ERITREA ETHIOPIA CLAIMS COMMISSION

FINAL AWARD

Pensions
Eritrea's Claims 15, 19 & 23

between

The State of Eritrea

and

The Federal Democratic Republic of Ethiopia

The Hague, December 19, 2005

ERITREA ETHIOPIA CLAIMS COMMISSION

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By the Claims Commission, composed of:
Hans van Houtte, President
George H. Aldrich
John R. Crook
James C.N. Paul
Lucy Reed

FINAL AWARD – Pensions – Eritrea's Claims 15, 19 & 23
between the Claimant,
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Government of Eritrea

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Ms. Lorraine Charlton, Deputy Legal Advisor to the Office of the President of Eritrea

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and the Respondent,
The Federal Democratic Republic of Ethiopia, represented by:

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I. INTRODUCTION

1. After Eritrea became independent in 1993, the State of Eritrea ("Eritrea') and the Federal Democratic Republic of Ethiopia ("Ethiopia") entered into discussions and arrangements regarding the rights and obligations of the previously unitary State of Ethiopia. These included arrangements regarding the pensions of former Ethiopian state employees, military personnel and employees of nationalized state enterprises who now resided in Eritrea.

2. Three pension programs were involved. The first two, created in the time of Emperor Haile Selassie, were contributory pension programs for Ethiopian military personnel and civil servants. The third, created during the time of the Mengistu regime, was a similar program for employees of state enterprises nationalized during that period. In all three programs, mandatory contributions were withheld from employees' pay and the employing government agency or state enterprise contributed additional amounts. The decrees and proclamations creating these programs specified the employees' contribution as 4 percent of salary and the government employers' contribution as 6 percent.

3. As described more fully in this Partial Award, Ethiopia and Eritrea cooperated for several years in developing and implementing arrangements to pay pensions to persons in Eritrea covered by these three programs. After hostilities began in May 1998, this cooperation ended. Eritrea contends that Ethiopia violated international law in ceasing to perform the Parties' pre-war pension arrangements.

II. PROCEEDINGS

4. The Commission informed the Parties on August 29, 2001 that it intended to conduct proceedings in Government-to-Government claims in two stages, first concerning liability, and second, if liability is found, concerning damages. Claim 19 is Eritrea's primary claim concerning pensions. It was filed on December 12, 2001, pursuant to Article 5, paragraph 8, of the Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia of December 12, 2000 ("the Agreement"). Ethiopia's Statement of Defense to Claim 19 was filed on October 15, 2002, Eritrea's Memorial on November 1, 2004, Ethiopia's Counter-Memorial on January 17, 2005, and Eritrea's Reply on March 10, 2005. The Claim was addressed in hearings on liability held during the week of April 4–8, 2005.

5. Eritrea also made claims relating to pensions in its Claims 15 (concerning persons expelled from Ethiopia) and 23 (concerning the treatment of Eritrean nationals and persons of Eritrean origin remaining in Ethiopia). In its December 2004 Partial Awards regarding the treatment of civilians ("Partial Award in Eritrea's Civilians Claims"), the Commission concluded that the portions of Eritrea's Claims 15 and 23 concerning pensions were not

admissible at that stage, and were instead to be addressed in connection with its Claim 19.[1] As appropriate, the Commission's findings and conclusions in this Partial Award also apply fully to the pension-related claims asserted in Eritrea's Claims 15 and 23.

III. JURISDICTION AND APPLICABLE LAW

6. Eritrea's Statement of Claim describes the Claimant in Claim 19 (Eritrea's principal pensions claim) as "the State of Eritrea on behalf of itself, by virtue of injuries and losses incurred by the State of Eritrea and its nationals and agents as a result of Ethiopia's failure to pay certain obligations as required by law." Such claims for injuries allegedly resulting from violations of international law affecting Eritrea or its nationals are within the Commission's jurisdiction under Article 5 of the Agreement.

7. The Statement of Claim in Claim 15 (expulsions) describes the Claimant as "the State of Eritrea on behalf of itself, by virtue of injuries and losses suffered by the State of Eritrea and its nationals (*and individuals of Eritrean origin as designated in Article 5, Paragraph 9*)" (emphasis added). The Claimant in Claim 23 (persons remaining in Ethiopia) is described similarly. However, in its Partial Award in Eritrea's Civilians Claims, the Commission found that it did not have jurisdiction under Article 5, paragraph 9, of the Agreement over claims made by Eritrea for its own account based on injuries to non-nationals.[2] At the April 2005 hearing, Ethiopia referred to this finding, and contended that Eritrea's claims in Claims 15 and 23 based on injuries to persons who were not Eritrean nationals are likewise outside the Commission's jurisdiction. The Commission agrees. Insofar as Eritrea's pension claims in Claims 15 and 23 are based upon purported injuries to Eritrea on account of injuries suffered by persons who were not its nationals, they are outside the Commission's jurisdiction.

8. As a remedy in Claim 19, Eritrea requested a lump sum cash payment equal to the pension payments it had previously made to former Ethiopian public and state enterprise employees and military personnel based upon their past service to Ethiopia, plus the present value of all such pension payments it might make in the future, including future payments both to persons already receiving pensions and to others becoming eligible in the future. Ethiopia contended that this request to be compensated for future payments was outside the Commission's jurisdiction. It contended that this request (a) was not pleaded in Eritrea's Statement of Claim, and so did not meet the mandatory deadline for filing claims under the Agreement, and (b) did not concern matters related to the conflict between the Parties, the focal point of the Commission's jurisdiction.[3] In light of the disposition of these claims, the Commission need not decide this jurisdictional issue.

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[1] 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), Part XII.A., para. 6 [hereinafter Partial Award in Eritrea's Civilians Claims].
[2] *Id.* at para. 19.
[3] *See* Commission Decision No. 1: The Commission's Mandate/Temporal Scope of Jurisdiction, issued July 24, 2001.

9. Ethiopia also contended that Eritrea's claim for compensation for payments already made was outside the Commission's jurisdiction because Eritrea had not presented evidence proving that it had actually made such payments. The Commission considers this objection to relate to the merits, rather than to jurisdiction.

10. The Commission's jurisdiction under Article 5 of the Agreement is limited to claims for violation of international law. As described more fully below, Eritrea invoked several legal theories in support of these claims. All of these involved obligations said to arise pursuant to international agreements between the Parties or under customary international law. As such, they are consistent with the Commission's mandate to apply international law as the applicable law.

IV. FACTUAL BACKGROUND

11. The Parties' descriptions of the relevant facts and documents and of their pre-war courses of dealing were generally similar. Beginning in 1993, the Parties entered into a series of discussions, agreements and courses of dealing concerning pension matters. By 1998, systems were operating under which Eritrean agencies administered payment of pensions to former Ethiopian civil servants, military personnel and state enterprise employees in Eritrea, utilizing funds provided by Ethiopia. Ethiopia periodically transferred fresh funds to Eritrea upon request.[4] Ethiopia continued to make such transfers until just before the war began; the last transfer was on April 30, 1998.

12. The foundation document for these arrangements was the Parties' September 1993 Protocol Agreement on Labour, Social Affairs and Pensions ("the 1993 Protocol").[5] This was a formal document signed by senior officials of the two governments. Its language and appearance are those employed by States intending to create international legal obligations. The Parties adopted other implementing arrangements as well, including some concluded by officials at lower levels in the two governments that are less formal.

13. Article 3 of the 1993 Protocol authorized two joint bodies. The first was a "joint committee of competent experts to carry out studies and to come out with concrete proposals on the number of pensioners, the amount of the fund, and on the mechanism of its disbursement before the next regular meeting." The second was a "joint body . . . to effect payment to the pensioners in Asmara." Ethiopia agreed to cover the administrative expenses of this second body. Article 3.4 then provided that "[t]he contracting Parties have

[4] Eritrea's Claim 19, Pensions, Memorial, filed by Eritrea on November 1, 2004, para. 1.4 [hereinafter ER Pensions MEM], contends that Eritrea paid pensions utilizing its own funds, and was then reimbursed by Ethiopia, rather than distributing funds provided by Ethiopia. This differs from the structure described in some documents in the record and from Ethiopia's description of the system. However, factual differences in this regard are not material and need not be resolved by the Commission.

[5] *Protocol Agreement on Labour, Social Affairs and Pensions Between the Government of the State of Eritrea and the Transitional Government of Ethiopia* (Sept. 27, 1993), ER Pensions MEM, *supra* note 4, Annex C, p. 95.

agreed . . . (4) that the Transitional Government of Ethiopia will take responsibility to pay eligible pensioners effectively and efficiently in Eritrea, until the established committee finalizes its study." Article 8 provided that either Party could terminate the Protocol on 12 months' notice.

14. The record indicates that Eritrean and Ethiopian officials met several times over the ensuing years regarding pension matters, but work on a permanent regime proceeded slowly. Discussions by experts in 1994 focused on necessary data collection. At a more senior level meeting in 1995, "it was agreed that the interests of both nations would be best served by providing the Eritrean Government with the actuarially determined pension fund so it can administer it independently."[6] Experts met again in 1996, and again discussed the data necessary to design a permanent system. That same year, the two sides enlisted the technical assistance of the International Labour Organization ("ILO"), whose experts produced an actuarial study in 1997.

15. While this work on a possible permanent system was underway, Ethiopia provided funding for pension payments in Eritrea for several years prior to May 1998. Eritrea made regular payments to pensioners in Eritrea pursuant to these arrangements until the outbreak of hostilities.[7] Ethiopia made its last transfer of funds on April 30, 1998.

V. THE MERITS

A. Eritrea's Contentions

16. Eritrea invoked different legal theories at different stages of the proceedings. Eritrea's Statement of Claim and Memorial appeared to emphasize bilateral agreements concluded after Eritrea became independent in 1993 as the claims' legal basis. Eritrea contended that these agreements required Ethiopia to reimburse Eritrea for payments it made to eligible pensioners. It maintained that Ethiopia recognized these obligations through a consistent course of dealing prior to 1998, when it regularly transferred funds for pension payments to Eritrea.

17. Eritrea also contended that these agreements obliged Ethiopia to transfer to Eritrea an actuarially determined sum sufficient to fund all future pension payments to eligible persons in Eritrea, after which Eritrea would take over administering and paying the pensions. Eritrea indicated that at the Parties' request, ILO experts prepared an actuarial study assessing the funding required. The ILO experts' 1997 study provided a range of estimates – from $44 million to $76 million – of the funds required to fund pensions for those already receiving pensions at that time, based on various interest rate assumptions. Eritrea contended that after

[6] Minutes of the Decisions made on Outstanding issues with regard to Pensions, Apr. 20, 1995, art. 1.1, ER Pensions MEM, *supra* note 4, Annex C, p. 113.
[7] Separate Eritrean mechanisms administered the pensions of former civil servants and military personnel and those of former employees of state enterprises.

hostilities began, Ethiopia transferred no more funds to Eritrea and repudiated its obligations under the governing agreements, contrary to international law.

18. Eritrea's Statement of Claim also alleged in broad terms that Ethiopia's actions violated guarantees of property rights under the Universal Declaration of Human Rights[8] and the African Charter on Human Rights.[9] The theory that Ethiopia's actions involved a taking of property was not developed in Eritrea's written pleadings, but Eritrea raised it at the hearing, particularly in its final rebuttal presentation.

19. At the hearing, Eritrea briefly developed two further theories in support of its claim: that Ethiopia's actions resulted in its unjust enrichment, and that its obligation to pay pensions arose pursuant to customary international law obligations regulating the succession of States.

B. Ethiopia's Response

20. Ethiopia denied liability. However, in its written pleadings and at the hearing, Ethiopia affirmed that it recognized the desirability of appropriate agreed arrangements to provide pensions to eligible Eritreans in recognition of their past services to the State of Ethiopia. Ethiopia's Counter-Memorial stated that "[f]ollowing the conclusion of the war, Ethiopia has stood ready to recommence the negotiations [relating to pensions] within an appropriate diplomatic context."[10] Ethiopia reaffirmed this position at the hearing. Counsel for Ethiopia also accepted the view that, in a situation of State succession like the independence of Eritrea from Ethiopia, international law entitled a successor State to some equitable share of the assets of a predecessor State, that it was correspondingly required to assume some equitable share of the predecessor's obligations, and that these general obligations must be brought into concrete form through negotiations.

21. Ethiopia denied any continuing international legal obligation to fund pensions for persons in Eritrea. It contended that the 1993 Protocol, which it viewed as the foundation of the Parties' cooperation on pension matters, was aimed at creating a negotiating process and was terminable on twelve-months' notice by either Party. Ethiopia viewed the funds transferred to Eritrea prior to May 1998 as having been provided pursuant to agreed arrangements that were temporary, transitional, and terminable by either Party. Ethiopia saw its payments as conditional upon continued good faith negotiations to develop a permanent mutually agreed settlement.

22. Ethiopia maintained that it had not incurred a legal obligation to transfer any fixed sum to fund future pensions, and that the amount required for this purpose and other key issues had not been agreed. It cited important questions remaining unresolved following the

[8] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948), at p. 71.
[9] African Charter of Human and Peoples' Rights, June 27, 1981, *reprinted in* 21 I.L.M. p. 58 (1982).
[10] Ethiopia's Counter-Memorial to Eritrea's Claim No. 19, filed by Ethiopia on January 17, 2005, at p. 1.

1997 ILO study, particularly the interest rate to be used in calculating the amount to be transferred, a crucial variable. Moreover, the ILO study addressed only persons already receiving pensions, and did not consider others who would subsequently become eligible as they grew older.

23. Ethiopia also stressed that after May 1998, the Parties were involved in a bitter international armed conflict. It contended that in such circumstances, international law allows a belligerent to terminate financial dealings with an opposing belligerent, and does not require it to transfer funds to its enemy, even if this might have been required under pre-war agreements.

24. Ethiopia contended that the Parties' agreements regarding pensions were not intended to survive a war between them. It viewed the 1998–2000 war as involving a fundamental transformation of circumstances that terminated agreements bearing on pensions, even without any formal act by Ethiopia announcing such termination. Ethiopia also denied that that its actions resulted in any taking of property, or that it was unjustly enriched.

C. The Commission's Findings – Eritrea's Treaty-Based Claims

25 The Commission finds that Article 3.4 of the 1993 Protocol, a clear, formal document concluded by senior officials of the two Parties, created an obligation under treaty law for Ethiopia "to pay eligible pensioners effectively and efficiently in Eritrea" while the Parties worked to develop permanent pension arrangements. Pursuant to Article 8 of the Protocol, either Party could terminate this obligation on one year's notice.

26. The conclusion that Ethiopia incurred such a legal obligation under the 1993 Protocol is reinforced by the Parties' subsequent courses of dealing. Officials met several times after 1993 to discuss pension matters, and adopted various documents addressing implementation of the Protocol. Moreover, as noted above, the Parties developed financial arrangements and carried out preparatory work regarding future permanent arrangements. These related agreements and the Parties' practice help to confirm that the Parties viewed the 1993 Protocol as giving rise to legal obligations.[11]

27. Accordingly, the Commission must consider the impact of the conflict that began in May 1998 on obligations under the Protocol and its associated documents. This implicates two separate but related strands of customary international law. The first concerns the nature and extent of belligerents' rights under customary international law to regulate or prohibit financial transactions with an opposing power during an international armed conflict. There has been extensive modern practice involving belligerents' assertions and exercises of expansive rights to regulate or prohibit economic dealings with opposing powers.[12] Eritrea

[11] *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. p. 331, arts. 31(2) & 32(3).
[12] *See*, *e.g.*, LORD MCNAIR & ARTHUR D. WATTS, THE LEGAL EFFECTS OF WAR pp. 343–365 (Cambridge 1966); CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC pp. 345–348 (Dalloz, 7th ed. 1973).

argued that a belligerent cannot interrupt pension-related payments to an opposing belligerent during such a conflict, asserting that Ethiopia:

> sought to weaken Eritrea's military by forcing Eritrea to choose between spending on elderly pensioners and spending on defense. However, international law does not allow a state to inflict harm on vulnerable civilians in order to divert its opponent's resources to protecting them. Denying the elderly their pensions is not a legitimate tactic in times of war.[13]

However, Eritrea offered no authority supporting this contention, and the Commission knows of none. Particularly given the widespread and generally accepted modern practice of extensive – indeed, often pervasive – prohibitions on financial transactions between belligerents, regardless of the transaction's purpose, the Commission does not agree that customary international law prevents belligerents from barring pension-related payments to an opposing belligerent.

28. Second, the Commission must assess the effect of the 1998–2000 armed conflict on Ethiopia's treaty obligations under the 1993 Protocol and related documents. The Vienna Convention on the Law of the Treaties does not address the impact of hostilities on treaties between belligerents.[14] At an earlier time, writers viewed war as canceling all treaty relationships between the belligerents, except for treaties specifically designed for war. Contemporary writers take a less absolute view, but modern doctrine does not provide settled guidance on significant points.

29. The parties' presumed intent is generally seen as a key factor in determining a treaty's wartime status, even though such intent often is not clear from treaty texts. By their terms, some treaties clearly apply during hostilities, *e.g.*, the Hague Regulations[15] and the 1949 Geneva Conventions.[16] Other treaties' nature or purpose is thought to reveal an intention that the treaty continues to operate. Treaties designed to create permanent legal situations, such as boundary treaties or treaties confirming private rights to land, are illustrations. Some other treaties, such as treaties of alliance – sometimes described as "political" treaties – are thought to reflect transitory political relationships and are seen as terminated by hostilities.

30. This leaves cases, such as this one, where the intention to maintain a treaty in operation during hostilities is not plainly apparent from the text or the surrounding

[13] ER Pensions MEM, *supra* note 4, at p. 27, para. 1.43.
[14] *See* Vienna Convention on the Law of Treaties, *supra* note 11, art. 73.
[15] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Annexed Regulations, Oct. 18, 1907, 36 Stat. p. 2277, 1 Bevans p. 631.
[16] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. p. 3114, 75 U.N.T.S. p. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. p. 3217, 75 U.N.T.S. p. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. p. 3316, 75 U.N.T.S. p. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. p. 3516, 75 U.N.T.S. p. 287.

circumstances. Writers generally maintain that parties should be presumed to intend that such treaties be at least suspended during the hostilities.[17] The Commission concludes that this principle applies here, and that the 1993 Protocol and its associated agreements were, at the least, suspended during the hostilities and their immediate aftermath. This seems the most reasonable result. It is not plausible to assume that the Parties intended these arrangements to operate during an armed conflict between them. Ethiopia would not have bound itself to make substantial cash payments to an opposing belligerent; nor would Eritrea have pledged to allow continued activities on its territory by Ethiopian pension administrators or auditors. Neither Party would have sanctioned regular contacts and communications between non-diplomatic officials administering the pensions program during an armed conflict.

31. Ethiopia contended that its obligations under the 1993 Protocol and related agreements were terminated, not just suspended. It maintained that these obligations were conditional upon a continuing negotiating process that was ended by the conflict; that the system required official interaction and trust that were also ended by the conflict; and that the key obligations under the 1993 Protocol were in any case unilaterally terminable on 12 months' notice. Eritrea did not address directly whether the 1993 Protocol and its associated documents were terminated or merely suspended, although some of its arguments seem to have implied that Eritrea also regarded them as having come to an end.

32. The Commission need not decide whether these treaty obligations were suspended or terminated in order to decide the issues in these claims falling within the limited temporal scope of its jurisdiction under the Agreement.[18] It finds that the 1998–2000 conflict resulted at the least in the suspension of pension-related treaty obligations during the period of the conflict and its immediate aftermath, the period with respect to which the Commission has jurisdiction. Accordingly, Eritrea's claims based upon Ethiopia's alleged non-performance of the 1993 Protocol and associated documents during that period are dismissed on the merits.

D. Eritrea's Taking Claims

33. Eritrea also contended that Ethiopia's actions resulted in an uncompensated taking of property contrary to international law. This claim was not systematically developed, but appeared to involve two separate strands: that Ethiopia took individuals' property rights to receive pensions, and that it took from the State of Eritrea its rights to monies set aside and held in Ethiopia for future pension payments.

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[17] *See, e.g.*, VOL. II, OPPENHEIM'S INTERNATIONAL LAW pp. 303–304 (Hersch Lauterpacht ed., Longmans, 7th ed. 1952); GEORG SCHWARZENBERGER, INTERNATIONAL LAW p. 71 (Stevens & Sons 1968); PAUL REUTER, DROIT INTERNATIONAL PUBLIC p. 158 (Presses Universitaires de France 1983); LORD MCNAIR, THE LAW OF TREATIES pp. 703, 718 (Clarendon Press 1986); CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC pp. 71–74 (Dalloz, 11th ed. 1987); VOL. IV ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW p. 1371 (Rudolf Bernhardt ed., Elsevier 2000); PATRICK DAILLER & ALAIN PELLET, NGUYEN QUOC-DIHN'S DROIT INTERNATIONAL PUBLIC p. 974 (L.G.D.J., 7th ed. 2002); PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC p. 611 (Dalloz, 6th ed. 2002); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW p. 592 (Oxford University Press, 6th ed. 2003).

[18] *See* Commission Decision No. 1, *supra* note 3, Section C.

34. Ethiopia denied any taking of property, contending that it continued to transfer funds when requested by Eritrea and otherwise performed its obligations fully until hostilities transformed the Parties' legal relationships. It denied that it had repudiated any responsibilities *vis-à-vis* individual pensioners, and reiterated its willingness to resume bilateral negotiations on pension matters.

35. The evidence did not clarify the character and extent of individuals' rights under the three Ethiopian pension programs. Eritrea argued in general terms that those who paid into these programs acquired rights under Ethiopian law, and were "entitled to the funds accumulated by their years of hard work." However, the evidence did not show that Ethiopian law established legally enforceable individual rights to return of contributions, to any specific level of pension payments, or even to receive a pension. In this regard, counsel for Eritrea told the Commission at the hearing that Eritrea did "not suggest [. . .] that there was an individual proprietary right of a private law character of the pensioners," although counsel contended that they had other types of rights under the programs.[19]

36. Thus, the record does not establish that public pension entitlements under Ethiopian law were sufficiently concrete to be property protected by international law. Moreover, there is no proof of an unlawful taking during the jurisdictional period; as the Commission finds above, it was lawful for Ethiopia to cease performing the bilateral agreements relating to pensions during the hostilities between the Parties. Accordingly, the Commission finds that Eritrea has not established that Ethiopia took property belonging to individual pensioners during the Commission's jurisdictional period. To the extent that any portion of this claim involves actions by Ethiopia after December 12, 2000, it must be dismissed as outside the Commission's temporal jurisdiction.

37. Eritrea also appears to have contended that Ethiopia took a property interest belonging to the State of Eritrea in some part of a pool of pension assets held by Ethiopia. This claim must also be dismissed. First, the record does not establish the existence of any such asset pool. The evidence indicates that employees' and employers' contributions were not held in separate funds and invested for the benefit of specific employees. Instead, as in many countries, funds taken into the system were used to pay pensions to current pensioners. The minutes of the Parties' high-level consultations in 1995 indicate that there was no pool of reserved pension funds. They provide that "[w]ith regards to the transfer of the lumpsum of pension funds to Eritrea, it was agreed that taking Ethiopian's [sic] capacity into account, a schedule of installment payments shall be agreed upon once the total amount is determined."

[19] Transcript of the Eritrea-Ethiopia Claims Commission Hearings of April 2005, Peace Palace, The Hague, at p. 181 (Apr. 5, 2005) [hereinafter Pensions Hearing Transcript]. It would not be unusual if Ethiopian legislation does not establish a legally enforceable, non-derogable right to receive a pension for past government service. Many countries' laws leave the State the flexibility to modify, or even eliminate altogether, such pensions. O'Connell notes that "the right of British civil servants to pensions is not absolute." VOL. 1, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW p. 470 (D.P. O'Connell ed., Cambridge 1967) [hereinafter O'CONNELL].

The 1997 ILO report likewise anticipates that any future transfer to fund future pensions would involve a series of installment payments, not the transfer of an existing pool of assets.

38. Second, Eritrea has not established a legal right to receive any specific amount from Ethiopia. The minutes of the Parties' 1995 high-level consultations noted that "the interests of both nations would be best served" if an actuarially determined amount of funds was provided to Eritrea, but this was not a binding commitment to transfer funds. The negotiations to determine the amount of any future transfer, a schedule of payments and other related arrangements appeared far from completion in May 1998. Eritrea has not shown any other entitlement to funds held by Ethiopia under customary international law. Third, as noted above, the record does not establish any action by Ethiopia indicating an unlawful taking under international law. Finally, even if the State of Eritrea had claims to money or other property interests in Ethiopia, those interests would have been subject to Ethiopia's wartime rights in relation to the State property of an opposing belligerent under customary international law.

E. Eritrea's State Succession and Unjust Enrichment Claims

39. Eritrea advanced two additional legal theories at the hearing: that customary international law relating to State succession required Ethiopia to fund pensions for former Ethiopian civil servants, and that Ethiopia was unjustly enriched by its actions. The Commission is concerned that the introduction of significant new legal arguments at the hearing stage may prejudice the opposing Party and invites unfairness and possible abuse. It also undermines the Commission's ability to reach fair and informed conclusions. Nevertheless, Ethiopia did not object to these additional theories as untimely under Article 5, paragraph 8, of the Agreement or otherwise. Moreover, the Commission has indicated previously that the Parties may present additional legal arguments to support claims that have been timely filed.[20] Accordingly, the Commission will consider Eritrea's additional theories.

40. Eritrea contended at the hearing that customary international law regulating State succession obliged Ethiopia to account to Eritrea in some appropriate way for past pension contributions related to persons now in Eritrea. However, Eritrea's counsel indicated that "Eritrea had no right under the law of state succession to insist" that pension funds held by Ethiopia be transferred to it.[21] Instead, the claim appeared to be that, once the Parties agreed on the 1993 Protocol and its associated documents, the customary law of State succession constituted an additional source of obligation reinforcing Ethiopia's obligations under those arrangements.

41. This claim was not briefed or argued in detail. However, based on the arguments adduced, the Commission is not persuaded that customary international law applicable in situations of State succession allocates to the predecessor State primary responsibility for

[20] *See*, *e.g.*, Partial Award in Eritrea's Civilians Claims, *supra* note 1, para. 22.
[21] Pensions Hearing Transcript, *supra* note 19, p. 182 (Apr. 5, 2005).

official pensions when unitary States divide. State practice varies. In some cases, following the partition of a unitary State, each of the successors assumed responsibility for pensions attributable to past service to the predecessor State payable to persons in the successor's territory.[22] The Tribunal in the *Danzig Pension Case* allocated responsibility for pensions based on the nationality of the recipient, assigning responsibility for pensions to the successor State whose nationality the recipient had assumed:

> A customary rule of international law has been developed to the effect that claims to pensions passed to the succeeding State if the person who claimed the pension became a national of the succeeding State and made no use of the right to opt for the nationality of his former State.[23]

42. Given the lack of an established customary rule of the character suggested by Eritrea, Eritrea's claim based on the laws of State succession is dismissed on the merits.

F. Eritrea's Unjust Enrichment Claim

43. Eritrea's invocation of the customary international law doctrine of unjust enrichment was discussed only briefly in the written pleadings and at the hearing.[24] The doctrine is predicated upon general principles of international law, and may come into play where there have been unjust shifts of control over assets, even if there has been no violation of a relevant agreement or other international legal rule.[25] Given the doctrine's imprecise and subjective character, it must be applied cautiously, taking account of all relevant circumstances. The Commission concludes that the record does not demonstrate unjust enrichment during the Commission's jurisdictional period. As indicated earlier in this Partial Award, Eritrea has not established that either individual Eritreans or the State of Eritrea had ownership interests in any pension assets in Ethiopia. Even had such property interests existed, Ethiopia's actions to halt transfers of funds to the opposing belligerent during the period subject to the Commission's jurisdiction would not constitute unjust enrichment. Any claim in this regard based on actions by Ethiopia subsequent to the Agreement is outside the Commission's jurisdiction.

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[22] *See* O'CONNELL, *supra* note 19, pp. 467 *et seq*.
[23] Danzig Pension Case, Case No. 41, VOL. 5, ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 1929–1930 p. 67 (Longmans 1935), *quoted in* O'CONNELL, *supra* note 19, at p. 468.
[24] ER Pensions MEM, *supra* note 4, at para. 1.3, briefly refers to "an enormous windfall" to Ethiopia "at the expense of elderly Eritreans," but it does not otherwise indicate a claim for unjust enrichment under international law or address the legal elements of such a claim.
[25] *See* Christoph Schreuer, *Unjust Enrichment*, *in* 9 ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW p. 381 (Rudolf Bernhardt ed., North-Holland 1986).

VI. CONCLUDING OBSERVATION

44. As noted earlier, Ethiopia indicated to the Commission at the hearing that Ethiopia continues to recognize the desirability of a fair, agreed regime to provide pensions for persons who have served Ethiopia in the past, and Ethiopia's written pleadings emphasized Ethiopia's willingness to resume the negotiations on pension matters interrupted by the 1998–2000 conflict.[26] Counsel reiterated this undertaking in Ethiopia's closing statements. The Commission views these as serious and important undertakings.[27] It encourages the Parties to act on them, and to resume the good-faith process of negotiations and cooperation interrupted by the 1998–2000 conflict, so as to bring about a fair, permanent settlement to ensure pensions to those who served Ethiopia in the years before 1993.

VII. AWARD

In view of the foregoing, Eritrea's Claim 19, and the pension-related portions of Eritrea's Claims 15 and 23, are dismissed on the merits.

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[26] *Supra*, para. 20.
[27] *See Tribunal arbitral institué par le compromis du 23 Octobre 1985 entre le Canada et la France : différend concernant le filetage a l'intérieur du Golfe du Saint-Laurent, Sentence du 17 Juillet 1986*, *in* REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC p. 713 (Paris 1986), at p. 756.

FINAL AWARD – PENSIONS
ERITREA'S CLAIMS 15, 19 & 23

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

President Hans van Houtte

George H. Aldrich

John R. Crook

James C.N. Paul

Lucy Reed