

Endpaper

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: Eritrea-Ethiopia Claims Commission, Partial Award Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, Between the State of Eritrea and the Federal democratic Republic of Ethiopia. The Hague, December 17, 2004. The Permanent Court of Arbitration, the Hague. Footnotes partially reproduced.]

PARTIAL AWARD

Civilian Claims Eritrea's Claims 15, 16, 23 & 27-32 Between the State of Eritrea and the Federal democratic Republic of Ethiopia

I. Introduction

A. Summary of the Positions of the Parties

1. These Claims ("Eritrea's Claims 15, 16, 23 and 27-32," "Eritrea's Civilians Claims") covering expellees, civilian detainees and "persons of Eritrean extraction living in Ethiopia," have been brought to the Commission by the Claimant, the State of Eritrea ("Eritrea") against the Federal Democratic Republic of Ethiopia ("Ethiopia"), pursuant to Article 5 of the Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia of December 12, 2000 ("the December 2000 Agreement"). The Claimant asks the Commission to find the Respondent, Ethiopia, liable for loss, damage and injury it suffered, including loss, damage and injury suffered by Eritrean nationals and a large number of other persons, resulting from alleged infractions of international law in the treatment of civilian Eritrean nationals and other persons by Ethiopia in connection with the 1998-2000 international armed conflict between the two Parties.
2. Ethiopia contends that it has fully complied with international law in its treatment of such civilians. [...]

II. Factual background

1. Eritrea's main claims and Ethiopia's defenses have their origins in the unusual circumstances leading to the emergence of Eritrea as a separate State during the early 1990s. Eritrea was an Italian colony from 1889 until the British defeated the Italian forces there in 1941, early in the Second World War. It then remained under British administration until 1952, when it entered into a federation with the Empire of Ethiopia. The federation lasted until 1962, when the last vestiges of Eritrea's political autonomy ended and Eritrea became a part of Ethiopia. In 1991, following the success of their long and bitter struggle against the Mengistu regime in Ethiopia, the successful revolutionary movements that had assumed power in Addis Ababa and Asmara agreed that "the people of Eritrea have the right to determine their own future by themselves and ... that the future status of Eritrea should be decided by the Eritrean people in a referendum...." [Letter from H.E. Meles Zenawi to UN Secretary-General Boutros Boutros-Ghali, Dec. 13, 1991, UN Doc. A/C.3/47/5 (1992).]
2. Organizing the Referendum was a large and complex task undertaken by the Referendum Commission of Eritrea ("RCE") appointed in April 1992. A Referendum Proclamation issued on April 7, 1992 established detailed procedures and limited participation to persons over 18 "having Eritrean citizenship." (The Referendum Proclamation and the associated Citizenship Proclamation are discussed below.) The RCE and the Provisional Government of Eritrea emphasized registration of potential voters outside of Eritrea, where over a million Eritreans lived. According to a report by the International Organization for Migration, 66,022 persons in Ethiopia registered to vote in the Referendum. The Referendum was successfully held on 23-25 April 1993, with extremely high participation and almost 99% of voters voting for Eritrea's independence. On May 4, 1993, Ethiopia's Ministry of Foreign Affairs recognized Eritrea's sovereignty and independence. Eritrea became a member of the United Nations on May 28, 1993.
3. During the decades when Eritrea did not exist as a separate political entity, there was extensive movement of population both into and out of the area of present-day Eritrea. These population movements were compounded by tumult and displacement from decades of bitter internal conflict within Ethiopia. Many Ethiopians of Eritrean ancestry knew only Ethiopia as their home. Many thousands of persons who were born or whose parents were born within the present-day boundaries of Eritrea came to reside as Ethiopian citizens in Addis Ababa and elsewhere in Ethiopia. The Commission received varying estimates of the numbers involved, but both Parties agreed the population was large. A June 12, 1998 Ethiopian Ministry of Foreign Affairs statement concerning "Precautionary Measures Taken Regarding Eritreans Residing in Ethiopia" referred to 550,000 such persons. Both Parties cited this figure during the proceedings, although Eritrea also referred to other lower estimates.
4. The evidence indicated that many persons with Eritrean antecedents were successful economically, owning property and operating businesses in Ethiopia. The evidence also indicated that there were active political and social organizations involving persons of Eritrean national origin. The Parties disagreed sharply regarding the character of these organizations and of their activities.
5. The heart of Eritrea's case is its contention that beginning soon after the outbreak of war in May 1998, Ethiopia wrongfully denationalized, expelled, mistreated and deprived of property tens of thousands of Ethiopian citizens of Eritrean origin in violation of multiple international legal obligations. Eritrea cited evidence it believed established that at least 75,000 persons were so expelled from Ethiopia, but contended that the actual numbers were larger, because some groups, particularly displaced rural

Eritreans, were difficult to count. Eritrea also alleged mistreatment of other groups, including civilians alleged to have been wrongfully detained as prisoners of war and otherwise.

6. Ethiopia acknowledged that it expelled thousands of persons during this period, although it maintained that there were far fewer than claimed by Eritrea. Ethiopia contended that, pursuant to its law, the Ethiopian nationality of all Ethiopians who had obtained Eritrean nationality had been terminated and that those expelled were Eritrean nationals, and hence nationals of an enemy State in a time of international armed conflict. It contended that all of those expelled had acquired Eritrean nationality, most by qualifying to participate in the 1993 Referendum. Ethiopia further contended that its security services identified each expellee as having belonged to certain organizations or engaged in certain types of activities that justified regarding the person as a threat to Ethiopia's security. Ethiopia distinguished between the approximately 15,475 persons who it claimed were expelled as threats to security, and an additional number of family members said voluntarily to have elected to accompany or follow them. Ethiopia contended that 21,905 family members left with the expellees on transport provided by Ethiopia and that an unknown number of others left Ethiopia by other means. [...]

IX. Detention without due process

1. **Introduction.** Eritrea's third major claim is that Ethiopia wrongfully detained large numbers of civilians under harsh conditions contrary to international law. This claim involves separate groups, including (a) persons held pending their expulsion, often for brief periods and in temporary facilities; (b) those held in jails or prisons for longer periods, many based on suspicions that the detainee was a spy or otherwise actively assisted the Eritrean war effort; and (c) civilians claimed to be wrongly detained and then wrongly confined together with prisoners of war. This last category included a group of Eritrean university students detained by Ethiopia at the outbreak of the war. For each group, Eritrea contended both that the initial detentions were illegal and that the detainees were held in poor and abusive conditions that did not satisfy legal requirements. [...]
2. **The Exchange Students.** Eritrea raised the first such group in its Prisoner of War Claim (Eritrea's Claim 17), which cited the allegedly unlawful detention and treatment of about 85 Eritrean university students studying in Ethiopia who were initially detained in June 1998 soon after the war began. The record indicates that their detention became an international *cause célèbre*, leading to numerous international appeals for their release. They were confined under allegedly harsh conditions for varying lengths of time; some were released early in 1999 while others were held much longer. [...]
3. The record indicates that the students were of military age and that some had received military training in Eritrea. Ethiopia contended that their internment was justified under Article 35, paragraph 1, of Geneva Convention IV. Under that provision, nationals of an enemy state have the right to leave a belligerent's territory "unless their departure is contrary to the national interests of the state." *The Handbook of Humanitarian Law* [Dieter Fleck] explains that "[t]his reference to the national interest of the state of residence is intended above all to enable the state to prohibit residents suitable for military service from leaving." Leslie Green similarly describes Article 35 as allowing a belligerent to prevent "the departure of those likely to be of assistance to the adverse party in its war efforts."
4. The evidence in this and other claims before the Commission indicates that some movement of civilians between the two countries continued during the war. Ethiopia could reasonably have feared that the students – and other Eritreans of military age, particularly those with military training – might have returned to Eritrea and joined the Eritrean forces if left at large. Their internment was consistent with

Article 35, paragraph 1, of Geneva Convention IV. Further, while the conditions in which they were detained may have been difficult and austere, particularly in comparison to those they previously experienced in Ethiopia, the record does not establish a substantial or widespread failure to meet Geneva Convention requirements with respect to their treatment.

5. It is not apparent from the record whether the students had individual opportunities to appeal either their confinement, as provided in Article 43 of Geneva Convention IV, or Ethiopia's refusal to allow them to leave, as provided in Article 35. Given the paucity of the record and the requirement for clear and convincing evidence, the Commission cannot find any liability concerning this aspect of their treatment. [...]
6. Eritrea's prisoner of war evidence includes multiple accounts of Eritrean farmers and other local residents living close to the military fronts who were taken prisoner by the Ethiopian Army and then held as prisoners of war, sometimes for years. These individuals maintained that they were not soldiers and took no part in military operations. Some were in their early teens; others were older men, some well above military age. Eritrea also presented evidence of other Eritrean civilians living far from the fronts who were similarly detained and held as prisoners of war.
7. Ethiopia did not rebut the evidence that Eritrean civilians, including both civilians living close to the front and others from elsewhere in Ethiopia, were detained and then held as prisoners of war. While international law allows the internment of civilian nationals of an enemy State under specified conditions and appropriate safeguards, the record did not show that these requirements were met. Accordingly, their continued detention was contrary to international law. In addition, under Article 84 of Geneva Convention IV, prisoners of war must be held separately from civilians. Ethiopia did not rebut Eritrea's evidence showing that Eritrean civilians were wrongly held as prisoners of war in breach of these requirements. [...]

X. Deprivation of property

1. Eritrea alleged that Ethiopia implemented a widespread program aimed at unlawfully seizing Eritrean private assets, including assets of expellees and of other persons outside of Ethiopia, and of transferring those assets to Ethiopian governmental or private interests. Ethiopia denied that it took any such actions. It contended that any losses resulted from the lawful enforcement of private parties' contract rights, or the nondiscriminatory application of legitimate Ethiopian tax or other laws and regulations.
2. Both Parties' arguments emphasized the customary international law rules limiting States' rights to take aliens' property in peacetime; both agreed that peacetime rules barring expropriation continued to apply. However, the events at issue largely occurred during an international armed conflict. Thus, it is also necessary to address the role of the *jus in bello*, which gives belligerents substantial latitude to place freezes or other discriminatory controls on the property of nationals of the enemy State or otherwise to act in ways contrary to international law in time of peace. For example, under the *jus in bello*, the deliberate destruction of aliens' property in combat operations may be perfectly legal, while similar conduct in peacetime would result in State responsibility.
3. The status of the property of nationals of an enemy belligerent under the *jus in bello* has evolved. Until the nineteenth century, no distinction was drawn between the private and public property of the enemy, and both were subject to expropriation by a belligerent. However, attitudes changed; as early as 1794, the Jay Treaty bound the United States and the United Kingdom not to confiscate the other's nationals' property even in wartime. This attitude came to prevail; the 1907 Hague Regulations reflect a

determination to have war affect private citizens and their property as little as possible.

4. The modern *jus in bello* thus contains important protections of aliens' property, beginning with the fundamental rules of discrimination and proportionality in combat operations, which protect both lives and property. Article 23, paragraph (g), of the Hague Regulations similarly forbids destruction or seizure of the enemy's property unless "imperatively demanded by the necessities of war." Article 33 of Geneva Convention IV prohibits pillage and reprisals against protected persons' property, both in occupied territory and in the Parties' territory. Article 38 of Geneva Convention IV is also relevant. It establishes that, except for measures of internment and assigned residence or other exceptional measures authorized by Article 27, "the situation of protected persons shall continue to be regulated, in principle, by the provisions governing aliens in time of peace."
5. However, these safeguards operate in the context of another broad and sometimes body of belligerent rights to freeze or otherwise control or restrict the resources of enemy nationals so as to deny them to the enemy State. Throughout the twentieth century, important States including France, Germany, the United Kingdom, and the United States have frozen "enemy" property, including property of civilians, sometimes vesting it for the vesting State's benefit. [...]
6. Such control measures have been judged necessary to deny the enemy access to economic resources otherwise potentially available to support its conduct of the war.
7. States have not consistently frozen and vested enemy private property. In practice, States vesting the assets of enemy nationals have done so under controlled conditions, and for reasons directly tied to higher state interests; commentators emphasize these limitations. The post-war disposition of controlled property has often been the subject of agreements between the former belligerents. These authorize the use of controlled or vested assets for post-war reparations or claims settlements, thereby maintaining at least the appearance of consent for the taking. This occurred both in the Versailles Treaty after World War I and in peace treaties after World War II.
8. Eritrea did not contend that Ethiopia directly froze or expropriated expellees' property. Instead, it claimed that Ethiopia designed and carried out a body of interconnected discriminatory measures to transfer the property of expelled Eritreans to Ethiopian hands.

These included:

- - Preventing expellees from taking effective steps to preserve their property;
 - Forcing sales of immovable property;
 - Auctioning of expellees' property to pay overdue taxes; and
 - Auctioning of expellees' mortgaged assets to recover loan arrears.

Eritrea asserts that the cumulative effect of these measures was to open up Eritrean private wealth for legalized looting by Ethiopians. [...]

1. The Cumulative Weight of Ethiopia's Measures. In addition to its findings above regarding particular Ethiopian economic measures, the Commission believes that the measures' collective impact must be considered. War gives belligerents broad powers to deal with the property of the nationals of their enemies, but these are not unlimited. In the Commission's view, a belligerent is bound to ensure insofar as possible that the property of protected persons and of other enemy nationals are not despoiled and wasted. If private property of enemy nationals is to be frozen or otherwise impaired in wartime, it must

be done by the State, and under conditions providing for the property's protection and its eventual disposition by return to the owners or through post-war agreement. [See, e.g., Article 38 of Geneva Convention IV, requiring that "the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace."]

2. The record shows that Ethiopia did not meet these responsibilities. As a result of the cumulative effects of the measures discussed above, many expellees, including some with substantial assets, lost virtually everything they had in Ethiopia. Some of Ethiopia's measures were lawful and others were not. However, their cumulative effect was to ensure that few expellees retained any of their property. Expellees had to act through agents (if a reliable agent could be found and instructed), faced rapid forced real estate sales, confiscatory taxes on sale proceeds, vigorous loan collections, expedited and arbitrary collection of other taxes, and other economic woes resulting from measures in which the Government of Ethiopia played a significant role. By creating or facilitating this network of measures, Ethiopia failed in its duty to ensure the protection of aliens' assets. [...]

Discussion

1.
 - a. May nationals of an enemy State be prevented from leaving the territory of a belligerent State? Is there any "right to leave"? What reason can be invoked by the retaining State? (GC IV, Art. 35(1))
 - b. Do you think that the condition stated by Article 35(1) of GC IV ("unless their departure is contrary to the national interests of the State") is applicable to the Eritrean exchange students? To your mind, could the departure of all "men of military age" be considered as contrary to the national interests of the State of residence? Would the answer differ if these men had not received military training?
2.
 - a. May civilians who are denied permission to leave the territory be automatically interned? Is the Commission right in stating that the internment of the exchange students "was consistent with Article 35, paragraph 1"? Did the treatment of the detainees have any influence on the Commission's conclusion with respect to the legality of their internment? (GC IV, Arts 41-43)
 - b. According to IHL, in which circumstances and for which purpose may the Detaining Power order the internment of civilians? What is the relevant legal basis?
 - c. Must internment be based upon an individual determination? May such individual determination flow from the fact that the person is individually denied permission to leave?
3. Must civilians denied permission to leave or interned be given a right to appeal? If there is no record that such appeals were possible, is Ethiopia responsible for a violation of IHL? How could Eritrea have proved that no appeal was available?
4. May a civilian internee be held in a POW camp? Which protections of civilian internees differ from those afforded to POWs?
5.
 - a. Is property belonging to enemy civilians on a party's own territory protected against confiscation? Against being frozen until the end of the conflict? Where can the rules be found according to which economic rights of enemy civilians on a State's own territory are to be treated? Which rules of Art. 38 of GC IV were relevant for our case?
 - b. May a combination of lawful measures taken against enemy aliens' property be unlawful because of their cumulative effect? To which provision of GC IV would you link such a prohibition?

