

ERITREA-ETHIOPIA CLAIMS COMMISSION

PARTIAL AWARD

Diplomatic Claim
Eritrea's Claim 20

between

The State of Eritrea

and

The Federal Democratic Republic of Ethiopia

By the Claims Commission, composed of:

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George H. Aldrich
John R. Crook
James C.N. Paul
Lucy Reed

The Hague, December 19, 2005

PARTIAL AWARD—Diplomatic Claim—Eritrea's Claim 20
between the Claimant,
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Government of Eritrea

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I. INTRODUCTION

A. Summary of the Positions of the Parties

1. This Claim (“Eritrea’s Diplomatic Claim”) has been brought to the Commission by the Claimant, the State of Eritrea (“Eritrea”), pursuant to Article 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of December 12, 2000 (“the Agreement”). The Claimant asks the Commission to find the Respondent, the Federal Democratic Republic of Ethiopia (“Ethiopia”), liable for loss, damage and injury suffered by Eritrea from the injuries sustained by the Eritrean diplomatic mission and consular posts and personnel in Ethiopia, including its accredited representative to the Addis Ababa based headquarters of the Organization of African Unity (“OAU”) and the United Nations Economic Commission for Africa (“UNECA”), as a result of the Respondent’s alleged violations of the international law of diplomatic and consular relations. The Claimant requests monetary compensation and additional remedies, including orders that Ethiopia desist from interference with Eritrean diplomatic personnel and restore the Embassy Residence to Eritrea.

2. The Respondent asserts that it fully complied with international law in its treatment of Eritrea’s diplomatic and consular missions and personnel in Ethiopia. The Respondent requests the Commission to dismiss Eritrea’s Claim 20 in its entirety and, in any event, to reject Eritrea’s requests for non-monetary compensation.

B. General Comment

3. As described in the Commission’s previous Partial Awards,¹ the Parties waged a costly, large-scale international armed conflict along several areas of their common frontier between 1998 and 2000. The Parties’ diplomatic relations obviously could not and did not continue unscathed. This Partial Award and the companion Partial Award issued today in Ethiopia’s Claim 8 (“Ethiopia’s Diplomatic Claim”) contain findings of violations of international diplomatic law, more or less serious, by both Parties.

¹ Partial Award, Prisoners of War, Eritrea’s Claim 17 Between the State of Eritrea and the Federal Democratic Republic of Ethiopia (July 1, 2003); Partial Award, Prisoners of War, Ethiopia’s Claim 4 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (July 1, 2003); Partial Award, Central Front, Eritrea’s Claims 2, 4, 6, 7 & 22 Between the State of Eritrea and the Federal Democratic Republic of Ethiopia (April 28, 2004); Partial Award, Central Front, Ethiopia’s Claim 2 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (April 28, 2004); 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 Civilians Claims]; Partial Award, Civilians Claims, Ethiopia’s Claim 5 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (Dec. 17, 2004).

4. However, at the outset, the Commission wishes to stress the Parties' commendable decisions not to sever diplomatic links despite the armed conflict. One need only recall Oppenheim to appreciate the truly exceptional character of this situation:

The outbreak of war at once causes the rupture of diplomatic intercourse between the belligerents, if this has not already taken place. The respective diplomatic envoys are recalled.²

5. Following the interruption of diplomatic relations in wartime, a common practice has been for States to entrust residual diplomatic and consular functions to diplomatic representatives of neutral States acting as their protecting powers.³ While it is conceivable that the appointment of neutral States serving as protecting powers in the circumstances here might have provided more effective diplomatic and consular and other services than were provided by the Parties' respective diplomatic missions, the fact is that Eritrea and Ethiopia chose instead to attempt to maintain diplomatic relations throughout the war, despite unavoidable friction and even great personal risk for diplomats and staff.

6. Having said this, and as amplified in the section below on Applicable Law, this unusual situation has created unusual challenges for the application of diplomatic law. Certain of the core functions of a diplomatic mission—for example, “promoting friendly relations between the sending State and the receiving State” as set out in Article 3, paragraph (c), of the Vienna Convention on Diplomatic Relations⁴—become obviously incongruous in wartime. Certain of the premises of effective diplomatic representation—for example, free travel, free access, intelligence gathering, ability to influence public opinion—cannot be presumed to continue without strain during hostilities.

II. PROCEEDINGS

7. 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. Eritrea filed this Claim on December 12, 2001, and Ethiopia filed its Statement of Defense on April 15, 2002. Eritrea's Memorial was filed on November 1, 2004, Ethiopia's Counter-Memorial on January 17, 2005, and

² Vol. II, *Oppenheim's International Law* Sect. 98 (Hersch Lauterpacht ed., Longmans, 7th ed. 1952).

³ See Leslie C. Green, *The Contemporary Law of Armed Conflict* p. 81 (Manchester University Press, 2d ed. 2000). The tasks of protecting powers under the 1977 Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (“Protocol I”) are more extensive than those traditionally performed by neutral diplomats representing an adverse party. *Id.*

⁴ Vienna Convention on Diplomatic Relations, April 18, 1961, 500 U.N.T.S. p. 95.

Eritrea's Reply on March 10, 2005. A hearing on liability was held at the Peace Palace during the week of April 4–8, 2005 in conjunction with a hearing in Ethiopia's Diplomatic Claim during the week of April 11–15, 2005.

III. JURISDICTION

8. Article 5, paragraph 1, of the Agreement establishes the Commission's jurisdiction. It provides, *inter alia*, that the Commission is to decide through binding arbitration claims for all loss, damage or injury by one Government or its nationals against the other that are related to the earlier conflict between them and that result from "violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law." Article 5, paragraph 8, of the Agreement requires claims to be filed by December 12, 2001.

9. In its Counter-Memorial, the Respondent challenges the Commission's jurisdiction over certain claims asserted by Eritrea in its Memorial that, according to the Respondent, were not included in Eritrea's Statement of Claim for its Claim 20 filed on December 12, 2001. As stated in the Commission's prior Partial Awards, the Parties agree that claims not filed with the Commission by that date were extinguished by the terms of Article 5, paragraph 8, of the Agreement. The task of the Commission, therefore, is to determine whether Eritrea has pursued claims here that were not included in its Statement of Claim.

10. The following claims asserted by Eritrea in its Memorial are subject to this jurisdictional challenge:

1. Alleged claims relating to the Eritrean Consulates in Mekelle and Aysa'ita;
2. Alleged restrictions on Eritrean Embassy funds and enforcement of court judgments against Embassy accounts; and
3. Alleged interference with Eritrean participation in OAU and UNECA meetings.

11. Upon study of Eritrea's Statement of Claim, the Commission agrees that the first and second of these claims were not identified or alluded to in the Statement of Claim. Consequently, they were extinguished pursuant to Article 5, paragraph 8, of the Agreement and the Commission cannot consider them.

12. Turning to the third claim, it bears mention that Ethiopia does not challenge the clarity with which Eritrea objected in the Statement of Claim to the allegedly wrongful expulsion of Eritrean Ambassador Ghirma Asmeron both as its bilateral ambassador to Ethiopia and as its accredited representative to the OAU and UNECA. Ethiopia's jurisdictional challenge here goes only to Eritrea's pursuit of a claim based on Ethiopia's alleged interference with Eritrea's effective participation in the OAU

and UNECA. Although it is true that Eritrea did not explicitly allege in the Statement of Claim that Ethiopia interfered *per se* with Eritrea's participation in the OAU and UNECA in Addis Ababa, the Commission considers this clear in the context of Eritrea's objections to Ambassador Ghirma's expulsion. Eritrea did specifically object to the impact of the Ambassador's departure on his roles as Eritrea's representative to the OAU and UNECA. Eritrea asserted in the Statement of Claim (at paragraph 6) that, when ordered to leave Ethiopia, "Ambassador Ghirma protested that he was also accredited to the OAU and thus Ethiopia was required to permit him to remain in Addis Ababa in order to *perform his responsibilities in relation to that body*" (emphasis added). Eritrea also specifically identified the OAU Charter and the OAU Headquarters Agreement as part of the applicable international law allegedly violated by Ethiopia. Accordingly, the Commission finds that Ethiopia had "fair warning" of the nature of this claim as envisioned by Article 24, paragraph 3, subparagraph (d), of the Commission's Rules of Procedure, and so denies the Respondent's request to dismiss this claim for lack of jurisdiction.

13. All other claims asserted by the Claimant in this proceeding are within the jurisdiction of the Commission.

IV. THE MERITS

A. Applicable Law

14. Under Article 5, paragraph 13, of the Agreement, "in considering claims, the Commission shall apply relevant rules of international law." Article 19 of the Commission's Rules of Procedure defines the relevant rules in the familiar language of Article 38, paragraph 1, of the Statute of the International Court of Justice. Article 19 directs the Commission to look to:

1. International conventions, whether general or particular, establishing rules expressly recognized by the parties;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognized by civilized nations;
4. Judicial and arbitral decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

15. Both Parties rely upon the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963,⁵ which largely codify customary international diplomatic and consular law, as the sources of applicable law for the Diplomatic Claims. Although Ethiopia is not a party to the latter, there is no need to apply it because the Claimant's late-

⁵ Vienna Convention on Consular Relations, April 24, 1963, 596 U.N.T.S. p. 262.

filed claims concerning the Consulates in Mekelle and Aysa'ita fall outside the Commission's jurisdiction.

16. As the International Court of Justice underscored in the Case Concerning United States Diplomatic and Consular Staff in Tehran, the fundamental requisite for the conduct of relations between States is the inviolability of diplomatic envoys and premises "[e]ven in the case of armed conflict."⁶ Articles 22 and 29 of the Vienna Convention on Diplomatic Relations provide:

Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

17. In its defense to Eritrea's Diplomatic Claim and in its own Diplomatic Claim, Ethiopia takes the position that a state of war must modify the application of international diplomatic law. In comparison, Eritrea argues for strict application of the standards in the Vienna Convention on Diplomatic Relations despite a state of war.

18. There is little jurisprudence on the points at issue in the Diplomatic Claims because, as noted in the Introduction to this Partial Award, nations engaged in armed conflict typically sever their diplomatic relations, withdraw their emissaries and close their missions, and rely on protecting powers for the protection of their property and for consular functions. The Vienna Convention on Diplomatic Relations contemplates this and such State practice as exists tends to focus on the disruptive impact of war on diplomatic relations, for example, on the orderly closing of the sending State's mission and the receiving State's obligations to safeguard the other's diplomatic premises until the end of hostilities.

⁶ United States Diplomatic and Consular Staff in Tehran (*United States v. Iran*), 1980 I.C.J. p. 3, at para. 86 (Judgment, May 24, 1980).

19. Here, as noted, the Parties, first, exceptionally attempted to maintain diplomatic relations despite the strain unavoidably put by the war on the principles embodied in the Vienna Convention on Diplomatic Relations and, second, have agreed that the Convention nonetheless governs the Parties' Diplomatic Claims. The Commission therefore faces the task of considering how the principles in the Convention should be construed and applied in the course of the Parties' armed conflict.

20. These are largely uncharted legal waters. However, the Commission does not accept that the Parties could derogate from their fundamental obligations under the Vienna Convention on Diplomatic Relations, notably those relating to the inviolability of diplomatic agents and premises, because of the exigencies of war. Neither Party can complain that abiding by such obligations was incompatible with its heightened security interests during the conflict, because each was free at all times to relieve itself of such obligations by unilaterally terminating diplomatic relations with the other. Diplomacy is premised on reciprocity and, as set forth in Article 2 of the Vienna Convention on Diplomatic Relations, "[t]he establishment of diplomatic relations. . . . takes place by mutual consent."

21. While unilateral derogations from key obligations are not authorized, the foundational principle of diplomatic reciprocity provides some guidance to the Commission in assessing the Parties' application of the Vienna Convention on Diplomatic Relations during an armed conflict. Accepting that a receiving State must have somewhat greater latitude in wartime to monitor and even to limit activities of the diplomatic mission of an enemy, the Commission has taken particular note of the specific manner in which both Parties performed their diplomatic obligations during the conflict. The Commission, not surprisingly, has found broadly corresponding compliance and noncompliance in certain areas. As cautioned above, this is not to say that matching violations of fundamental obligations under the Vienna Convention on Diplomatic Relations can cancel each other out. It is to say that, in dealing with the uncertainties generated by the Parties' reciprocal (and laudable) decisions to maintain diplomatic relations despite the war, reciprocity can provide a helpful indicator in applying the flexibility provided in the Convention, for example, in assessing the reasonableness of the deadlines set for the departure of diplomats and the level of monitoring of each other's diplomats.

22. A critical standard for the Commission in applying international diplomatic law must be the impact of the events complained about on the functioning of the diplomatic mission. Particularly in light of the limited resources and time allocated to this Commission and the serious claims of international humanitarian law violations presented by the Parties, and remaining attentive to the principle of reciprocity, the Commission again is

constrained to look for serious violations impeding the effective functioning of the diplomatic mission.

23. Other sources of applicable law in Eritrea's Diplomatic Claim include the primary documents of the Organization of African Unity and the United Nations Economic Commission for Africa, including the OAU Charter,⁷ the OAU Headquarters Agreement,⁸ the UNECA Headquarters Agreement,⁹ and the OAU Privileges and Immunities Convention.¹⁰

B. Evidentiary Issues

24. As in its prior Partial Awards, the Commission requires clear and convincing evidence in support of its findings.

25. The Claimant submitted 17 witness declarations in support of this Claim. The Respondent submitted six witness statements (some previously submitted in its Claim 5 regarding the treatment of civilians ("Ethiopia's Civilians Claims")) and 18 documentary or legal exhibits. The Claimant presented Mr. Tesfu Haile Kifle, formerly the driver for Ambassador Ghirma, as a witness on this Diplomatic Claim at the April 2005 hearing.

26. As an initial matter, the Commission notes that each Party objects to the other's heavy reliance on the witness statements of its head (or heads) of mission, while simultaneously relying heavily on its own. Reliance on such statements is bound to be the case in these Diplomatic Claims, where the Ambassador or Chargé d'Affaires has played such an overarching role. The Commission has given balanced weight to these declarations from both Parties.

C. Categories of Claims

27. Eritrea organized its argument and evidence in this Diplomatic Claim into three categories, as follows:

1. Alleged illegal expulsion of diplomatic and consular agents and staff;

⁷ Charter of the Organization of African Unity, Addis Ababa, May 25, 1963, 479 U.N.T.S. p. 39.

⁸ *Agreement Between the Imperial Ethiopian Government and the Organization of African Unity Regarding the Headquarters of the Organization of African Unity*, Addis Ababa, July 6, 1965, Ethiopia's Counter-Memorial to Eritrea's Claim 20, filed by Ethiopia on January 17, 2005 [hereinafter ET Diplomatic C-M], Documentary Annexes, Vol. II, TAB 20.

⁹ *Agreement Between the United Nations and Ethiopia Regarding the Headquarters of the United Nations Economic Commission for Africa*, Addis Ababa, June 18, 1958, ET Diplomatic C-M, *supra* note 8, Documentary Annexes, Vol. II, TAB 21.

¹⁰ General Convention on the Privileges and Immunities of the Organization of African Unity, adopted by the Assembly of Heads of State and Government, Accra, Oct. 25, 1965.

2. Alleged seizure of the Embassy Residence and detention of personnel; and
3. Alleged interference with Embassy and Consulate operations.

The Commission will address the claims in the categories and order adopted by the Claimant, with one exception. The Commission will address last the distinct issue of alleged interference with Eritrea's participation in OAU and UNECA meetings, which Eritrea included in its first category of claims.

28. The Commission will not address the merits of the claims concerning consular personnel and operations because, as explained above, all claims concerning the status and treatment of the Mekelle and Aysa'ita Consulates under international diplomatic and consular law were not timely filed, and so were extinguished. To the extent that individual consular officers, staff and family members fall within the categories for which the Commission assessed liability in the Partial Award in Eritrea's Civilians Claims, Eritrea may assert damages claims with respect to them in the damages phase in that case.

D. Expulsion of Diplomats and Staff

29. Eritrea includes three main complaints under this category of alleged expulsion: (a) the short length of time allowed by Ethiopia for the departure of Eritrean diplomats and staff; (b) Ethiopian treatment of such personnel during departure; and (c) the size and makeup of the Eritrean mission following the departures. Each raises different considerations.

30. It is undisputed that, shortly after the armed conflict began in May 1998, Ethiopia ordered Ambassador Ghirma to reduce the diplomatic staff to three (himself and two others), declared all but those three *persona non grata* and ordered them to depart the country within 48 hours. The diplomats apparently did depart via the airport within the deadline, albeit without all of their property. Ethiopia also ordered the summary departure of most of the mission service staff, most if not all of whom were local hires of Eritrean origin. In February 1999, after Ethiopia initiated a counteroffensive in the Badme region, Ethiopia declared the Ambassador himself *persona non grata* and gave him 24 hours (later extended to 25 hours) to depart. Following unsuccessful demarches to Ethiopia and the OAU, the Ambassador departed by plane.

31. The Commission does not understand that the Claimant objects *per se* to the Respondent's declaring Ambassador Ghirma and other diplomatic staff *persona non grata*. Nor could it. Article 9 of the Vienna Convention on Diplomatic Relations, which concerns the receiving State's rights to declare diplomatic staff *persona non grata*, provides:

1. The receiving State may at any time and without having to explain its decision notify the sending State that the head of the mission or any member

of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out the obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.

1. Length of time for departure

32. Eritrea alleges that the 25-hour and 48-hour departure periods for the Ambassador and diplomatic staff, respectively, were unreasonably short under Article 9, paragraph 2, of the Vienna Convention on Diplomatic Relations because the deadlines did not allow the diplomats adequate time to close out their professional and personal affairs. In response, Ethiopia identifies several instances in which receiving States have allowed even shorter departure intervals.

33. Particularly given the circumstances of the armed conflict, the Commission cannot find a violation of international diplomatic law by reason of the time periods allowed for Ambassador Ghirma and other diplomats to depart Ethiopia. The evidence reflects that the diplomats were able to gather family members and transportable belongings within the time allotted for departure. The Commission also takes note that Eritrea itself allowed the diplomatic staff of the Ethiopian Embassy 48 hours to depart Asmara in June 1998.

34. The Commission has some reservations as to whether the 25-hour limit applied to the Ambassador allowed Eritrea sufficient time to pursue its alleged desire to have him remain in Addis Ababa as its representative to the OAU and UNECA, despite his loss of his bilateral privileges and immunities under Articles 9 and 39 of the Vienna Convention on Diplomatic Relations. The Commission need not resolve this issue because, as discussed below, the Claimant's international organization representation claim is dismissed.

2. Treatment of diplomatic personnel during departure

35. In sharp comparison with the issue of the time period, the Commission does find violations of the Vienna Convention on Diplomatic Relations with respect to the Respondent's treatment of the Eritrean diplomats during their departures. In addition to Article 29 (quoted above) concerning the violability of diplomatic agents, Article 36, paragraph 2, provides that the personal baggage of diplomatic agents is exempt from search unless there are serious grounds for presuming it contains non-exempt articles. Diplomats declared *persona non grata* are entitled to full

privileges and immunities in the receiving State until they are recalled or their functions are terminated after a reasonable time.

36. Eritrea presented detailed and corroborated evidence, from the Embassy consul and others, that Ethiopian security officials physically searched diplomats and their luggage at the airport before they departed. Most troubling is Ambassador Ghirma's detailed account of being pulled out of the boarding line and taken to a separate room by armed Ethiopian security agents, who then searched his hand luggage, confiscated papers from his briefcase and attempted to search his person, despite his (correct) assertion of his continuing diplomatic privileges and immunities. He was never able to collect luggage he checked in Addis Ababa. Ethiopia's general denials do not overcome Eritrea's *prima facie* case of blatant breaches of the inviolability of the head of the mission and diplomatic staff in these instances under Articles 36 and 29 of the Vienna Convention on Diplomatic Relations.

37. The Commission dismisses for failure of proof the Claimant's related allegations that Ethiopian security officials searched the personal residences and vehicles of departing diplomats, interfered with their efforts to retrieve their personal property and confiscated personal property, which are supported only by broad witness declarations based on hearsay. The Commission notes that the treatment allegedly accorded by Ethiopia to the departing Eritrean diplomats in this regard approximated that allegedly accorded by Eritrea to Ethiopian diplomats departing Asmara.

3. Size and make-up of the mission

38. Although Ethiopia ordered Eritrea to limit its diplomatic staff to three, as matters actually developed Eritrea was left with only two diplomats: Ambassador Ghirma and the Deputy Chief of Mission, later elevated to Chargé d'Affaires on Ambassador Ghirma's departure. Eritrea's evidence demonstrated that Ethiopia initially accepted Eritrea's proposal of a named individual to be the third diplomat but, after the other diplomatic staff had departed Addis Ababa, also ordered that individual to depart as *persona non grata*. Ethiopia allegedly then proceeded to reject the three other allegedly proposed candidates for the third position, who go unidentified in Eritrea's evidence.

39. The Respondent's two-diplomat limit and expulsion of most of the locally-hired service staff, according to the Claimant, brought the functioning of the Eritrean Embassy to a near standstill. Eritrea claims that Ethiopia's policies violated Article 11 of the Vienna Convention on Diplomatic Relations, under which the receiving State "may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the State and to the needs of the particular mission." Eritrea asserts that the skeletal diplomatic and service staff allowed by Ethiopia was unreasonable, particularly given the increased consular, nego-

tiation and press responsibilities faced by the mission during the war. Eritrea recognizes that service staff have limited immunities, but relies on the prescription in Article 38, paragraph 2, of the Vienna Convention on Diplomatic Relations that the receiving State must exercise its jurisdiction over its nationals who are non-diplomatic staff “in such a manner as not to interfere with the performance of the functions of the mission.”

40. As for the number of diplomats, Ethiopia bases its defense on its absolute discretion under Article 9 of the Vienna Convention on Diplomatic Relations to declare diplomatic agents *persona non grata* without reason. Ethiopia identified Eritrea's first and subsequent candidates as individuals who had already been declared *persona non grata* and hence not even proposals worthy of consideration; the Claimant presented no evidence rebutting this. As for the service staff, Ethiopia contends that it reasonably exercised its prerogative to limit the size of the mission under Article 11 of the Convention.

41. The Commission finds no violation of the Vienna Convention on Diplomatic Relations in the Respondent's setting of the size and make-up of the Claimant's mission staff. Although Ethiopia's initial acceptance and subsequent rejection of the first candidate for the third diplomatic position undoubtedly inconvenienced Eritrea, Ethiopia correctly relies on its discretion under Article 9 of the Vienna Convention on Diplomatic Relations to reject proposed staff previously declared *persona non grata*. Overall, Eritrea presented insufficient evidence to prove that the small size of the Embassy staff allowed by Ethiopia—which, it appears from the record, was no smaller than Eritrea allowed the Ethiopian Embassy in Asmara—left it unable to perform its diplomatic functions. The record reflects that the Eritrean mission was able to function, at least at a basic level, with two diplomats, one driver, and four guards. Even after the Chargé became the sole diplomat upon Ambassador Ghirma's departure—which, the Commission notes, left him in the same situation as the Ethiopian Chargé in Asmara—the record reflects that he was able to perform basic diplomatic and consular tasks in Addis Ababa. The Commission does not agree with Eritrea that wartime mandates a larger Embassy staff. If anything, once warring States have agreed to attempt to keep their Embassies operating, the receiving State must have a legitimate interest in limiting the presence of the sending State diplomats in its territory.

42. The Commission acknowledges the clear and convincing evidence in the record that members of the Eritrean Embassy service staff were among the first persons of Eritrean origin to be denationalized and expelled from Ethiopia under the conditions described in the Commission's Partial Award in Eritrea's Civilians Claims. To the extent that individual staff and family members fall within the categories for which the Commission assessed liability in that Partial Award, Eritrea may assert damages claims with respect to them in the damages phase in that case.

E. Seizure of the Embassy Residence and Detention of Personnel

43. Eritrea alleges that Ethiopia entered and seized the Embassy Residence and took diplomatic property shortly after Ambassador Ghirma's departure in February 1999, in violation of Article 22 of the Vienna Convention on Diplomatic Relations. Article 22, quoted above, proclaims the inviolability of mission premises, which are defined in Article 1, paragraph (i), to include the residence of the head of mission.

44. Eritrea submitted witness declarations from the Chargé, the Embassy driver and the guard on duty, each describing in detail his experience on the two days following Ambassador Ghirma's departure. According to the witnesses, armed Ethiopian security agents tried to enter the Residence premises on the day after the Ambassador left, apparently to take possession of the house and its contents. They departed after the Chargé protested and refused to let them in. The next day, the driver took the Chargé to seek assistance from the OAU Secretary General. On their return about one hour later, armed Ethiopian security officials and soldiers already inside the Residence compound refused them entry. According to the guard, they had come over the fence, broken doors and windows to enter the Residence and abducted the staff. The guard was imprisoned, but was brought back to the Residence 17 days later and asked to direct the security agents to contraband allegedly located there. On that visit he observed that the Residence had been ransacked and the garden dug up, and that three Embassy cars, the Ambassador's personal car, books, papers and personal items, including the guard's belongings, were missing. Despite the Chargé's protests to the Ethiopian Ministry of Foreign Affairs and the OAU, Ethiopia has never returned the Residence.

45. Ethiopia denies entering, searching or taking items from the Residence, but admits, to use the Respondent's term, "sealing off" the Residence from Eritrean use. Ethiopia alleges that it did not violate international law by taking this step because it had "credible internal intelligence and national security reports"¹¹ that Eritrea was using the Residence for illegal purposes, specifically to stockpile weapons and to counterfeit money for its war effort. Ethiopia supported its defense only with conclusory witness declarations, choosing not to submit copies or excerpts from the alleged intelligence and national security reports. Ethiopia challenged the credibility of the Claimant's witnesses on grounds of discrepancies in dates and timing in their declarations.

46. The Commission concludes that, even with minor discrepancies between the Claimant's witness declarations, Eritrea has presented clear and

¹¹ Ethiopia's Counter-Memorial to Eritrea's Claim 20, filed by Ethiopia on January 17, 2005, para. 92.

convincing evidence that Ethiopian security agents entered, ransacked, searched and seized the Eritrean Embassy Residence, as well as vehicles and other property, without Eritrea's consent. Ethiopia's general factual denials do not overcome Eritrea's *prima facie* case. Even if the Respondent had presented evidence supporting the reasonableness of its suspicion of criminal activity taking place in the Residence, for example, by submitting redacted intelligence reports, there would still be no legal defense for Ethiopia's admitted "sealing off" of the Residence in the face of such suspected illegal activity without Eritrea's consent. The Residence, as part of the diplomatic premises, is absolutely inviolable under Article 22 of the Vienna Convention on Diplomatic Relations.

47. This conclusion does not mean that Ethiopia was defenseless in the face of allegedly illegal Eritrean activity in the Residence. Ethiopia was at all times free to terminate diplomatic relations with Eritrea and hence to close its mission, including the Residence, subject to Ethiopia's obligations under Article 43, paragraph (a), of the Vienna Convention on Diplomatic Relations to "respect and protect the premises of the mission, together with its property and archives." What Ethiopia could not legally do was unilaterally take possession of and "seal off" the Residence while diplomatic relations continued and the head of mission demanded access to it.

48. Ethiopia's alleged detention and torture of persons abducted from the Residence poses a less clearcut situation under the applicable international diplomatic law. The evidence, while limited, is detailed and convincing. In his witness declaration, the guard testified that he and his teenaged son (who submitted no statement) were detained in a criminal prison for six months under inhuman conditions, during which time the guard was repeatedly beaten and tortured. The guard ultimately was bussed to the border with Eritrea and released. The alleged fate of the Chargé's driver was worse. He testified in two witness declarations and at the hearing that, while he was waiting for the Chargé in the Eritrean Embassy car parked outside of another Embassy in August 2000, armed Ethiopian security agents pulled him out of the car, beat him unconscious and imprisoned him in the First Police Station. He was detained for 20 months, much of it in solitary confinement, and taken out of his cell for only two days, allegedly to hide him from International Committee of the Red Cross ("ICRC") visitors (as recounted to him later by others in the Police Station). At the hearing, the witness drew a picture of the layout of the Police Station, showing the location of his cell and where he was held during the alleged ICRC visits. Ethiopia defended itself against these claims by making blanket denials and pointing out minor inconsistencies in the witness declarations, for example, concerning dates and the whereabouts of the guard's son.

49. The Commission finds the detailed evidence of the detention and abuse of the guard, the guard's son and the driver clear, convincing and troubling—just as it does similar evidence of less severe Eritrean detentions and

abuse of Ethiopian Embassy staff in Ethiopia's Diplomatic Claim—but the Commission cannot find a violation of international diplomatic law in these events. As locally-hired service staff, the guard and driver had limited immunities; Ethiopia's exercise of its jurisdiction over them is measured against the standard in Article 38, paragraph 2, of the Vienna Convention on Diplomatic Relations that there not be interference with the performance of mission functions. Although not in any way condoning physical abuse or other indignities suffered by Embassy staff, the Commission fails to find clear and convincing evidence that the treatment of the driver, guard and, assuming he had some derivative immunity, the guard's son, compromised the essential functioning of the Eritrean mission. The evidence in the record indicates, instead, that the Eritrean Embassy was able to stay open and continue to provide services even after these unfortunate detentions. The Commission dismisses this claim for failure of proof.

50. To the extent that these members of the service staff fall within the categories for which the Commission assessed liability in the Partial Award in Eritrea's Civilians Claims, including liability for wrongful and abusive detention, Eritrea may assert damages claims with respect to them in the damages phase in that case.

51. The Commission dismisses for lack of jurisdiction two other claims of alleged mistreatment involving the Chargé. The Claimant alleged that the Chargé was held against his will briefly at Ethiopian intelligence headquarters in 2001 and that his luggage was searched when he left Addis Ababa for the last time in 2003. Given that these claims on their face date from after December 2000 and did not arise as a result of the armed conflict, they were extinguished pursuant to Article 5, paragraph 8, of the Agreement.

F. Interference with Embassy Operations

52. As Ethiopia does in its companion Diplomatic Claim, Eritrea complains of several types of official action allegedly interfering with the functioning of its mission in violation of international diplomatic law. These allegations call into play Articles 22, 25 and 27 of the Vienna Convention on Diplomatic Relations. Article 22 (quoted above) obliges the receiving State to protect the inviolability of the mission premises and prevent any disturbance of the peace of the mission. Article 25 obliges the receiving State to "accord full facilities for the performance of the functions of the mission," and Article 27 "to permit and protect free communication on the part of the mission for all official purposes" (other than wireless communication).

1. Treatment of Embassy staff and visitors

53. Parallel to Ethiopian complaints, Eritrea complains that Ethiopian security agents increasingly monitored, harassed and intimidated both

visitors to the Embassy and Embassy staff. In specific, with supporting evidence from witness declarations, Eritrea alleges that three to four armed Ethiopian security agents videoed, stopped, questioned, searched, took documents from and arrested visitors. Eritrea, like Ethiopia, speaks of a literal “blockade” of its Embassy at certain times. Eritrea also alleges that Ethiopian security agents tailed the Ambassador and the Chargé, sometimes putting their safety at risk by surrounding the Embassy car with multiple vehicles; followed staff members to and from the Embassy; conducted surveillance of staff homes, even monitoring and arresting personal visitors; and eavesdropped on diplomatic conversations. Eritrea’s major complaint is that this intrusive monitoring of Embassy visitors and local staff alike allowed Ethiopia to identify and arrest individuals of Eritrean origin, who were then channeled to the denationalization and expulsion procedures described in the Commission’s Partial Award in Eritrea’s Civilians Claims. Under the circumstances, Eritrea alleges that Ethiopia interfered with the Embassy staff’s ability to perform its consular and diplomatic functions.

54. The Respondent denies Eritrea’s allegations of any abuse. Ethiopia argues that Eritrea’s evidence, if credible, merely reflects the frustration of running a diplomatic mission during armed conflict.

55. On the basis of the evidentiary record in this case and the Commission’s prior consideration of the situation in both Addis Ababa and Asmara during the armed conflict, the Commission has no doubt that Ethiopia and Eritrea each increased its monitoring of the other’s Embassy and its scrutiny of both staff and visitors to the Embassy. Once the Parties (the Commission notes again, commendably) decided to keep their Embassies open during the war, this is neither surprising nor contrary to international law. Equally, given the tension in both capitals, the Commission has no doubt that there was some level of harassment and intimidation of Embassy staff and visitors. The record, particularly diplomatic correspondence, also reveals a perhaps unavoidable dilemma: each mission sometimes requested and other times objected to an increased security presence, as the need for extra protection in wartime competed with the problems inherent in the enemy’s serving as security provider. On balance and particularly in light of the seriousness of other claims competing for its attention, the Commission cannot find that Ethiopia’s security measures involving the Eritrean Embassy, while sometimes intrusive and even perhaps abusive, compromised the basic functioning of the Eritrean mission in violation of the applicable international diplomatic law.

56. Again, to the extent that Embassy visitors and staff who were mistreated, denationalized and/or expelled fall within the categories for which the Commission assessed liability in the Partial Award in Eritrea’s Civilians Claims, Eritrea may assert damages claims with respect to them in the damages phase in that case.

2. Interference with Embassy communications

57. The Commission turns next to the Claimant's contentions, echoing certain of those pursued by Ethiopia, that Ethiopia unlawfully interfered with Eritrean Embassy communications by: (a) intermittently disconnecting telephone lines; (b) tapping telephone lines; and (c) taking and opening Embassy mail. Although free communications are essential to the proper functioning of a diplomatic mission, these particular claims cannot withstand scrutiny.

58. First, even accepting that Ethiopia may have occasionally cut off telephone lines for short periods, for example on the day of Ambassador Ghirma's departure, there was no evidence in the record that the Embassy lacked sufficient telephone capacity to carry on its day-to-day operations. Indeed, the Chargé indicated that it was to Ethiopia's advantage to "keep our phones operating and tapped."¹² Second, the sole evidence for the claim of wire tapping comes from the Chargé, who recounted hearing "beeping or a whirring sound" on the telephone and learning from persons with whom he had set up appointments by telephone that Ethiopian officials had thereafter proposed appointments with them at exactly the same time. Even assuming that evidence from such individuals would circumstantially prove tapping of Embassy lines, the record contains no declarations from them. Third, the allegation of tampering with Embassy mail is supported solely by a conclusory statement in the Chargé's declaration. The Commission dismisses these claims of unlawful interference with free Embassy communications, which in any event are relatively minor in the overall context of this case, for failure of proof.

G. Interference with OAU and UNECA Participation

59. Eritrea's claims related to its status as a member of the Organization of African Unity and the United Nations Economic Commission for Africa evolved in the course of the proceedings. Eritrea alleged in its Memorial that Ethiopia violated its obligations as host to the OAU and UNECA "by illegally expelling Eritrea's official representatives, breaking into and seizing protected embassy buildings, and detaining and torturing embassy and consular authorities."¹³ Eritrea's focus at the hearing was on Ethiopia's alleged interference with Eritrea's full participation in those international organizations, at a critical time in the peacemaking process, by preemptorily rejecting Ambassador Ghirma and then his nominated replacement as Eritrea's accredited representative to those international organizations.

¹² Eritrea's Claim 20, Violations against Diplomatic and Consular Staff and Premises, Memorial, filed by Eritrea on November 1, 2004, para. 2.60 [hereinafter ER Diplomatic MEM].

¹³ *Id.* at para. 2.3.

60. The Commission recognizes that this claim implicates a complex area of international organization law.¹⁴ There is, as Eritrea's counsel noted at the hearing, "considerable tension between host states, international organizations and sending states over the balance to be struck between freedom of representation and the interests of the host state." The Commission, however, finds that it need not venture into the debate concerning this tension.

61. The first task must be to explore whether Ethiopia had a legal obligation to allow Eritrea absolute discretion to designate particular individuals to serve as its representatives to the OAU and UNECA. The Commission finds nothing to this effect in the OAU Privileges and Immunities Convention, the OAU Headquarters Agreement or the UNECA Headquarters Agreement. All of those agreements do provide significant privileges and immunities for member State representatives, but are silent as to member States' selection of representatives. As compared, for example, to the United Nations Headquarters Agreement,¹⁵ the OAU and UNECA Headquarters Agreements contain very little as to the nature of the host State's obligations in relation to the setting up of member missions and representation. Absent an international law basis for Eritrea's allegation that Ethiopia had affirmative obligations *vis-à-vis* Eritrea's selection of its particular representatives to the OAU and UNECA, the Commission must dismiss the claim.

62. Even if there were a cognizable international law basis for this claim, Eritrea failed to prove that Ethiopia interfered with its full participation in the OAU and UNECA. First, although Eritrea alleged that Ethiopia purposefully declared Ambassador Ghirma *persona non grata* on the eve of significant OAU negotiations, Eritrea failed to identify those negotiations or present any supporting evidence. Second, even accepting that Ethiopia's 24-hour departure order did not allow Eritrea adequate time to decide whether to recall Ambassador Ghirma or to terminate his bilateral diplomatic functions but leave him in Ethiopia as its OAU and UNECA representative, it is difficult for the Commission to view the latter as a realistic option. There is no diplomatic note or other evidence in the record suggesting that Eritrea wanted the Ambassador to stay (or to return later) for this purely multilateral diplomatic function. Third, despite argument at the hearing that Ethiopia interfered with Eritrea's "freedom of representation" by rejecting a series of proposed representatives, the record shows that: (a) Eritrea waited nine months (until December 1999) to make its first and only proposal for a new permanent representative to the OAU, and (b) Ethiopia rejected the candidate on the ground, not objectively unreasonable, that he had been declared *persona non grata* in 1997. Finally, and most important, the record reflects that Eritrea's Chargé was promptly accredited to the

¹⁴ Transcript of the Eritrea-Ethiopia Claims Commission Hearings of April 2005, Peace Palace, The Hague, at p. 157 (April 5, 2005).

¹⁵ Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, June 26, 1947, 11 U.N.T.S. p. 11.

OAU after Ambassador Ghirma's departure, attended at least some OAU sessions starting in March 1999, and was invited to others that he did not attend.

H. Eritrea's Request for Additional Remedies

63. Eritrea seeks a variety of remedies in addition to monetary compensation. In specific, Eritrea requests the Commission to order Ethiopia: (a) to "desist and refrain from interference with any and all legal and proper diplomatic and consular activities of Eritrean diplomatic and consular personnel, including participation in international and pan-African organizations having their headquarters in Addis Ababa and visits from Eritrean nationals seeking the assistance of their government;"¹⁶ (b) to restore the Embassy Residence to Eritrea; (c) to pay consequential damages for seizing the Residence and taking property from Residence premises, as well as for taking other property from and interfering with Embassy staff; and (d) to restore unrestricted access to funds held in diplomatic bank accounts and to repay amounts paid in satisfaction of judgments out of such accounts.

64. In its Decision No. 3 of July 24, 2001, the Commission decided that "in principle, the appropriate remedy for valid claims. . . . should be monetary compensation."¹⁷ The Commission did not foreclose the possibility of providing other types of remedies in appropriate cases, "if the particular remedy can be shown to be in accordance with international practice, and if the Tribunal determines that a particular remedy would be reasonable and appropriate in the circumstances."

65. The Commission finds that Eritrea has not made the showing required by Decision No. 3 in connection with the additional remedies sought and so dismisses Eritrea's claims for non-monetary relief. In any event, the Parties' termination of diplomatic relations in 2003 presumably moots Eritrea's requests that Ethiopia refrain from interfering in its diplomatic activities and return the Residence. Insofar as the requests for additional relief relate to diplomatic bank accounts and Consulate matters, the Commission has dismissed those claims for lack of jurisdiction. As noted several times above, to the extent that Embassy staff members who lost property in the course of denationalization and expulsion fall within the categories for which the Commission assessed liability in the Partial Award in Eritrea's Civilians Claims, Eritrea may assert damages claims with respect to them in the damages phase in that case.

IV. AWARD

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

¹⁶ ER Diplomatic MEM, *supra* note 12, at para. 2.62.

¹⁷ Commission Decision No. 3: Remedies, issued July 24, 2001.

A. Jurisdiction

1. The Commission lacks jurisdiction over claims that were not filed by December 12, 2001, and hence were extinguished. Consequently the Commission dismisses the following claims for lack of jurisdiction:

- a. all claims relating to the Eritrean Consulates in Mekelle and Aysa'ita; and
- b. claims that the Respondent restricted Eritrean Embassy funds and enforced court judgments against Embassy accounts.

2. The Commission also dismisses as outside its temporal jurisdiction the claims that the Eritrean Chargé d'Affaires was detained briefly at Ethiopian intelligence headquarters in 2001 and his luggage was searched when he departed Ethiopia in 2003.

3. The Claimant's requests for remedies other than monetary compensation were not shown to meet the requirements of Commission Decision No. 3 and are denied.

4. All other claims asserted in this proceeding are within the jurisdiction of the Commission.

B. Applicable Law

As agreed by the Parties, the primary applicable law is the Vienna Convention on Diplomatic Relations of 1961, which largely codifies customary law.

C. Evidentiary Issues

The Commission requires clear and convincing evidence to establish the liability of a Party for violations of applicable international law.

D. Findings on Liability for Violation of International Law

1. The Respondent is liable for violating Articles 36 and 29 of the Vienna Convention on Diplomatic Relations in the course of the departure of Eritrean diplomatic personnel from the Addis Ababa airport in May 1998 by attempting to search the Ambassador's person, searching his hand luggage, confiscating papers from his briefcase and interfering with his checked luggage, and also by searching other departing diplomats and their luggage, without regard to their diplomatic immunity.

2. The Respondent is liable for violating Article 22 of the Vienna Convention on Diplomatic Relations by entering, ransacking, searching and seizing the Eritrean Embassy Residence, as well as official vehicles and other property, without Eritrea's consent.

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

[*Signed*] LUCY REED