

ERITREA-ETHIOPIA CLAIMS COMMISSION

PARTIAL AWARD

**Loss of Property in Ethiopia
Owned by Non-Residents
Eritrea's Claim 24**

between

The State of Eritrea

and

The Federal Democratic Republic of Ethiopia

By the Claims Commission, composed of:

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John R. Crook
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The Hague, December 19, 2005

**PARTIAL AWARD—Loss of Property in Ethiopia Owned by Non-Residents—Eritrea's Claim 24
between the Claimant,
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I. INTRODUCTION

1. Eritrea's Claim 24, covering the alleged loss of property in Ethiopia owned by non-residents, has been brought before the Commission by the Claimant, the State of Eritrea ("Eritrea"), against the Respondent, the Federal Democratic Republic of Ethiopia ("Ethiopia"), pursuant to Article 5 of the Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia of December 12, 2000 ("the Agreement"). Eritrea asks the Commission to find Ethiopia liable for loss, damage and injury it suffered, including by reason of injuries to Eritrean nationals and certain other persons, resulting from alleged infractions of international law by Ethiopia during the 1998–2000 international armed conflict between the Parties.

2. In its Partial Award of December 17, 2004 in Eritrea's Claims 15, 16, 23 and 27–32 regarding the treatment of civilians ("Partial Award in Eritrea's Civilians Claims"), the Commission decided several significant legal issues that are also raised in Claim 24. This Partial Award will indicate where these previous findings by the Commission also determine matters raised in Eritrea's Claim 24. The Partial Award in Eritrea's Civilians Claims also contains relevant back-

ground concerning Ethiopia's treatment of civilians with Eritrean antecedents, and their property, during the 1998–2000 conflict.¹

3. Claim 24 contains claims regarding non-residents' businesses and real property that are similar to claims by expellees that were addressed in the Partial Award in Eritrea's Civilians Claims. Claim 24 also emphasizes an additional large class of property owners: non-resident Eritrean truck owners. Evidence submitted by both Parties indicates that, before May 1998, persons with Eritrean nationality or antecedents owned and operated many of the heavy trucks that carried fuel and freight from Eritrean ports to Ethiopia. These trucks also played an important role in Ethiopia's internal transportation system. When hostilities began in 1998, Ethiopian officials took possession of many of these trucks (and sometimes their cargoes), although the Parties dispute the circumstances and the number of vehicles. Eritrea contends that the seizure of the trucks was unlawful, and that their owners never received either compensation or the return of their trucks. Ethiopia denies Eritrea's claims.

II. PROCEEDINGS

4. The Commission informed the Parties on August 29, 2001 that it intended to conduct proceedings in Government-to-Government claims in two stages, first concerning liability, and second, if liability is found, concerning damages. The Statement of Claim in Eritrea's Claim 24 was filed on December 12, 2001 pursuant to Article 5, paragraph 8, of the Agreement. Ethiopia's Statement of Defense was filed on October 15, 2002. Eritrea's Memorial was filed on November 1, 2004, Ethiopia's Counter-Memorial on January 17, 2005, and Eritrea's Reply on March 10, 2005. The claim was addressed in hearings on liability held during the week of April 4–8, 2005.

III. JURISDICTION

A. Claims Involving Injury to Persons Who Are Not Eritrean Nationals

5. Article 5, paragraph 9, of the Agreement significantly differs from general international practice, which typically limits claims procedures to claims involving the claiming party's nationals. Article 5, paragraph 9, provides that "in appropriate cases, each party may file claims on behalf of

¹ See, e.g., Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27–32 Between the State of Eritrea and the Federal Democratic Republic of Ethiopia (Dec. 17, 2004) [hereinafter Partial Award in Eritrea's Civilian Claims], paras. 6–11 and paras. 64–157.

persons of Eritrean *or Ethiopian* origin who may not be its nationals. Such claims shall be considered by the Commission on the same basis as claims submitted on behalf of that party's nationals" (emphasis added). Thus, the Agreement creates a *lex specialis* authorizing the Parties to present claims on behalf of certain non-nationals, and giving the Commission jurisdiction to consider those claims.

6. Eritrea's Memorial described Claim 24 as having been brought "on behalf of *all* persons of Eritrean national origin residing outside of Ethiopia who suffered injury to their property interests as a result of Ethiopia's illegal actions related to the war."² However, this description is not consistent with the claim as it was originally filed in December 2001. Eritrea's Statement of Claim filed at that time identified the Claimant as "the State of Eritrea *on behalf of itself* by virtue of injuries and losses suffered by the State of Eritrea and its nationals (and individuals of Eritrean origin as designated in Article 5, Paragraph 9)" (emphasis added).³

7. In the Partial Award in Eritrea's Civilians Claims, the Commission held that "claims based on injuries to non-nationals made for Eritrea's own account, and not on behalf of the affected individuals, are outside the Commission's jurisdiction."⁴ The same principle applies here. Under the jurisdictional scheme created by Article 5, paragraph 9, of the Agreement, injuries suffered by persons who were not Eritrean nationals at the time of the injury cannot be taken into account in determining Eritrea's own damages. Although the Commission is unaware of the extent to which the damages asserted by Eritrea in Claim 24 involve such injuries, the subsequent remedial phase of the claims process will take into account the nationality of the owners of affected property in determining any damages due to Eritrea.

B. Dual Nationality

8. Ethiopia also contended that certain of Eritrea's claims based upon injuries to persons possessing both the nationality of Eritrea and of a third State are within the Commission's jurisdiction only if Eritrea shows that the Eritrean nationality is the dominant and effective one. Eritrea indeed presented several witness statements describing harassment and intimidation directed against persons having the nationality of a third country (the United States or the Netherlands) when the harassment occurred and when

² Eritrea's Claim 24, Injuries to Private-Property Owners Living Outside of Ethiopia, Memorial, filed by Eritrea on November 1, 2004, p. 66, para. 3.4.

³ Eritrea's Claim 24, Statement of Claim for Injuries to Private-Property Owners Living Outside of Ethiopia, filed by Eritrea on December 12, 2001, p. 1, para. B.1.

⁴ Partial Award in Eritrea's Civilians Claims, *supra* note 1, para. 19.

the claim was submitted. To support its position, Ethiopia relied *inter alia* on Decision No. DEC 32-A18-FT of the Iran-United States Claims Tribunal.⁵

9. Eritrea responded that if a person had both Eritrean nationality and the nationality of a third country, no criterion of dominant and effective nationality conditioned Eritrea's ability to submit claims involving that person. Eritrea considered that in the Partial Award in its Civilians Claims, the Commission had implicitly rejected this condition for expellees with both Eritrean and Ethiopian nationality. Indeed, since the dominant and effective nationality of the expellees probably was Ethiopian, a dominant and effective nationality test would have made it impossible for Eritrea to represent them. Moreover, the extensive case law of the Iran-U.S. Claims Tribunal concerning dual nationals only encompasses cases where the claimant had both U.S. and Iranian nationality. Eritrea argued, referring to some of the scholarly literature on this matter, that the dominant and effective nationality test should be limited to instances where the claimant has the nationality of the two States involved in a dispute settlement procedure.

10. Doctrine is rather divided on this matter. Some authors consider that the notion of dominant and effective nationality has general application, and is not confined to situations involving persons holding the nationality of the two disputing parties.⁶ Other authorities believe its application is limited to such situations.⁷

11. Following the latter approach, the Commission believes that a dominant and effective nationality test must be restrictively applied, and limited to cases where a claimant holds the nationality of the two disputing States. This is because international dispute settlement traditionally requires an international element that is absent if the claim involves a person with the

⁵ The Islamic Republic of Iran and United States of America, Case No. A/18 (Apr. 6, 1984), *reprinted in* 5 Iran- U.S. C.T.R. p. 251 (1985). Ethiopia cited page 265 of the Iran-U.S. Claims Tribunal decision, in which it found that “[the Tribunal] has jurisdiction over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the claimant during the relevant period from the date the claim arose until 19 January 1981 was that of the United States.”

⁶ Ian Brownlie views the notion of dominant and effective nationality as a natural reflection of a fundamental concept which has long been inherent in the materials concerning nationality on the international plane. [...] The recognition is commonly in connection with dual nationality, but the particular context of origin does not obscure its role as a general principle with a variety of possible applications. Several members of the International Law Commission were proponents of the principle (out of the context of dual nationality) during the fifth session. Ian Brownlie, *Principles of Public International Law* p. 396 (Oxford University Press, 6th ed. 2003).

⁷ Paul Weis considers that “the theory of effective or active nationality had been established for the purpose of settling conflicts between two States regarding persons simultaneously vested with both nationalities.” Paul Weis, *Nationality and Statelessness in International Law* p. 184 (Sijthoff & Noordhoff, 2d rev. ed. 1979).

nationality of the defendant State. The test only makes sense as a means to assess whether a claim in an international forum has this predominantly international character. This reasoning also explains why diplomatic protection for claims related to persons with the nationality of both the claimant and the respondent State can only be granted when the first nationality is the most effective and dominant.⁸

C. Detention and Conscription of Drivers

12. Eritrea presented claims for illegal detention and conscription into Ethiopian military service of numerous drivers and their assistants. Ethiopia responded that this issue should have been pleaded and raised in the context of the Civilians Claims proceedings.

13. The Partial Award in Eritrea's Civilians Claims covered the illegal detention and conscription of the drivers and their assistants. Paragraphs 107–122 of that Partial Award addressed and decided claims that Eritreans were wrongly detained and abusively treated during the conflict between the Parties. *Inter alia*, the Commission found Ethiopia liable “[f]or detaining Eritrean civilians without apparent justification, holding them together with prisoners of war, and subjecting them to harsh and inhumane treatment while so held.”⁹ The Commission's Findings on Liability in that Partial Award apply, as the facts of individual cases may warrant, to Eritrean drivers and their assistants detained by Ethiopia. Eritrea's request for a further, separate finding of liability with respect to these persons therefore is not admissible. However, the Commission will consider the evidence presented in connection with Claim 24 during the damages phase.

D. Diversion of Eritrea-bound Cargo

14. Ethiopia objected to the Commission's jurisdiction to hear Eritrea's claims in its Memorial based on losses associated with the diversion of vessels because they were not pleaded with sufficient particularity in Eritrea's Statement of Claim.¹⁰ Ethiopia also considered that these claims fell outside of the Commission's jurisdiction because Eritrea did not allege that they resulted from violations of international humanitarian law or other breach of international law.¹¹ The Commission has examined Eritrea's

⁸ See, e.g., the extensive case law of the Iran-U.S. Claims Tribunal.

⁹ Partial Award in Eritrea's Civilians Claims, *supra* note 1, p. 37, Part XIII.E., para. 10.

¹⁰ Ethiopia cites paragraph 26 of the Partial Award, Prisoners of War, Eritrea's Claim 17 Between the State of Eritrea and the Federal Democratic Republic of Ethiopia (July 1, 2003), saying that “general references” and “generalized allegations” were not “sufficient to give the Respondent fair warning of what it had to answer.” Ethiopia's Counter-Memorial to Eritrea's Claim 24, filed by Ethiopia on January 17, 2005, p. 11, para. 38.

¹¹ Ethiopia's Counter-Memorial, *supra* note 10, p. 12.

Statement of Claim, and agrees that Eritrea's claims relating to alleged losses stemming from diversion of vessels were not stated there. The subsequent assertion of these claims in Eritrea's Memorial constitutes a new claim that was not filed within the one-year filing deadline established by the Agreement. These claims are therefore outside the Commission's jurisdiction.

IV. THE MERITS

15. In its Memorial and during the April 2005 hearings, Eritrea identified the following components of Claim 24:

1. Seizure of movable property (*i.e.*, confiscation of trucks and buses, and diversion of Eritrea-bound cargo);
2. Interference with Eritrean-owned businesses; and
3. Violations of Eritreans' real property rights.

A. Seizures and Other Losses Involving Moveable Property

16. Trucks and buses. Eritrea contended that shortly after hostilities began, the Ethiopian authorities launched a wave of systematic confiscation of trucks with Eritrean registrations and of trucks with Ethiopian registrations owned by Eritreans. The confiscations were mainly accomplished by Ethiopian military, police or customs personnel. No compensation was provided, either at the time of seizure or subsequently.

17. Eritrea submitted ample evidence showing the widespread confiscation of trucks. This included 73 declarations describing the confiscation of trucks and trailers with Eritrean plates for which the owners received no compensation whatsoever. Nineteen declarations described the confiscation of trucks with an Ethiopian license plate, but belonging to Eritrean nationals. Eritrea submitted additional documentary evidence, including Ethiopian official correspondence, consistent with these declarations. Some Eritrean witnesses also described the application of a double-standard policy *vis-à-vis* trucks with Eritrean plates and those bearing Ethiopian plates: in a first phase, only Eritrean licensed trucks were prohibited from operating in Ethiopia.

18. In a significant number of witness statements, the owners explained that they complained about the seizure of their trucks to different Ethiopian entities, in particular the Ministry of Transport. All the accounts converge regarding the lack of help provided by the Ministry.

19. Eritrea's evidence with regard to the confiscation of buses was much more limited. Eritrea submitted five declarations involving confiscation of Eritrean-owned buses without compensation. These declarations do not indicate whether the buses had Eritrean or Ethiopian plates.

20. Ethiopia denied Eritrea's allegations. It argued that Eritrea's evidence was mainly based on "unverifiable second hand sources," identify-

ing 17 Eritrean declarations said to illustrate this weakness. Ethiopia also presented a statement by an Ethiopian official who acknowledged that 4,000 trucks with Ethiopian license plates were requisitioned during the hostilities, including some belonging to Eritreans. However, this witness maintained that in nearly all instances, compensation was paid, including to Eritrean owners. He testified that compensation had not been paid with respect to just 78 Eritrean-owned trucks because the owners had not appointed legal representatives in Ethiopia. These trucks were said to be in safe custody.

21. The Commission sees a clear imbalance between the numerous consistent and often detailed witness statements presented by Eritrea, the majority referring to trucks with Eritrean plates, and the rebuttal statement by a single Ethiopian official admitting only confiscation of trucks with Ethiopian license plates. The Commission acknowledges the possibility that trucks with Ethiopian license plates were returned or compensated (except for 78 owned by Eritreans). There is no inconsistency between Ethiopia's admission that 78 Eritrean-owned trucks with Ethiopian license plates have not been compensated or returned to their Eritrean owners, and the 19 declarations about such Eritrean-owned Ethiopian trucks submitted by Eritrea. Nevertheless, the Ethiopian declaration that no Eritrean trucks were seized is not sufficient to rebut the 73 declarations and other evidence Eritrea has submitted.

22. Considering the totality of the record, the Commission concludes that the evidence establishes a systematic confiscation of trucks, for which no compensation was provided, including trucks with Eritrean plates as well as those with Ethiopian plates but owned by Eritreans. Even though the evidence presented with regard to the confiscation of buses is less extensive, the Commission believes that it supports a similar conclusion.

23. Eritrea contended that Ethiopia's widespread confiscation of Eritrean-registered or owned trucks and buses was discriminatory and in itself contrary to international law. The Commission does not agree. The confiscation of heavy vehicles for use by State agencies in a time of war, even if it were confined to vehicles owned by nationals of the opposing State, is not *per se* contrary to international law. Given the circumstances facing Ethiopia, and the limited range of transportation assets available for military and other public purposes, its acts of confiscation appear in principle to have been for legitimate public purposes and consistent with international law applicable during an international armed conflict.

24. As the Commission indicated in the Partial Award in Eritrea's Civilians Claims, belligerents have "substantial latitude to place freezes or other discriminatory controls on the property of the nationals of the enemy State or otherwise to act in ways contrary to international law in time of peace."¹² However, as the Parties agreed in connection with their

¹² Partial Award in Eritrea's Civilians Claims, *supra* note 1, para. 124.

respective Civilians Claims, the basic international legal rules regulating expropriation nevertheless continue to apply.¹³ Where aliens' property is taken for State purposes in wartime, the obligation to provide full compensation continues to operate, even if the payment of that compensation may be delayed by the interruption of economic relations between belligerents. Accordingly, the Commission finds Ethiopia liable for failing to pay full compensation for those Eritrean-owned trucks and buses, of both Eritrean and Ethiopian registry, requisitioned by Ethiopia during the conflict and not returned to their owners.

25. Diversion of Eritrea-bound Cargo. In its Memorial, Eritrea contended that the diversion of ships containing Eritrea-bound cargo resulted in the partial or total loss of Eritrean-owned goods, and sometimes in extra costs for the trans-shipment of goods from Djibouti to Eritrea. Ethiopia responded that the diversion of cargo did not violate any rules of international law.

26. The Commission determined earlier that these claims were not included in Eritrea's Statement of Claim, and accordingly, were not within the Commission's jurisdiction.¹⁴ Nevertheless, had this claim fallen within the Commission's jurisdiction, it would have been rejected on the merits. The evidence proved that when hostilities began in May 1998, the Ethiopian Ministry of Transport and Communications instructed different shipping companies, including the state-owned Ethiopian Shipping Lines ("ESL"), to divert ships bound for Assab and Massawa to Djibouti. However, Eritrea failed to prove any violation of international law or humanitarian law with regard to the diversion of Eritrea-bound cargo. The outbreak of a conflict is bound to alter the economic and commercial relationships between the belligerents. In this respect, the prohibition of any trade with the enemy by governmental authorities is neither unusual, nor unlawful.¹⁵ The Commission is also mindful of the risk to ESL or any other Ethiopian operators of having their ships confiscated as enemy property upon entering Eritrean ports. The basis for resolving such claims does not lie in international law or humanitarian law, but in the private law applicable between the shipping companies and those who suffered from the diversion of cargo.

B. Interference With Businesses and Immovable Property in Ethiopia Owned by Non-Resident Eritreans

27. Eritrea contended that Ethiopia interfered with the rights of Eritreans living outside of Ethiopia who owned businesses or real property in Ethiopia through the following measures:

¹³ *Id.*

¹⁴ *Supra*, para. 14.

¹⁵ See, e.g., Vol. IV *Encyclopedia of Public International Law* pp. 1365–1366 (Rudolf Bernhardt ed., Elsevier 2000).

1. Detention and intimidation of Eritrean property owners temporarily present in Ethiopia;
2. Expulsion of Eritrean-origin agents and employees of non-residents' businesses; and
3. Ethiopia's refusal to issue visas and facilitate the appointment of new agents.

28. This aspect of Claim 24 substantially duplicates issues that were pleaded and decided with respect to expellees' property in the Partial Award in Eritrea's Civilians Claims,¹⁶ and that Partial Award serves as the basis for much that follows. The Commission notes, however, that the evidence submitted by Eritrea in support of this portion of Claim 24 is less extensive and precise than that submitted in the earlier Civilians proceedings regarding expellees' property losses.

29. The Commission acknowledges that the outbreak of a war will undoubtedly decrease business-related activities. Nevertheless, even though the operation of businesses owned by nationals of an opposing belligerent and the distribution to owners of business profits and of rental payments for real property may lawfully be suspended during the hostilities, confiscation of assets or other measures making a business property a *res derelicta* without compensation are not acceptable. In this respect, Eritrea presented convincing if limited evidence of Ethiopian harassment of Eritrean nationals or third State nationals of Eritrean origin attempting to act to protect their property.

30. Regarding the expulsion of Eritrean-origin agents and employees of non-residents, as well as Ethiopia's restrictive policies on visas and the appointment of new agents, the Commission considers that the relevant conclusions of the Partial Award in Eritrea's Civilians Claims must be applied. Thus, Eritrea's claims with regard to these individual measures are dismissed on the merits.

31. Nevertheless, the Commission believes that the collective impact of Ethiopia's measures on non-resident business and real property owners must be considered. War gives belligerents broad powers to deal with the property of their enemy's nationals, but these are not unlimited. As the Commission held in the Partial Award in Eritrea's Civilians Claims, a belligerent is bound to ensure insofar as possible that the property of protected persons and of other enemy nationals are not despoiled and wasted. If private property of enemy nationals is to be frozen or otherwise impaired in wartime, it must be done by the State, and under conditions providing for the property's protection and its eventual disposition by return to the owners or through post-war agreement.¹⁷

¹⁶ See, e.g., Partial Award in Eritrea's Civilians Claims, *supra* note 1, paras. 123–152 (dealing with deprivation of expellees' property).

¹⁷ *Id.* at para. 151.

32. The record shows that Ethiopia did not meet these responsibilities. As a result of the cumulative effects of the measures discussed above, many non-resident business and real property owners, including some with substantial assets, lost virtually everything they had in Ethiopia. The lawfulness of some of the measures applied by Ethiopia does not preclude that their cumulative effect resulted in the despoliation of non-residents' properties. "By creating or facilitating this network of measures, Ethiopia failed in its duty to ensure the protection of aliens' assets."¹⁸

33. It must be noted that the Commission acknowledges the difficulties that could arise in the second phase of its work with regard to the valuation of business properties owned by non-resident Eritrean nationals. As they were considered enemy nationals, the decrease in their business activity and the value of associated assets might prove to be more acute than for the Ethiopian population.

V. AWARD

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

A. Jurisdiction

1. Eritrea's claims based on injuries to non-nationals made for Eritrea's own account, and not on behalf of the affected individuals, are outside the Commission's jurisdiction.

2. The Commission has jurisdiction with respect to claims involving persons who are dual nationals with the nationality of Eritrea and of a third State. Where dual nationals hold both Eritrean and Ethiopian nationality, the Commission will apply the test of dominant and effective nationality for purposes of determining its jurisdiction.

3. Eritrea's request for a finding of liability concerning Eritrean drivers and their assistants detained in Ethiopia has been addressed in the Partial Award in Eritrea's Civilians Claims and is not admissible in this Claim.

4. Eritrea's claims for damages relating to diversion of Eritrea-bound cargo were not timely filed and are outside the Commission's jurisdiction.

B. Findings on Liability for Violations of International Law

The Respondent is liable to the Claimant for the following violations of international law involving acts or omissions by its civilian officials, military personnel or others for whose conduct it is responsible:

¹⁸ *Id.* at para. 152.

1. For failing to provide full compensation for trucks and buses owned by Eritreans that were requisitioned by Ethiopia during the conflict and were not returned to their owners.

2. 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 businesses and immovable property in Ethiopia of non-resident Eritreans, contrary to Ethiopia's duty to ensure the protection of aliens' assets.

3. All other claims presented in this case are dismissed.

Done at The Hague, this 19th day of December 2005.

[*Signed*] PRESIDENT HANS VAN HOUTTE

[*Signed*] GEORGE H. ALDRICH

[*Signed*] JOHN R. CROOK

[*Signed*] JAMES C.N. PAUL

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