the President), Michael Reisman, Stephen Schwebel and Arthur Watts; the Claims Commission consisted of George Aldrich, John Crook, Hans van Houette (the President), James Paul and Lucy Reed.

^[3] The Boundary Commission promptly completed its work on delimiting the boundary, conducting hearings in December 2001 and issuing a decision enumerating coordinates for the entire boundary in April 2002. See Decision Regarding Delimitation of the Border between the State of Eritrea and the

Federal Democratic Republic of Ethiopia (Erit-Eth.), 25 Int'l Arb. Awards 83 (Apr. 13, 2002) available at http://untreaty.un.org/cod/riaa/cases/vol_XXV/83-195.pdf (last visited Sept. 2, 2009). However, the physical demarcation of the boundary remains unresolved, and a state of tension continues along the border area. See The Secretary-General, *Special report of the Secretary-General on the United Nations Mission in Ethiopia and Eritrea*, UN Doc. S/2008/226 (Apr. 7, 2008) available at <http://www.mineaction.org/downloads/1/s2008226.pdf> (last visited Sept. 2, 2009)

[4] These and other documents for the claims process may be found at the PCA website: www.pca-cpa.org (last visited Sept. 2, 2009).

[5] Partial Award: *Jus ad Bellum* - Ethiopia's Claims 1-8 (Eth.-Erit.), 45 ILM 430 (Dec. 19 2005) available at <http://www.pca-cpa.org/upload/files/FINAL%20ET%20JAB.pdf> (last visited Sept. 2, 2009)

[6] Partial Award: Western and Eastern Fronts - Ethiopia's Claims 1 & 3 (Eth.-Erit.) ICGJ 357 (Dec. 19, 2005) available at [http://www.pca-cpa.org/upload/files/FINAL%20ET%20FRONT%20CLAIMS\(1\).pdf](http://www.pca-cpa.org/upload/files/FINAL%20ET%20FRONT%20CLAIMS(1).pdf) (last visited Sept. 9, 2009); Partial Award: Central Front - Ethiopia's Claim 2 (Eth.-Erit.), 2004 ILM 1275 (Apr. 28, 2004) available at [http://www.pca-cpa.org/upload/files/ET%20Partial%20Award\(1\).pdf](http://www.pca-cpa.org/upload/files/ET%20Partial%20Award(1).pdf) (last visited Sept. 2, 2009).

[7] Partial Award: Prisoners of War - Ethiopia's Claim 4 (Eth.-Erit), 42 ILM 1056 (July 1, 2003) available at <http://www.pca-cpa.org/upload/files/ET04.pdf> (last visited Sept. 2, 2009).

[8] Partial Award: Civilian Claims - Ethiopia's Claim 5 (Eth.-Erit.), 44 ILM 630 (Dec. 17, 2004), available at <http://www.pca-cpa.org/upload/files/ET%20Partial%20Award%20Dec%202004.pdf> (last visited Sept. 2, 2009).

[9] Partial Award: Prisoners of War - Eritrea's Claim 17 (Eth.-Erit.), 42 ILM 1083 (July 1, 2003), available at <http://www.pca-cpa.org/upload/files/ER17.pdf> (last visited Sept. 2, 2009).

[10] Partial Award: Central Front - Eritrea's Claims 2, 4, 6, 7, 8 & 22 (Eth.-Erit.), 43 ILM 1249 (Apr. 28, 2004) available at <http://www.pca-cpa.org/upload/files/Eritrea%20Central%20Front%20award.pdf> (last visited Sept. 2, 2009); Partial Award: Western Front, Aerial Bombardment and Related Claims - Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26 (Eth.-Erit.), 45 ILM 396 (Dec. 19, 2005), available at <http://www.pca-cpa.org/upload/files/FINAL%20ER%20FRONT%20CLAIMS.pdf> (last visited Sept. 2, 2009).

[11] Partial Award: Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32 (Eth.-Erit), 44 ILM 601 (Dec. 17, 2004), available at <http://www.pca-cpa.org/upload/files/ER%20Partial%20Award%20Dec%202004.pdf> (last visited Sept. 2, 2009).

[12] For more detailed commentary on the work of the Commission, see Christine Gray, *The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?* 17 EUR. J. INT'L L. 699 (2006); Won Kidane, *Civil Liability for Violations of International Humanitarian Law: the*

Jurisprudence of the Eritrea-Ethiopia Claims Commission in The Hague, 25 WISC. INT'L L. J. 23 (2007); C.G. Weeramantry, *International Decisions*, 101 AM. J. INT'L L. 616 (2007).

[13] Of particular interest have been its conclusions on the extent to which the provisions of Additional Protocol I to the 1949 Geneva Conventions and of the recent agreements on landmines have become customary law. See, e.g., Ethiopia's Claim 5, *supra* note 8, at 29.

[14] See, e.g., Ethiopia's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, *supra* note 10, at 91-121.

[15] See, e.g., Eritrea's Claim 17, *supra* note 9, at 54-163. See also *Prisoners of War: Ethiopia's Claim 4*, *supra* note 7, at 49-150.

[16] See, e.g., Eritrea's Claim 24, at 16-33, (Dec. 19, 2005) available at <http://www.pca-cpa.org/upload/files/FINAL%20ER%20CLAIM%2024.pdf> (last visited Sept. 2, 2009).

[17] See, e.g., *Partial Award: Pensions - Eritrea's Claims 15, 19 & 23*, 45 ILM 633, at 8 (Dec. 19, 2005) available at <http://www.pca-cpa.org/upload/files/FINAL%20ER%20PENSIONS.pdf> (last visited September 2, 2009).

[18] See Ethiopia's Claims 1-8, *supra* note 5, at 18-20.

[19] Basically, the Commission required at the liability stage that the claimant state provide "clear and convincing evidence of a violation – *i.e.*, a *prima facie* case", after which the Commission would consider whether the evidence offered by the respondent state "effectively rebutted" the claimant's proof. The Commission rejected the application of the higher standard of proof typically required in criminal proceedings (*i.e.*, beyond a reasonable doubt), even though much of the alleged conduct would constitute international crimes. See, e.g., Eritrea's Claim 17, *supra* note 9, at 47-49.

[20] The Commission relied extensively on witness statements and to a lesser degree on oral testimony, but also considered various forms of documentary and physical evidence, including video evidence and commercial satellite imagery. It stressed the totality of the evidence presented and the degree to which different evidentiary submissions corroborated one another.

[21] Although the Commission generally declined to consider violations that were not pervasive or frequent, it did not do so with respect to alleged rapes, given "heightened cultural sensitivities" about such allegations and "the typically secretive and hence unwitnessed nature of rape" Ethiopia's Claims 1 & 3, *supra* note 6, at 54.

[22] *Decision Number 5: Multiple Claims in the Mass Claims Process, Fixed-Sum Compensation at the \$500 and \$1500 Levels, Multiplier for Household Claims (Erit-Eth.)*, available at <http://www.pca-cpa.org/upload/files/Decision%205.pdf> (last visited Sept. 2, 2009).

[23] See *Final Award: Eritrea's Damages Claims (Erit.-Eth.)*, at 9 (Aug. 17,

2009) available at <http://www.pca-cpa.org/upload/files/ER%20Final%20Damages%20Award%20complete.pdf> (last visited Sept. 2, 2009) [hereinafter Eritrea's Damages Claims].

[24] *Id.* at 236.

[25] *Id.* at 18.

[26] *Id.*, at 16.

[27] The Commission noted that it "is not the UNCC [the UN Compensation Commission created for Gulf War claims], with (at peak) staff of several hundred persons and extensive financial resources." *Id.* at 71.

[28] *Id.* at 282.

[29] *Id.* at 228.

[30] See *supra* note 19.

[31] Eritrea's Damages Claims, *supra* note 23, at 36.

[32] *Id.* at 37.

[33] *Id.* at 260, 264-65, 288.

[34] Final Award: Ethiopia's Damages Claims (Erit.-Eth.), at 397, 400, 402, 409, 425 (Aug. 17, 2009) available at <http://www.pca-cpa.org/upload/files/ET%20Final%20Damages%20Award%20complete.pdf> (last visited Sept. 2, 2009) [hereinafter Ethiopia's Damages Claims].

[35] *Id.* at 104-110, 332, 339, 356. Eritrea's Damages Claims, *supra* note 23, at 70, 238.

[36] See, e.g., Ethiopia's Damages Claims, *supra* note 34, at 103, 126, 135, 238, 241, 247, 254.

[37] Eritrea's Damages Claims, *supra* note 23, at 230, 238.

[38] Ethiopia's Damages Claims, *supra* note 23, 61-65.

[39] This was based in part on the fact that neither party had engaged in dilatory tactics to delay the awards, and in part to the fact that the awarding of interest would not have materially changed the relative position of the two sides, given that the amounts awarded to each were broadly similar. See Eritrea's Damages Claims, *supra* note 23, at 43-44.

[40] *Id.* at 45.

[41] *Id.* at 155, 174, 207.

[42] See, e.g., Ethiopia's Damages Claims, *supra* note 34, at 204, 451.

[43] *Id.* at 461.

[44] *Id.* at 465, 469.

[45] *Id.* at 395.

[46] *Id.* at 425.

[47] Eritrea's Damages Claims, *supra* note 23, at 204-05, 208-16. The Commission was apparently influenced by the stress given by international humanitarian law to the protection of medical facilities and services.

[48] *Id.* at 222-23.

[49] *Id.* at 385-91. See also Ethiopia's Damages Claims, *supra* note 34, at 269-70.

[50] Decision No. 7: Guidance Regarding *Jus ad Bellum* Liability (Erit-Eth.), 13 (July 2007) available at http://www.pca-cpa.org/upload/files/EECC_Decision_No_7.pdf (last visited Sept. 2, 2009). In particular, the Commission declined to follow the precedent of the UN Compensation Commission's awards against Iraq with respect to the 1990-91 Gulf War, where the UN Security Council had decided that compensation would be provided from Iraqi oil revenues for "any direct loss, damage – including environmental damage and the depletion of natural resources – or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait . . ." S.C. Res. 687, 16, 46 U.N. SCOR, U.N. Doc. S/RES/687 (Apr. 8, 1991). The Commission evidently considered the Eritrean invasion to have been of lesser scope, ambition and consequence than the Iraqi invasion and occupation of Kuwait.

[51] Ethiopia's Damages Claims, *supra* note 34, at 280.

[52] *Id.* at 289-305.

[53] *Id.* at 388-93, 426-27.

[54] *Id.* at 431.

[55] Eritrea's Damages Claims, *supra* note 23, at § IX.

[56] Ethiopia's Damages Claims, *supra* note 34, at § XII.

[57] See *Commission awards Ethiopia-Eritrea war claims*, AFP, August 18, 2009, available at <http://www.zimbio.com/AFP+News/articles/f2CUn39Trm1/Commission+awards+Ethiopia+Eritrea+war+claims> (last visited Sept. 2, 2009).

[58] The Commission expressed its "confidence that the Parties will ensure that the compensation awarded will be paid promptly, and that funds received in respect of their claims will be used to provide relief to their civilian populations injured in the war." It did not indicate whether this confidence was based on any specific assurances received by the parties. See Eritrea's Damages Claims, *supra* note 23, at § IX; Ethiopia's Damages Claims, *supra*

note 34, at § XII.

