

# **REPORTS OF INTERNATIONAL ARBITRAL AWARDS**

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## **RECUEIL DES SENTENCES ARBITRALES**

**Eritrea-Ethiopia Claims Commission - Partial Award: Diplomatic Claim -  
Ethiopia's Claim 8**

19 December 2005

VOLUME XXVI pp. 407-428



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## **PART XI**

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### **Partial Award Diplomatic Claim—Ethiopia's Claim 8**

**Decision of 19 December 2005**

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### **Sentence partielle Demande diplomatique—Réclamation de l'Éthiopie N° 8**

**Décision du 19 décembre 2005**



PARTIAL AWARD, DIPLOMATIC CLAIM—ETHIOPIA'S CLAIM 8,  
DECISION OF 19 DECEMBER 2005

SENTENCE PARTIELLE, DEMANDE DIPLOMATIQUE—  
RÉCLAMATION DE L'ÉTHIOPIE N° 8,  
DÉCISION DU 19 DÉCEMBRE 2005

Jurisdiction of the Commission—extinction of claims not timely filed—no jurisdiction over claims relating to events not occurred during the war.

Diplomatic relations—commendable nature of the decision of belligerents not to sever diplomatic relations during the war—the Vienna convention on diplomatic relations of 1961, largely codifying customary diplomatic law, is the applicable law—inviolability of envoys and premises considered as the fundamental requisite of diplomatic relations even during war—each State remained free at any time to sever unilaterally its diplomatic relations with the other belligerent—no possibility of unilateral derogation from the key obligation while diplomatic relations are maintained—questioning of a diplomat for less than one hour not viewed as constituting an interrogation otherwise prohibited—short arrests and detentions of the Chargé not viewed as inhibiting his freedom of travel or the performance of his consular functions—meetings with accredited diplomats called by the receiving State not considered as an interrogation otherwise prohibited—no immunity of inspection of embassy correspondence not clearly identified as diplomatic bag - obligation of the receiving State to promptly transfer embassy documents to the mission once their official character became apparent.

Compétence de la Commission—extinction des réclamations soumises hors délai—pas de compétence relative aux réclamations concernant des événements non survenus pendant la guerre.

Relations diplomatiques—nature admirable de la décision des belligérants de ne pas interrompre leurs relations diplomatiques pendant la guerre—la Convention de Vienne sur les relations diplomatiques de 1961, codifiant largement le droit diplomatique coutumier, représente le droit applicable—l'inviolabilité des envoyés et locaux diplomatiques est considérée comme l'exigence fondamentale des relations diplomatiques, y compris durant la guerre—chaque État reste libre à chaque instant de rompre unilatéralement ses relations diplomatiques avec l'autre belligérant—pas de possibilité de déroger unilatéralement à l'obligation clef tant que les relations diplomatiques sont maintenues—le questionnement d'un diplomate pendant moins d'une heure n'est pas considéré comme constituant un interrogatoire autrement interdit—arrestations et détentions de courte durée du Chargé d'affaire non perçues comme des entraves à sa liberté de mouvement et à l'accomplissement de ses fonctions consulaires—les réunions avec des diplomates accrédités à la demande de l'État accréditaire ne sont pas considérées comme des interrogatoires autrement interdits—pas d'immunité d'inspection de la correspondance de l'ambassade non clairement identifiée comme courrier diplomatique—obligation de l'État accréditaire de transférer rapidement les documents d'ambassade à la mission, une fois leur nature officielle devenue apparente.

**ERITREA-ETHIOPIA CLAIMS COMMISSION****PARTIAL AWARD****Diplomatic Claim  
Ethiopia's Claim 8****between****The Federal Democratic Republic of Ethiopia****and****The State of Eritrea**

By the Claims Commission, composed of:

Hans van Houtte, President  
George H. Aldrich  
John R. Crook  
James C.N. Paul  
Lucy Reed

The Hague, December 19, 2005

**PARTIAL AWARD—Diplomatic Claim—Ethiopia's Claim 8  
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## I. INTRODUCTION

### A. Summary of the Positions of the Parties

1. This Claim (“Ethiopia’s Diplomatic Claim”) has been brought to the Commission by the Claimant, the Federal Democratic Republic of Ethiopia (“Ethiopia”), pursuant to Article 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of December 12, 2000 (“the Agreement”). The Claimant asks the Commission to find the Respondent, the State of Eritrea (“Eritrea”), liable for loss, damage and injury suffered by Ethiopia from the injuries sustained by the Ethiopian diplomatic mission and consular post and personnel in Eritrea as a result of the Respondent’s alleged violations of the international law of diplomatic and consular relations. The Claimant requests monetary compensation.

2. The Respondent asserts that it fully complied with international law in its treatment of Ethiopia’s diplomatic and consular missions and personnel in Eritrea. The Respondent requests the Commission to dismiss Ethiopia’s Claim 8 in its entirety.

## B. General Comment

3. As described in the Commission's previous Partial Awards,<sup>1</sup> 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 Eritrea's Claim 20 ("Eritrea's Diplomatic Claim") contain findings of violations of international diplomatic law, more or less serious, by both Parties.

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.<sup>2</sup>

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.<sup>3</sup> 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 Ethiopia and Eritrea chose instead to attempt to maintain diplomatic relations throughout the war, despite unavoidable friction and even great personal risk for diplomats and staff.

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<sup>1</sup> 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); Partial Award, Civilians Claims, Ethiopia's Claim 5 Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (Dec. 17, 2004).

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

<sup>3</sup> 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.*



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 Relations<sup>4</sup>—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. Ethiopia filed this Claim on December 12, 2001, and Eritrea filed its Statement of Defense on April 15, 2002. Ethiopia’s Memorial was filed on November 1, 2004, and Eritrea’s Counter-Memorial on January 17, 2005. Ethiopia did not include materials on this Claim in its Reply filings of March 10, 2005. A hearing on liability was held at the Peace Palace during the week of April 11–15, 2005 in conjunction with a hearing in Eritrea’s Diplomatic Claim during the week of April 4–8, 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 contends that certain of Ethiopia’s claims fall outside the Commission’s jurisdiction because they were not filed by December 12, 2001 or are not related to the conflict. The Commission will address each category of jurisdictional contention in turn.

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

### **A. Claims Not Filed by December 12, 2001**

10. The Respondent challenges the Commission's jurisdiction over several claims asserted by Ethiopia in its Memorial that, according to the Respondent, were not included in Ethiopia's Statement of Claim for its Claim 8 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 Ethiopia has pursued claims here that were not included in its Statement of Claim.

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

1. Alleged harassment and arrest of Embassy visitors by Eritrean security agents predating March 1999;
2. Alleged beating and other harassment of Embassy visitors by Eritrean security agents;
3. Alleged blocking of Embassy access by Eritrean security agents in May and June 2000;
4. Alleged harassment by Eritrean security agents of diplomatic staff in the course of their June 1998 departure;
5. An alleged incident in which four rocks were thrown into the Embassy compound on August 7, 1998;
6. Alleged intrusion of Embassy premises by an individual climbing over the fence on August 10, 1998;
7. Alleged entry of the Embassy compound by Eritrean security agents without Ethiopian authorization in May or June 1998;
8. Alleged placement of a bus stop near the main gate of the Embassy;
9. Alleged refusal by private merchants in Asmara to transact business with Embassy employees;
10. Alleged denial of access to the Embassy mailbox;
11. Alleged interference with recruitment of local Embassy staff in March 2001; and
12. All alleged claims relating to the Ethiopian Consulate in Assab, including allegations that Eritrea refused to facilitate the repatriation of consular staff, restricted the consular staff's freedom of movement and communication, closed the Consulate, and seized consular property.

12. Upon study of Ethiopia's Statement of Claim, the Commission agrees that the first, fifth, seventh, eighth, ninth, eleventh and twelfth 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.

13. The Commission finds that the Claimant identified the remaining five claims in the Statement of Claim with sufficient particularity to give the Respondent “fair warning” of the nature of the claims, as envisioned in Article 24, paragraph 3, subparagraph (d), of the Commission’s Rules of Procedure. Read in context, these claims are not distinct causes of action but rather specific examples or illustrations of broader allegations of misconduct in the Statement of Claim.

## **B. Temporal Jurisdiction**

14. Under Article 5, paragraph 1, of the Agreement, the Commission’s jurisdiction extends to claims “related to the conflict that was the subject” of certain agreements between the Parties. The Commission held in its Decision No. 1 that the central reference point for determining its temporal jurisdiction is the armed conflict between the Parties.<sup>5</sup> However, jurisdiction also extends to claims involving subsequent events arising as a result of the armed conflict or occurring in the course of measures to disengage contending forces or otherwise end the military confrontation.

15. Eritrea objects to the following Ethiopian claims on grounds that the relevant alleged events occurred before the conflict started in May 1998 or after the conflict formally ended in December 2000:

1. Alleged arrests of an Embassy guard, gardener and driver in May 2001;
2. Alleged arrest of an Embassy driver in August 2001;
3. Alleged arrest of an Embassy guard in April or May 2002;
4. Alleged arrest of a visitor to the Embassy in February 2001;
5. Alleged arrest of an Embassy employee in November or December 2001;
6. Alleged placement of a bus stop near the main gate of the Embassy in 1997; and
7. Alleged interference with recruitment of local Embassy staff in March 2001.

16. The Commission has already found above that it lacks jurisdiction of the sixth and seventh claims because they were not filed before December 12, 2001. The Commission finds that it also lacks jurisdiction of the first, third, fourth and fifth claims because they concern events allegedly occurring after December 2000 that do not fall within the extended parameters of Commission Decision No. 1. With respect to the second claim, the

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<sup>5</sup> Commission Decision No. 1: The Commission’s Mandate/Temporal Scope of Jurisdiction, issued July 24, 2001.

Claimant in fact alleges that the relevant individual was arrested on August 2, 2000, rather than 2001,<sup>6</sup> and so the Commission has jurisdiction.

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

## IV. THE MERITS

### A. Applicable Law

18. 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.

19. Both Parties rely upon the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963,<sup>7</sup> 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-filed claims concerning the Consulate in Assab fall outside the Commission’s jurisdiction.

20. 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.”<sup>8</sup> Articles 22 and 29 of the Vienna Convention on Diplomatic Relations provide:

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<sup>6</sup> See Ethiopia’s Claim 8, Claims for Loss, Damage or Injury to Ethiopia’s Diplomatic Personnel and Diplomatic Property, Memorial, filed by Ethiopia on November 1, 2004, para 2.26 (“The Eritrean security agents arrested [the individual] again on Hamle 26, 1992 E.C. or 2 August 2000 G.C.”) [hereinafter ET Diplomatic MEM] and Documentary Annexes, Vol. II, TAB 31.

<sup>7</sup> Vienna Convention on Consular Relations, April 24, 1963, 596 U.N.T.S. p. 262.

<sup>8</sup> 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).

### 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.

21. In this Diplomatic Claim and in its defense to Eritrea's 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.

22. 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.

23. 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.

24. 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.”

25. 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 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.

26. 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.

## **B. Evidentiary Issues**

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

28. The Claimant submitted 18 witness declarations in support of this Claim, as well as 33 documentary exhibits, including several *Notes Verbales* and other diplomatic correspondence. The Respondent submitted 14 witness statements and 15 documentary exhibits. There were no witnesses on this Diplomatic Claim at the hearing.

29. 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**

30. Ethiopia organized its argument and evidence in this Diplomatic Claim into six categories, as follows:

1. Alleged arrest, detention and interrogation of the Chargé d’Affaires;
2. Alleged harassment of Embassy personnel;
3. Alleged seizure of Embassy documents;
4. Alleged interference with Embassy access;
5. Alleged failure to protect the security of the Embassy and its personnel; and
6. Alleged failure to facilitate the repatriation of staff of the Consulate in Assab and their families, and restriction of their freedom of movement and communication.

The Commission will address the claims in the categories and order adopted by the Claimant.

31. The Commission will not address the merits of the last category because, as explained above, all claims concerning the status and treatment of the Assab Consulate 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 Ethiopia’s Claim 5 regarding the treatment of civilians (“Partial Award in Ethiopia’s Civilians Claims”), Ethiopia may assert damages claims with respect to them in the damages phase in that case.

### **D. Treatment of the Chargé d’Affaires**

32. Ethiopia complains that Eritrea violated Articles 26, 29 and 31 of the Vienna Convention on Diplomatic Relations by mistreating the Ethiopian Chargé in several respects. The text of Article 29 is set out above. In brief, Article 26 protects free travel in the territory of the receiving State, while Article 31 guarantees immunity from criminal prosecution and compulsion to give evidence.

33. The Claimant contends that Eritrean guards twice arrested and then briefly (for less than one hour) detained and interrogated the Chargé at local police stations after he visited Ethiopian nationals in Aba Shawl in September 1998 and Medebere in October 1999. Ethiopia presented clear

and convincing evidence of these events in the form of declarations from the Chargé and the Embassy driver and contemporaneous notes from the Ethiopian Embassy to the Eritrean Ministry of Foreign Affairs objecting to the Chargé's mistreatment. Eritrea bases its defense primarily on the lack of corroborating descriptions in press accounts by foreign reporters who accompanied the Chargé on the relevant consular visits, which the Commission does not find sufficient to overcome Ethiopia's *prima facie* case. The Commission finds Eritrea liable for violating Article 29 of the Vienna Convention on Diplomatic Relations by arresting and briefly detaining the Chargé in September 1998 and October 1999 without regard to his diplomatic immunity.

34. The Commission does not consider that these circumstances also gave rise to violations of Article 26 or Article 31 of the Convention. The Commission is not convinced that Eritrean officials questioning the Chargé for less than one hour constituted interrogation in the context of compulsion of evidence. Nor is the Commission convinced that the arrests and detentions of the Chargé inhibited his freedom to travel in Eritrea to perform his consular functions for Ethiopian nationals. Indeed, the events complained of occurred while the Chargé was traveling in Asmara in the performance of his official duties. These claims are dismissed.

35. Similarly, the Commission dismisses the related claim that the Respondent violated Article 29 of the Vienna Convention on Consular Relations by failing to protect the Chargé from students allegedly throwing rocks at his car when he was leaving Medebere in October 1999. The Claimant failed to prove that this relatively minor incident chilled the Chargé's performance of his functions.

36. Finally, the Claimant complains about two instances in which Eritrea summoned the Chargé to the Ministry of Foreign Affairs to question him about a letter he had written and circulated to foreign governments demanding judicial action against an Eritrean policeman who had killed an Ethiopian national. Eritrea denies that these meetings took place, on the basis of a declaration from the then Director General of the Asia and Africa Department of the Ministry. Eritrea also argued—and the Commission finds the argument convincing—that Ethiopia's own evidence shows that the Chargé attended any such meetings willingly. The Vienna Convention on Diplomatic Relations does not prohibit the receiving State from calling for meetings with accredited diplomats and, indeed, such meetings—if not coerced—are not prohibited interrogations but rather an integral part of effective diplomacy. Absent clear and convincing proof that the Chargé was coerced, the Commission finds no violation of international law and so dismisses this claim.



## E. Harassment of Embassy Personnel

37. Similar to the contentions made by Eritrea in its companion Diplomatic Claim, Ethiopia presents broad claims that Eritrean security agents “consistently engaged in harassment, intimidation, abusive search, interrogation, arrest and detention” of non-diplomatic Embassy staff who were Ethiopian nationals.<sup>9</sup> Ethiopia acknowledges that locally-hired staff have limited privileges and immunities, but notes that under Article 38, paragraph 2, of the Vienna Convention on Diplomatic Relations Eritrea may not exercise its jurisdiction over such staff in a manner interfering with the performance of the functions of the mission. Ethiopia bases its claims on several detailed declarations of surveillance and tailing; arrests; detentions of several hours to several weeks, including at Adi Abeyto; beatings, including one that allegedly left a gardener with broken ribs; and abusive searches, including of female staff. The Embassy driver, in particular, allegedly was imprisoned for three months and brutally beaten. Ethiopia claims that this pervasive mistreatment caused Embassy guards, drivers and a gardener to quit, thereby disrupting the functioning of the mission.

38. Eritrea denies any campaign of harassment and justifies any arrests on the failure of Ethiopian staff at the Embassy to carry valid residence permits. For certain staff, Eritrea presented credible immigration files showing expired permits at the time of arrest and detention. Eritrea did not address the physical abuse alleged by the Claimant.

39. Without 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 permanent resident service staff compromised the essential functioning of the Ethiopian mission. The only specific allegation made by the Claimant to this effect concerns a minor and isolated event: the intruder who attempted to burn the Embassy flag (discussed below) entered the premises when a guard was in detention. Overall, the evidence in the record indicates, instead, that even without a full panoply of service staff (or diplomats for that matter) the Ethiopian Embassy stayed open and continued to provide services throughout the war. The Commission dismisses this claim for failure of proof.

40. As in the case of the staff of the Assab Consulate, the Commission notes that to the extent that individual Embassy staff members fall within the categories for which the Commission assessed liability in the Partial Award in Ethiopia’s Civilians Claims, including liability for wrongful and abusive detention, Ethiopia may assert damages claims with respect to them in the damages phase in that case.

41. The Claimant makes a separate claim that Eritrean officials mistreated a group of Ethiopian diplomats in the course of their departure

<sup>9</sup> ET Diplomatic MEM, *supra* note 6, at para. 2.19.

from Asmara in June 1998, in violation of Articles 29 and 44 of the Vienna Convention on Diplomatic Relations. Article 44 requires the receiving State, even in the case of armed conflict, to provide the necessary means of transport for diplomats to enable them to leave at the earliest possible moment. In specific, on the basis of a declaration from an Embassy consul, Ethiopia alleges that Eritrean security officers obstructed the departing diplomats at the entrance to the airport and again at the terminal, thereby putting them at risk of missing the 48-hour departure deadline imposed by Eritrea. The Respondent's Counter-Memorial contains declarations from two Eritrean Ministry of Foreign Affairs officials denying any mistreatment and describing assistance provided to the departing Ethiopian diplomats. In the absence of any clarifying evidence in Ethiopia's March 2005 Reply, and noting that any obstruction did not in fact cause the diplomats to miss the 48-hour departure deadline (which, the Commission notes, matched that imposed by Ethiopia on certain Eritrean diplomats), the Commission dismisses this claim for lack of proof.

## **F. Seizure of Embassy Documents**

42. Ethiopia claims that on April 29, 1999, Eritrean Customs officials at the Asmara airport intercepted and retained a diplomatic bag sent from the Ethiopian Consulate in Jeddah to the Embassy, which contained 100 blank passports, invoices and receipts, in violation of Articles 24, 27 and 29 of the Vienna Convention on Diplomatic Relations. Article 24 confirms the inviolability of all diplomatic documents and official correspondence. Article 27, paragraph 3, specifically states that a "diplomatic bag shall not be opened or detained," and Article 27, paragraph 4, that "packages constituting the diplomatic bag must bear visible external marks of their character." As to Article 29 (quoted above), Ethiopia alleges that the Embassy had run out of blank passports in March 1999 and so Eritrea's confiscation of the bag seriously disrupted its consular functions.

43. The Parties agree on several points: (a) the package at issue is a box shipped via DHL; (b) at the invitation of the Eritrean Ministry of Foreign Affairs, the Ethiopian Chargé was present at the opening of the box; and (c) Eritrea nonetheless did not release the box or its contents to Ethiopia despite formal demands. The heart of Eritrea's defense is, simply put, that the box was not labeled as a diplomatic bag. Eritrea presented the box and contents as evidence at the hearing.

44. Having seen the box, the Commission finds that it was not labeled in any fashion to indicate its character as a diplomatic bag and hence Ethiopia cannot prove a violation of Article 27 of the Vienna Convention on Diplomatic Relations. However, it is undisputed that the box constituted official Ethiopian correspondence and that Eritrea refused to release it to Ethiopia for more than five years. Although the box may not have been entitled to

immunity from inspection and, indeed, the Chargé appeared to have participated voluntarily in such inspection, Eritrea was under an obligation promptly to transfer the box and its contents to the Ethiopian mission after its official character became apparent. The Commission finds Eritrea liable for violating official Ethiopian diplomatic correspondence and interfering with the functioning of the mission in breach of Articles 24 and 29 of the Convention.

### **G. Interference with Embassy Access**

45. Parallel to Eritrean complaints, Ethiopia complains of increased monitoring of its Embassy by security agents after the outbreak of the war. Ethiopia alleges that four to six Eritrean security personnel, visibly stationed outside the Embassy, searched staff members and visitors alike, questioned visitors about the purpose of their visits, confiscated their Ethiopian identification cards while they were inside the Embassy compound, and occasionally assaulted them. In support of this claim for harassment and intimidation, Ethiopia presented declarations from Embassy staff, contemporaneous correspondence between the Embassy and the Eritrean Ministry of Foreign Affairs, and a small number of declarations from Ethiopian citizens who visited or attempted to visit the Embassy during the armed conflict.

46. In addition to objecting to the Claimant's reliance on nonspecific witness declarations in the Civilians Claims record, Eritrea denies any unlawful monitoring, harassment or intimidation. Eritrea presented declarations from persons living in the neighborhood of the Embassy who denied seeing Eritrean guards stationed at the Embassy during the war. Eritrea also presented the report of the interviews of Ethiopians in Eritrea conducted by Dr. Richard Reid of the University of Asmara in August 1999, recounting no problems for Ethiopians in accessing the Embassy prior to that time.<sup>10</sup>

47. The Commission has examined carefully Ethiopia's specific allegations of serious interference with Embassy access and communications in violation of 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).

48. The Claimant alleges that in March 1999 Eritrean security agents began arresting Ethiopians who visited the Embassy on the pretext they were

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<sup>10</sup> Eritrea submitted Dr. Reid's August 1999 report, entitled "Ethiopian Nationals in Asmara: A Report," as Documentary Annex A, Volume 3, to Eritrea's Counter-Memorial to Ethiopia's Claim 5, filed by Eritrea on January 15, 2004 in the Civilians Claims, and the Commission heard Dr. Reid as a witness in the hearing of those claims in March 2004.

spies. Ethiopia bases this claim on declarations from less than ten individuals who allegedly were arrested between March 1999 and December 2001. As this limited evidence does not support a pattern of unlawful arrest disrupting the functioning of the Embassy, the Commission dismisses this claim for lack of proof.

49. The Claimant also charges that Eritrean security agents completely blocked visitor access to the Embassy for 25 days starting on July 16, 1999 and 20 days starting on May 17, 2000 (a period when Ethiopia was carrying out a major military offensive taking Ethiopian troops deep into Eritrean territory). Ethiopia presented declarations from the Chargé, an Embassy guard and one student who described being barred (albeit briefly) from the Embassy in July 1999, as well as a *Note Verbale* and a subsequent report to the Eritrean Ministry of Foreign Affairs complaining about the blocked access. For the July 1999 period, Eritrea denies the allegations, primarily on the basis of Dr. Reid's report that at least some Ethiopian nationals were able to obtain or renew their identification cards at the Embassy in August 1999. For the May 2000 period, Eritrea again relies on the declarations of residents in the Embassy neighborhood who reported seeing Ethiopians lined up and entering the Embassy throughout the war. On balance, the Commission finds Eritrea's evidence sufficiently persuasive to rebut Ethiopia's *prima facie* case, and so dismisses this claim for failure of proof.

50. On the basis of the evidentiary record in this case and the Commission's prior consideration of the situation in both Asmara and Addis Ababa during the armed conflict, the Commission has no doubt that Eritrea and Ethiopia 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 evidence, fortunately, shows that any beating or other physical abuse of visitors was rare. 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 Eritrea's security measures involving the Ethiopian Embassy, while sometimes intrusive and even perhaps abusive, compromised the basic functioning of the Ethiopian mission in violation of the applicable international diplomatic law.

51. The Commission turns next to Ethiopia's contentions, certain of which are similar to those pursued by Eritrea in its companion Diplomatic Claim, that Eritrea unlawfully interfered with Ethiopian Embassy communications by: (a)

disconnecting six telephone lines; (b) tapping all Embassy lines; (c) locking the Embassy mail box; (d) routinely opening and seizing official correspondence; and (e) denying the Embassy's request for Internet service. Although free communications are essential to the proper functioning of a diplomatic mission, these particular claims cannot withstand scrutiny.

52. First, even accepting that Eritrea may have deprived the Embassy of six telephone lines, the evidence in the record demonstrates that the Embassy had sufficient remaining lines—at least four—to carry on its day-to-day operations. Second, there is insufficient evidence in the record that Embassy telephone lines were tapped. The sole evidence for this claim comes from the *Chargé*, who reached this conclusion upon learning that the telephones of certain Ethiopians who called to report arrests, injuries or deaths allegedly were cut off. Even assuming that evidence from such persons would circumstantially prove tapping of Embassy lines, the record contains no declarations from them. Third, Ethiopia failed to explain how its Embassy mailbox was locked after February 1999 and based its claim of routine censorship on at most eight allegedly opened letters. 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.

53. Ethiopia's claim concerning Internet service requires separate consideration. Ethiopia contends that the *Chargé*, on a date not specified, requested Internet service from the Eritrean Telecommunication Service office and sought the necessary permission from the Ministry of Foreign Affairs, neither of which was forthcoming. Eritrea presented conclusive evidence that Internet service was not available in Eritrea until after December 2000. This claim, therefore, falls outside the Commission's temporal jurisdiction.

## **H. Failure to Protect the Security of the Embassy and its Personnel**

54. The Claimant charges Eritrea with violating Article 22 of the Vienna Convention on Diplomatic Relations by failing to protect the Embassy and its personnel from intrusion on August 10, 1999, when an individual jumped over the Embassy fence around midnight, and on June 23, 2000, when another individual jumped over the fence and attempted to burn the Embassy flag. Eritrea presented clear and convincing evidence that it took action consistent with its obligations under the Vienna Convention on Diplomatic Relations in connection with both instances: Eritrean police arrested both intruders, the first of whom was initially stopped by the Embassy guard and the second of whom was intoxicated and proved unable to burn the flag. The Commission finds no violation of the applicable law in connection with these claims.

## V. AWARD

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

### 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. claims that Eritrean security agents harassed and arrested Embassy visitors before March 1999;
- b. the claim that four rocks were thrown into the Embassy compound on August 7, 1998;
- c. claims that Eritrean security agents entered the Embassy compound without Ethiopian authorization in May or June 1998;
- d. claims for Eritrea's placement of a bus stop near the main gate of the Embassy;
- e. claims that private merchants in Asmara refused to transact business with Embassy employees;
- f. claims that Eritrea interfered with recruitment of local Embassy staff in March 2001; and
- g. all claims relating to the Ethiopian Consulate in Assab, including allegations that Eritrea refused to facilitate the repatriation of consular staff, restricted the consular staff's freedom of movement and communication, closed the Consulate, and seized consular property.

2. The Commission also dismisses the following claims because they concern events allegedly occurring after December 2000, which do not fall within its temporal jurisdiction:

- a. claims that an Embassy guard, gardener and driver were arrested in May 2001;
- b. claims that an Embassy guard was arrested in April or May 2002;
- c. claims that a visitor to the Embassy was arrested in February 2001;
- d. claims that an Embassy employee was arrested in November or December 2001; and
- e. claims that Eritrea denied the Embassy's request for Internet service, which the Respondent proved did not become available until after December 2000.

3. 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 Article 29 of the Vienna Convention on Diplomatic Relations by arresting and briefly detaining the Ethiopian Chargé d’Affaires in September 1998 and October 1999 without regard to his diplomatic immunity.

2. The Respondent, having retained a box containing Ethiopian Embassy correspondence including blank passports for five years, is liable for violating official Ethiopian diplomatic correspondence and interfering with the functioning of the mission in breach of Articles 24 and 29 of the Vienna Convention on Diplomatic Relations.

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

Done at The Hague, this 19<sup>th</sup> 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