In, Out or at the Gate? The Predicament on Eritrea’s Membership and Participation Status in IGAD

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Abstract

On 27 April 2007 Eritrea notified the Intergovernmental Authority on Development (IGAD) of its decision to “temporarily suspend its membership” and “freeze its activities” in IGAD followed on 25 July 2011 by its decision to “reactivate its membership.” On 24 August 2011 Eritrea’s representative to the IGAD Council of Ministers meeting in Addis Ababa was informed that he could not sit in the meeting and was escorted out. Eritrea’s representatives have not attended IGAD meetings since. The incident raises the important question of what should be done in the absence of an IGAD rule regulating unilateral temporary suspension and reactivation of membership. The answer should be based on a clear understanding of the laws and practices of withdrawal, suspension, expulsion, membership reactivation and rejoining international / regional organizations. This article discusses how the stalemate regarding Eritrea’s status in IGAD should be handled by reference to such laws and practices, and the rules in the Vienna Convention on the Law of Treaties governing the interpretation of treaties.

THE IGAD ANATOMY

Based on the Agreement Establishing the Intergovernmental Authority on Development (IGAD) (the Agreement), IGAD is constituted by the following four fundamental organs: the Assembly of Heads of State and Government (AHSG); the Council of Ministers (CoM); the Committee of Ambassadors (CoA); and the Secretariat.2

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The author would like to thank Isaias Y Tesfalidet (SJD candidate, Yale Law School) for his critical comments on the initial draft of this article and the office of the Permanent Mission of the State of Eritrea to the African Union and the UN Economic Commission for Africa for providing him with the official communications between IGAD and the government of Eritrea referred to in this article.

1 For a brief history of IGAD’s evolution and institutional development, see KI Weldesellassie “IGAD as an international organization, its institutional development and shortcomings” (2011) 55/1 Journal of African Law 1.

2 The Agreement, art 8.
As IGAD’s supreme authority, the AHSG makes IGAD’s most significant decisions including policy making, directing and controlling IGAD’s functioning, as well as giving guidelines and monitoring political issues especially on conflict prevention, management and resolution.3

The CoM is composed of foreign ministers and one other focal minister designated by each member state. Its activities include recommending policies for approval by IGAD, approving IGAD’s budget and monitoring the implementation of AHSG decisions.4 CoM decisions are reached by consensus.5

The CoA consists of ambassadors or plenipotentiaries accredited to IGAD headquarters and reports to the CoM.6 It advises IGAD’s executive secretary, promoting his efforts in realizing the work plan approved by the CoM and guides him in interpreting policies and guidelines which may require further elaboration.7

The Secretariat is IGAD’s executive body and is headed by the executive secretary who is appointed by the AHSG for a term of four years, renewable once. The Secretariat undertakes IGAD’s daily operations and implements AHSG and CoM decisions.8

ACQUISITION AND TERMINATION OF MEMBERSHIP IN INTERNATIONAL AND / OR REGIONAL ORGANIZATIONS AND IGAD

The Agreement does not contain detailed provisions regarding the various states of membership and the respective levels of participation: admission to, withdrawal, suspension or expulsion from, reactivation of membership or rejoining IGAD. Neither does it refer to customary practices in international and / or regional organizations (IROs) for handling these issues. The Agreement has two articles dealing with membership. Article 1A(b)–(d) provides:

“(b) Membership shall be open only to African States in the sub-region which subscribe to the principles, aims and objectives enshrined in the Agreement.”

(c) New members shall be admitted by a unanimous decision of the [AHSG].

(d) Application for membership shall be made by means of an official written request to the [AHSG].”

Article 22 provides:

3 Id, art 9(2).
4 Id, art 10(2).
5 Id, art 10(4) and (5). In practice, however, the CoM votes if no consensus can be reached.
6 Id, art 11(1).
7 Id, art 11(2).
8 Id, arts 12 and 13.
(a) Any Member State wishing to withdraw from the Authority shall give to the Chairman of the [AHSG] one year’s written notice of its intention to withdraw and at the end of such year shall, if such notice is not withdrawn, cease to be a Member State of the Authority.

(b) During the period of one year referred to in the preceding paragraph, a Member State wishing to withdraw from the Authority shall nevertheless observe the provisions of this Agreement and shall remain liable for the discharge of its obligations under this Agreement.

These two provisions only provide procedures for entry to and exit (through withdrawal) from IGAD and put the AHSG at the heart of the procedure. Without reference to practices of customary international law, various decisions regarding membership that are found between the extreme poles of admission and withdrawal (such as suspension of membership by the organization or “temporary suspension of membership” by a member and rejoining the organization) remain unregulated by the Agreement, its rules and procedures. Moreover, a dispute settlement mechanism expected to be established within IGAD has not yet been created. To put Eritrea’s current IGAD membership and participation status in context, it is important to refer to the laws and practices in other IROs on the admission, withdrawal, suspension, expulsion and rejoining of members.

**Admission**

The Agreement requires that a country that seeks to be a member of IGAD should make a simple application to that effect. As noted below, members that have withdrawn or are expelled from membership in an IRO should reapply for membership if they wish to be readmitted.

**Withdrawal**

Withdrawal, also known as “exit” or “denunciation”, is “the act by which a state unilaterally quits its membership in a treaty pursuant to the terms of the treaty”. A country that has withdrawn from a treaty terminates its future obligations under the treaty; however, it is neither released from obligations

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9 Id, art 18A(b).
11 Helfer, ibid.
that occurred, nor excused from violations that existed, prior to the date that its denunciation or withdrawal takes effect.\(^{12}\)

Withdrawal from a treaty creates discomfort to international relations and has thus been called “a mask for anarchy, a practice which weakens the whole structure of treaty-created international obligations”.\(^{13}\) Withdrawal can lead to disastrous consequences such as that which the world witnessed after the mass withdrawal of members from the League of Nations.\(^{14}\) It is a subject that is intentionally given little attention by international law scholars\(^{15}\) and many treaties do not contain explicit provisions on withdrawal,\(^{16}\) the most notable of them being the UN Charter. In the treaties that do allow withdrawal, withdrawal takes one of six different forms\(^{17}\) and IGAD falls into the form


\(^{13}\) Helfer “Exiting treaties”, above at note 10 at 1585.

\(^{14}\) Helfer briefly narrates: “In the decade leading up to the Second World War, Germany, Italy, Japan, and several other League members exercised their right to withdraw from the organization, thereby avoiding even the mild sanctions that the global body had attempted to impose ... The widespread withdrawals from the League explain in part why the United Nations Charter does not contain an express denunciation clause.” Id at 1585, note 15.

\(^{15}\) Helfer (id at 1592, note 30) uses the following as examples from luminaries of international law scholarship. Ian Brownlie in his Principles of Public International Law (6th ed, 2003, Oxford University Press) devoted only a single page (592) in his 715 page treatise to unilateral denunciation; in the three volume treatise H Lauterpacht (ed) I Oppenheim, International Law: A Treatise (8th ed, 1955, Longman), only one paragraph (at 938, para 538) is dedicated to unilateral denunciation; Shabtai Rosenne, in his Developments in the Law of Treaties, 1945–1986 (1989, Cambridge University Press) did not discuss unilateral withdrawal or denunciation at all.

\(^{16}\) This has raised a very contentious issue as to whether the absence of an exit clause restrains the choice of states to participate and withdraw from participating in international relations through treaties: Helfer, id at 1592–95. For more understanding of the debate on whether states have the right, and whether international law allows states, unilaterally to withdraw from treaties at will, see CA Bradley and M Gulati “Withdrawing from international custom” (2010) 120 Yale Law Journal 202, available at: <http://documents.law.yale.edu/sites/default/files/Bradley%20Gulati.pdf> [last accessed 7 May 2015], in contrast with L Brilmayer and IY Tesfalidet “Treaty denunciation and ‘withdrawal’ from customary international law: An erroneous analogy with dangerous consequences” (2011) 120 Yale Law Journal 217. The debate centres on whether states have “the right to terminate (or right to withdraw)” or “the right to invoke certain grounds as a basis for withdrawal or termination”: Brilmayer and Tesfalidet, id at 222.

\(^{17}\) These are: treaties that may be denounced at any time; treaties that preclude denunciation for a fixed number of years, calculated either from the date the agreement enters into force or from the date of ratification by the state; treaties that permit denunciation only at fixed time intervals; treaties that may be denounced only on a single occasion, identified either by time period or upon the occurrence of a particular event; treaties whose denunciation occurs automatically upon the state’s ratification of a subsequently negotiated agreement; and treaties that are silent as to denunciation or withdrawal: Helfer, id at 1597.
that allows states to withdraw at any time by following the procedures set down in the treaty.

Withdrawal of members from an organization whose constituting treaty does not explicitly provide for withdrawal is a difficult legal and political problem in international relations. The withdrawal from and return of Indonesia to the UN is one of the most discussed events in this regard. Indonesia’s case is discussed in this article because of its precedential value in analysing the case of Eritrea’s temporary suspension of its IGAD membership.

When, on 25 January 1965, Indonesia informed Secretary General U Thant of its “decision to withdraw” from the UN he, aware that the UN Charter did not explicitly permit the withdrawal of members, replied on 26 February 1965: “[t]he position of your Government recorded [in the 25 January letter] has given rise to a situation in regard to which no express provision is made in the Charter. It is to be recalled, however, that the San Francisco Conference adopted a declaration relating to the matter ... In conclusion I wish to express ... the earnest hope that in due time [Indonesia] will resume full cooperation with the United Nations.” Arrangements were then made to allow the Indonesian Mission in New York to maintain its official status until 1 March 1965. Seats previously occupied by Indonesia in various subsidiary organs of the UN and, in what the UN Secretariat termed “administrative actions”, Indonesia’s name-plate and flag were subsequently removed; hence Indonesia ceased to be listed as a member of the UN.

Scholars have interpreted U Thant’s cautiously worded statement on the resumption of Indonesia’s full co-operation to mean that Indonesia remained a member of the UN, because a non-member cannot “resume full cooperation” with the UN. Only the governments of Great Britain and Italy made statements reacting to Indonesia’s decision to withdraw. While the British government, possibly basing its opinion on the interpretative declaration, stated that Indonesia could not prove “exceptional circumstances” justifying its decision to withdraw, the Italian government found it “necessary to voice its apprehension over the disquieting consequences ... resulting from the absence of any mention in the Charter of such an important point as withdrawal ... from the United Nations”.

21 Ibid.
22 Id at 667. The interpretive declaration made by the First Commission of the San Francisco conference that led to the establishment of the UN read: “The Committee [Committee I/2 which handled the issue of withdrawal] adopts the view that the Charter should not make express provision either to permit or prohibit withdrawal from the Organization ... If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining
On 19 September 1966, Indonesia informed the UN Secretary General that it had “decided to resume full co-operation with the United Nations and to resume participation in its activities”. In a meeting on 28 September 1966, the president of the General Assembly cautiously stated that:

“It would therefore appear that the Government of Indonesia considers that its recent absence from the Organization was based not upon a withdrawal from the United Nations but upon a cessation of co-operation. The action so far taken by the United Nations would not appear to preclude this view. If this is also the general view of the membership, the Secretary-General would give instructions for the necessary administrative actions to be taken for Indonesia to participate again in the proceedings of the Organization ... the bond of [Indonesia’s] membership has continued throughout the period of non-participation ...”

The president then invited the Indonesian representatives to take their seats in the General Assembly.

Analysis of Indonesia’s letters for its “withdrawal” from and “resumption of full co-operation” with the UN has sparked debate among scholars as to whether Indonesia legally withdrew from the UN. Schwelb argued that Indonesia did not withdraw from the UN and that, had Indonesia’s decision to “withdraw” been accepted, it could not have returned to the UN without the formal procedure for [re]admission under article 4 of the charter. Helfer observed that this pattern for interpreting the “withdrawal” from an IRO whose treaty does not explicitly provide for withdrawal has been followed. He cited many examples of withdrawals and observed that, when the withdrawing states rejoin the organization, “they acquiesced in the organization’s re-characterization of their conduct as a temporary cessation of participation rather than a unilateral (and unlawful) withdrawal from membership. Indeed, states often bolster this re-writing of history by paying a portion of the dues assessed against them during their erstwhile absence.”

Blum, by analysing Indonesia’s letter of withdrawal, the reaction of the members of the UN after being notified of the withdrawal decision, the Secretary General’s letter and the actions of the Secretariat and the General Assembly, questioned the legality of the president’s statement that Indonesia’s “bond of membership has continued throughout the period of non-participation” and concluded that the bond had actually terminated,
that Indonesia legally withdrew from the UN, and that Indonesia should have been readmitted only as a new member under article 4 of the UN Charter.\textsuperscript{26}

For the purpose of this article, we need to answer the question how does a member that has withdrawn from an IRO rejoin the organization? For all purposes, a member that has withdrawn has its bond of membership terminated and is considered a non-member from the day its withdrawal takes effect. Therefore, the member applies to join the organization afresh as if it were a non-member.\textsuperscript{27} Given the fact that most withdrawals are voluntary acts (compared to compulsory withdrawal), it is reasonable, and the author believes it appropriate, for IROs somehow to make their displeasure known to such member. This is conventionally done by allowing re-entry of the member only following a new membership application.

**Suspension**

When an IRO member places itself at odds with the organization, especially in instances when the organization wants to isolate the member after it refuses to yield to pressure to withdraw its membership voluntarily, the organization may resort to suspending the member. What distinguishes suspension from expulsion is that “suspension would be an adequate sanction while action was being taken against a state, and that it would make easier the reinstatement of an offending member. Readmission after expulsion would have to follow the formal procedure for admitting new members”.\textsuperscript{28}

Suspension is a temporary measure, freezing a member’s participation in an organization pending the review of the steps that the member takes to reverse the actions that led to its suspension. This is, for example, how Czechoslovakia was initially suspended (January 1954) and finally expelled (January 1955) from the International Bank for Reconstruction and Development.\textsuperscript{29} Suspension is also intended to encourage the member to stay within the circle of the organization pending rectification of its condemned actions, under the condition that it continues to fulfil its other obligations under the rules of the organization, particularly the obligation to pay its dues.\textsuperscript{30} Upon receipt by the organization of a report that the matters that led to the suspension of a member

\textsuperscript{26} YZ Blum “Indonesia’s return to the United Nations” (1967) 16/2 International and Comparative Law Quarterly 522 at 525–31.
\textsuperscript{27} Id at 529. See below at notes 28 and 32.
\textsuperscript{28} LB Sohn “Expulsion or forced withdrawal from an international organization” (1964) 77/8 Harvard Law Review 1382 at 1398.
\textsuperscript{29} Id at 1406.
\textsuperscript{30} Cuba, for instance, has remained an official member of the Organization of American States (OAS) since 1962 when it was suspended because of its relationship with the Soviet Union and China. In July 2009, Cuba rejected an OAS resolution to “readmit” it. See also the example of South Africa and its suspension from the UN in “Membership – Suspension and expulsion”, available at: <http://www.nationsencyclopedia.com/United-Nations/Membership-SUSPENSION-AND-EXPULSION.html> (last accessed 7 May 2015).
have been rectified, the suspended member’s participation in the organization is simply reactivated.

**Expulsion**

Expulsion is the harshest of the measures that can be taken against a member. Scholars differ on the purposes of expulsion, at least on the purposes of the historic article 16(4) of the Covenant of the League of Nations. While some argue that the purpose of expulsion is to enable the organization to block the member from obstructing the taking of measures against it, others argue that expulsion is intended “to punish the violator, to provide disciplinary sanction, or to exert pressure on the recalcitrant state to fulfill its obligations”.  

An expelled member loses all rights and privileges of membership and the reciprocal obligations between it and the other members of the organization come to an end. Although expulsion does not mean permanent exclusion of the expelled state, the expelled state can rejoin the organization only through the regular procedure for admitting new members and after receipt by the organization of a report that the matters that led to the member’s expulsion have been rectified.

**Compulsory withdrawal**

A number of IRO rules do not provide for the suspension or expulsion of a member, since such measures are generally viewed as harsh. To address this issue, an ingenious system has been developed in a number of international organizations. Forced (compulsory) withdrawal is a process by which the organization initially invites the violating member to withdraw and, if the member refuses to withdraw, makes it very difficult for the member to continue participating in the organization’s activities, effectively compelling the member to withdraw. The forced withdrawal of Czechoslovakia from the International Monetary Fund in December 1954 and that of South Africa from the International Labour Organisation in March 1964 may be cited as examples.

**Nebulous yet workable decisions**

Circumstances may arise which cannot be resolved by the clear-cut decisions of withdrawal, suspension or expulsion of a member. In fact, most routine frictions do not reach the respective thresholds for taking one of these three decisions. To avoid these outcomes, while simultaneously putting pressure

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31 Sohn “Expulsion or forced withdrawal”, above at note 28 at 1391–92.
33 Sohn, id at 1405–06.
34 Id at 1412–15.
on the wrongdoer, half-way practices have developed within IROs whereby a member is partially excluded or partially withdraws its participation from the organization. These practices are intended to put all sorts of pressure on the other party, without the need for a member to be completely cut off from the organization through withdrawal, suspension or actual expulsion. This article now turns to these two scenarios.

Piecemeal exclusion or limited exclusion
Here an IRO restricts or prohibits a member’s participation, pending the rectification of its unacceptable actions. A member which faces limited exclusion continues to be a member of the organization and fully participates in the organization’s organs which are not subject to the limited exclusion. The most notable provision in this regard is article 19 of the UN Charter which states that a UN member which is two years in arrears in its contributions shall have no voting rights in the General Assembly, unless the assembly is satisfied that the failure to pay is due to conditions beyond the member’s control.

Decision by a member not to participate (temporary withdrawal or suspension of its activities)
A complex situation, different from a threat to withdraw, arises when a member formally decides not to participate in an organization without fully withdrawing. Unlike limited exclusion, non-participation involves the member putting pressure on the organization to change a course of action that the member deems unacceptable.

Such a situation occurred once in the Economic and Social Council (ECOSOC) of the UN. The decision by the government of Eritrea to “temporarily suspend its membership” or “freeze its activities” in IGAD looks similar to this scenario. In 1962, African members of the Economic Commission for Africa (ECA) of ECOSOC claimed that South Africa, which had not complied with a previous resolution regarding the investigation of racial discrimination, be deprived of its ECA membership until it terminated its policy of racial discrimination. While ECOSOC, resisting the demand, was seriously debating what to do about it, South Africa informed ECOSOC of its decision “not to attend any ECA Conferences in the future nor to participate in the other activities of the Commission while the hostile attitude of the African states toward South Africa persists”. When ECOSOC finally acquiesced to the African countries’ demands, it first had to decide on the status of South Africa’s membership in light of its decision not to participate in ECA activities. Some countries argued that South Africa’s action amounted to withdrawal and that this “irreversible action” be recognized as constituting voluntary deprivation of

35 Id at 1409.
36 ECOSOC official record 34th sess, supp no 10, 39–41 (E/3586) (1962), referred to in id at 1409, note 142.
37 UN doc no E/3820 (1963), referred to in id at 1410, note 143.
membership by South Africa. Others interpreted South Africa’s action “not as a renunciation of membership in the [ECA], but merely as a temporary withdrawal permitting South Africa to return [to the ECA] at any moment of its own choice”. The latter argument seems to have prevailed, since ECOSOC proceeded with discussing whether South Africa should be expelled from the ECA and various arguments were forwarded in favour and against such a sanction. No decision was taken on whether or not to expel South Africa and an amendment proposal related to non-participation failed to be adopted. Thus a compromise solution was approved, which prohibited South Africa from taking part in ECA activities until ECOSOC determined that conditions for constructive co-operation had been restored in South Africa through a change in its racial policy.

ERITREA’S DECISION TO “TEMPORARILY SUSPEND” AND “REACTIVATE” ITS IGAD MEMBERSHIP OR PARTICIPATION

Temporary suspension
On 27 April 2007, the Eritrean minister of foreign affairs sent a letter to the then AHSG chair notifying him that the Eritrean government “has temporarily suspended its membership in [IGAD] effective 21st April 2007.” The Eritrean government stated that it took the decision “in reaction to a number of resolutions passed pertaining to the worsening situation in Somalia … [which] resolutions go contrary to the core principles of IGAD in the promotion of peace and security in the region. Moreover, the resolutions taken recently are contrary to the previous IGAD and Security Council resolutions, in particular the non-involvement of frontline countries in Somalia”.

Although Eritrea had to some degree participated in the efforts to solve the Somalia problem, it began to disagree with a majority of IGAD members

38 ECOSOC official record 36th sess 199 (USSR) (1962) 202, referred to in id at 1410, note 144.
39 Ibid.
40 Id at 1410–11.
41 Id at 1411–12.
42 Letter from Eritrean Ministry of Foreign Affairs to the then AHSG chair, ref: AAP/220/07, 27 April 2007 (copy on file with the author, courtesy of the Mission of the State of Eritrea to the AU and ECA).
43 Ibid.
when they started to call for the deployment of a peacekeeping mission in Somalia in January 2005. What finally sparked Eritrea’s decision was the 13 April 2005 CoM resolution to support Ethiopia’s military intervention in Somalia.45

The 51 months of absence
In the 51 month interval between Eritrea’s decisions to suspend and reactivate its membership, that is, between April 2007 and July 2011, a number of events occurred that are relevant in analysing the status of Eritrea’s membership of and participation in IGAD. It must, at the outset, be noted that IGAD did not send a letter replying to the 27 April 2007 letter from Eritrea. Such a letter, like U Thant’s letter reacting to Indonesia’s decision to withdraw from the UN, would have clarified IGAD’s understanding of Eritrea’s action and whether or not IGAD recognized Eritrea’s “temporary suspension” of its membership.

For one, the peace and stability situation in Somalia continued to deteriorate, especially given the incessant and often bloody battle between the Transitional Federal Government and the militant Islamic group Al Shabaab.46 A very significant related event, lying at the heart of the debates around Eritrea’s attempts to resume its participation in IGAD, was the decision by the UN Security Council, through resolution 1907 of 23 December 2009, to impose sanctions against Eritrea for its involvement in Somalia and due to a border dispute with Djibouti.47

Initially IGAD was not clear on how it viewed Eritrea’s April 2007 action. The CoM had concluded its 27th ordinary session two days before the AHSG summit mentioned below; regarding Eritrea’s absence, the CoM had recommended to the upcoming AHSG summit that “[t]he formula of IGAD + 1 that embraces Eritrea in the program or any other formula which does not

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undermine IGAD’s role as a vehicle of regional integration is welcome.”\textsuperscript{48} The CoM also recommended “the establishment of a task force … to engage Eritrea and convince them to reconsider their position and continue with their full membership of IGAD”\textsuperscript{49} while simultaneously instructing that the Secretariat “[retain] the current staff and freeze recruitment of new staff from Eritrea pending further decision”.\textsuperscript{50}

AHSG’s 12th summit was held in Addis Ababa on 14 June 2008 where, among other things, AHSG discussed the reasons for Eritrea’s absence from IGAD. Participants at the summit had varying views on their understanding of the status of Eritrea’s membership of and participation in IGAD. For the then IGAD executive secretary, Dr Attalla Hamad Bashir, it only required discussions with the Eritrean authorities to embrace Eritrea back into the club. Dr Bashir noted that “he had sought audience with the President of Eritrea to discuss the issue but that never materialized. He welcomed the proposal to engage the state of Eritrea afresh on the forthcoming sidelines of the African Union meeting in Egypt.”\textsuperscript{51} For Louis Michel, EU commissioner for development and humanitarian aid, who attended the meeting, Eritrea had simply frozen its membership and he exhorted IGAD to “remain all inclusive in its membership and supported the efforts being undertaken to facilitate the resumption of Eritrea’s membership to the IGAD family”.\textsuperscript{52} On the other hand Mwai Kibaki raised concerns “on the withdrawal of membership of Eritrea from IGAD”\textsuperscript{53} Only the AHSG’s final communiqué shed some light on AHSG’s common understanding of the matter. In its communiqué, the AHSG summit endorsed the CoM recommendation for the establishment of a task force that would engage Eritrea in the succeeding 11th African Union (AU) summit to be held in Sharm El-Sheikh, Egypt from 24 June – 1 July 2008 “with a view to convincing Eritrea to reconsider her decision to suspend her membership in IGAD”\textsuperscript{54} Perhaps the most direct statement about Eritrea’s membership status came from Dr Bashir’s statement that “[t]he case of Eritrea suspending its membership is one of the challenges in front of IGAD. It is worth mentioning that Eritrea did not withdraw, but it only suspended its membership”.\textsuperscript{55}

In conclusion, the statements and behaviour of AHSG, the CoM and concerned international actors (such as the EU) as at June 2008 showed that IGAD generally acknowledged Eritrea’s decision and considered Eritrea to be a member that was temporarily, yet seriously, at odds with IGAD concerning some matters.

\textsuperscript{48} Comm of 27th ordinary session (12 June 2008) at 16 (emphasis added).
\textsuperscript{49} Id at 17 (emphasis added).
\textsuperscript{50} Id at 18.
\textsuperscript{52} Id at 6 (emphasis added).
\textsuperscript{53} Id at 9 (emphasis added).
\textsuperscript{54} Id at 23 (emphasis added).
\textsuperscript{55} Id at 44 (emphasis added).
As a follow up to the AHSG decision, a delegation led by Kenyan Foreign Minister Moses Wetangula, Sudanese Foreign Minister Deng Alor and IGAD Executive Secretary Mahboub Maalim made an official visit to Eritrea on 14–15 August 2008 at the invitation of the Eritrean government. The delegation met and held discussions with President Isaias Afwerki. Mr Wetangula told Mr Afwerki that “whilst Eritrea had suspended its membership, its nationals are still working at the Organization’s Secretariat in Djibouti … that in the restructured expanded IGAD, Eritrea will have its quota of staff. He noted that, whatever the difficulties in the region, Eritrea should forget the past and move ahead … He thus implored Eritrea to reconsider her suspension of membership from IGAD.”

President Afwerki noted his observation of IGAD’s failure to live up to its expectations in the Somalia, Sudan and Eritrea-Ethiopia / Eritrea-Djibouti disputes. He stated that IGAD’s failure in Somalia as well as its inaction in the “kidnapping of three Eritrean nationals on the streets of Nairobi by the Kenyan authorities” contributed to Eritrea’s decision to suspend its membership, which decision was motivated “not by self-interest but rather by the regional interests” and that “it was meant to tell IGAD to review its methods of work”. The president finally announced the appointment of his minister of agriculture as the focal person to deal with IGAD matters in Eritrea and promised Eritrea’s commitment to continue engaging with IGAD.

Wetangula continued that “IGAD is not whole in the absence of Eritrea” and that “the suspension of [membership] by Eritrea did not mean withdrawal”. Alor added that “IGAD cannot be restructured when Eritrea is still not participating in the organization’s activities”. Maalim briefed the president on the plan to expand IGAD’s activities from peace and security to development and to restructure the IGAD Secretariat, and requested the president to consider paying Eritrea’s arrears. In essence, Maalim “promised the President that Eritrea will be part and parcel of the restructuring process of IGAD, and reiterated IGAD’s continued engagement with Eritrea”.

The delegation’s statements are testament to the conclusion that Eritrea considered itself, and IGAD generally considered Eritrea, to be a displeased

56 Report of the Mission of the IGAD ministers of foreign affairs and executive secretary to Eritrea at 2 (copy on file with the author, courtesy of the Mission of the State of Eritrea to the AU and ECA).
57 Id at 2–3.
58 Id at 3–4.
59 Id at 4.
60 Ibid.
61 Ibid.
62 Ibid.
member that was not fully participating in IGAD. An additional piece of evidence in this regard was a letter that Maalim sent to the Eritrean foreign minister on 20 July 2011 (five days before Eritrea formally announced its decision to reactivate its IGAD membership)\textsuperscript{64} inviting Eritrea to participate in the IGAD hydrological cycle observing system project (HCOSP).\textsuperscript{65} Maalim referred to this 20 July letter in a subsequent letter he sent to the Eritrean foreign minister on 27 July 2011, two days after Eritrea’s membership reactivation letter. These two letters sent before and after Eritrea’s letter reactivating its membership are further evidence that IGAD considered Eritrea to be a member that had to be updated with progress made in the East African community.

**Reactivation**

In a letter dated 25 July 2011, the Eritrean government announced its decision to “reactivate its membership” of IGAD. The letter does not expressly state why Eritrea decided to reactivate its membership, except for the closing remark that Eritrea “is determined to make its contribution, in cooperation with members, to the achievement of peace and development as well as the revitalization of IGAD”.\textsuperscript{66} The reasons were later stated in Saleh’s 18 October 2011 letter of protest to Dr Jean Ping, the then chair of the AU Commission, where the minister stated that, “[i]n recognition and appreciation of the consistent and frequent requests and appeals made by IGAD Ministerial Delegation, AU and International Development Partners such as EU; and in the spirit of reconciliation, peace and security and regional integration; as well as in recognition of the current economic and political dynamics of the world, Eritrea has finally decided to reactivate its membership to IGAD effective 25th July 2011.”\textsuperscript{67}

Three days after Saleh’s letter of 25 July 2011, Eng Maalim sent a letter acknowledging Eritrea’s “historic letter … concerning Eritrea’s commendable decision to reactivate its membership of IGAD with immediate effect” and expressed his happiness with “the bold decision of Eritrea to rejoin the IGAD family”.\textsuperscript{68} He furthermore stated that he “broke the good news to the

\textsuperscript{64} Letter ES10–400/AD 013/11, 20 July 2011. A copy of the 27 July 2011 letter referring to this letter is on file with the author, courtesy of the Mission of the State of Eritrea to the AU and ECA.

\textsuperscript{65} More detailed information on the project, which is part of the world hydrological cycle observing system developed by the World Meteorological Organization, is available at: \url{http://www.whycos.org/whycos/documents/igad-hycos-rev-project_documents_2012.pdf} (last accessed 11 May 2015).

\textsuperscript{66} Letter from Mr Osman Saleh, Eritrea’s foreign minister, to Eng Mahboub M Maalim, IGAD executive secretary, (no reference number) 25 July 2011 (copy on file with the author, courtesy of the Mission of the State of Eritrea to the AU and ECA).

\textsuperscript{67} Letter from Mr Osman Saleh, Eritrea’s foreign minister, to Dr Jean Ping, AU Commission chair, ref: MO/114/2011, 18 October 2011 (copy on file with the author, courtesy of the Mission of the State of Eritrea to the AU and ECA).

\textsuperscript{68} Letter from Eng Mahboub Maalim, IGAD executive secretary, ES20–103/328 (28 July 2011) (copy on file with the author, courtesy of the Mission of the State of Eritrea to the AU and ECA).
rest of the IGAD Members by forwarding copies of your letter to them. I am confident that the IGAD Member states, the IGAD development partners and all IGAD stakeholders will be delighted to see Eritrea back in the IGAD family fold.”

In fact on 27 July 2011, Eng Maalim had sent Saleh a letter inviting Eritrea to send three representatives to attend a 23–24 August 2011 meeting on the implementation of HCOSP, an invitation that would not have been sent to a member cut off from the organization.70 The footer of the 27 July 2011 letter, written on IGAD’s letterhead, shows the flags of the then seven IGAD members including Eritrea.71 Similarly, IGAD emblems in all communiqués during and after the absence of Eritrea from IGAD activities show Eritrea on the map inside the IGAD emblem.

Following Maalim’s response, Saleh sent a letter to Maalim on 30 July 2011, informing him that Ambassador Girma Asmerom, Eritrea’s permanent representative at the AU and ECA, was also Eritrea’s national contact in IGAD.72

Mini conclusion

It might be stated at this stage that, despite Eritrea’s use of the terms “temporary suspension” and “reactivation” of its membership and the use of these and other phraseologies (such as “rejoin”) in the deliberations within IGAD as well as in the communications between IGAD, Eritrea and other international actors, what happened in effect was that Eritrea never even temporarily suspended its membership. From a legal point of view, what Eritrea did by its self-imposed suspension, and how IGAD reacted accordingly, was to suspend the exercise of its membership rights and obligations and not its membership per se. This is what Eritrea did in reality and that was how the other actors involved treated it.

The 24 August 2011 incident

On 24 August 2011, the 40th extraordinary session of the CoM was to convene at the Sheraton Addis in Addis Ababa. The chargé d’affaires of the state of Eritrea to the AU and ECA, who had been delegated to attend the meeting was, however, informed that he would not be allowed to sit at the meeting and, following a brief altercation, was escorted out of the meeting hall by the hotel’s security personnel. The meeting then proceeded without Eritrea’s representative.

The communiqué of the meeting referred to Eritrea’s application to reactivate its membership and stated that the CoM “[r]eaffirms the credibility of

69 Ibid.
70 Letter ES40–100/324/11, 27 July 2011 (copy on file with the author, courtesy of the Mission of the State of Eritrea to the AU and ECA).
71 Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan and Uganda.
72 Letter from Mr Osman Saleh, Eritrea’s foreign minister, to Eng Mahboub M Maalim, IGAD executive secretary, ref: MO/300/2011, 30 July 2011 (copy on file with the author, courtesy of the Mission of the State of Eritrea to the AU and ECA).
IGAD as a regional organization governed by established rules and procedures, and urges that these be followed in the conduct of its business; further underscores that the application of Eritrea for re-admission to IGAD should follow appropriate rules and procedures including consideration of the summit of the IGAD Heads of State and Government”.

When asked why Eritrea’s representative was not allowed to attend the meeting despite Eritrea’s 25 July 2011 letter, Maalim responded that Eritrea had notified him of the reactivation of its membership and that he had replied that the case would be decided by the AHSG. He added that, even though the AHSG had not yet decided on Eritrea’s membership status, Eritrea had, contrary to his note in the letter regarding the AHSG decision and in violation of international law, released information in a number of websites to the effect that it was allowed to rejoin IGAD, but that he had repeatedly told the media that Eritrea’s action was wrong. He also stated that, in a subsequent letter he had sent to the Eritrean government, he made it clear that it was not the executive secretary but the AHSG that approves membership.

Eng Maalim’s 28 July 2011 letter to the Eritrean foreign minister makes no mention of him telling the government of Eritrea that the AHSG had to decide on Eritrea’s readmission. Although the purpose of this paragraph is not to examine the veracity of Eng Maalim’s statements vis-à-vis his letter to the Eritrean foreign minister, his reaction following the 24 August 2011 incident is testament to the legal vacuum that exists in the Agreement about the appropriate legal response to Eritrea’s decision temporarily to suspend and reactivate its IGAD membership.

In a 25 August 2011 interview with the Voice of America, Eng Maalim said that, “as he had stated in his reply to Eritrea”, the process of Eritrea’s readmission had to be handled by the AHSG and that the process was being pursued, a process that had not yet materialized. When again asked why the Eritrean diplomat was allowed to enter the meeting hall and hold his seat before he was asked to leave the hall, Maalim replied that he did not know and, in a statement that would later be part of a reaction in a press release by Eritrea’s Foreign Ministry, he then asked the journalist why the South Sudan representative, whose country had asked to be admitted to IGAD, did not enter the meeting hall. Indeed, before or at about the same time as Eritrea’s notice to IGAD of its decision to reactivate its membership, the Republic of South Sudan applied for IGAD membership. Surely South Sudan, as a new
member, had to wait until 25 November 2011 when it was admitted as a new member during the 19th extraordinary session of the AHSG held in Addis Ababa.\textsuperscript{77} Equating the situation of South Sudan with that of Eritrea, however, would mean that Eritrea had \textit{in effect} withdrawn from IGAD and thus had to be treated like a new member to be readmitted to IGAD.

\section*{Since 24 August 2011}

Eritrea was not invited to attend the 41st extraordinary session of the CoM held on 21 October 2011 in Addis Ababa and Minister Saleh sent a letter to Maalim on 24 October 2011 stating that “Eritrea, a full-fledged member state of IGAD was not informed by the Secretariat of our regional Organization about the convening of this Meeting. I, therefore, need an explanation from you why and under what mandate and whose instruction that the Secretariat did not inform Eritrea about the holding of the above mentioned Meeting.”\textsuperscript{78}

Saleh’s letter followed a five page letter of complaint that he had written to Jean Ping on 18 October 2011 where the minister referred to IGAD’s rules and procedures to argue that:

“There is no clause that delegates or empowers the Council or the Assembly of Heads of State and Government to prevent a Member State from participating in any IGAD sponsored or organized meetings; The Chairperson and the Executive Secretary do not have the mandate to take unilateral decision or action; and There is no article or clause that restricts a Member State from temporarily suspending or reactivating its membership … It should be underlined that Eritrea is not a new member and is not applying for readmission, as it has not withdrawn from IGAD. Therefore, Article 1(A) and Article 22 do not apply to Eritrea’s temporary suspension or reactivation of its membership. At this juncture, I must also mention, Your Excellency, that suspension of participation and withdrawal from an organization are two legally and substantially different concepts and actions.”\textsuperscript{79}

The minister added that “[i]t was out of this shared apprehension that Eritrea had not withdrawn but had only temporarily suspended its IGAD membership. Furthermore IGAD had never ceased its engagement with Eritrea. Therefore, 14 months after Eritrea’s temporary suspension of her membership, the 12th AHSG summit, which gathered in Addis Ababa on 14 June 2008, decided to send to a Ministerial Delegation to Eritrea.”\textsuperscript{80}

\begin{thebibliography}{99}

\bibitem{77}Comm of AHSG’s 19th extraordinary session at 3.
\bibitem{78}Letter from Mr Osman Saleh, Eritrea’s foreign minister, to Eng Mahboub M Maalim, IGAD executive secretary, ref: MO/227/2011, 24 October 2011 (copy on file with the author, courtesy of the Mission of the State of Eritrea to the AU and ECA).
\bibitem{79}Letter from Mr Osman Saleh to Dr Jean Ping, above at note 67.
\bibitem{80}Ibid.
\end{thebibliography}
To support his claim, the minister also referred to: the August 2008 IGAD delegation visit to Asmara; the “numerous telephone and email communications [that] took place between Eng Mahboub Maalim and Eritrea’s minister of agriculture [the IGAD focal person in Asmara]”;81 and Eng Maalim’s 28 July 2011 letter to him lauding Eritrea’s “historic and bold” decision to reactivate its IGAD membership, all of which should have “sufficed as a confirmation to Eritrea’s automatic reactivation of its membership to the Authority, should there be any legal requirement for it”.82

Despite Saleh’s letters of protest to Ping and Maalim, Eritrea was once again not invited to the 19th AHSG extraordinary session held on 25 November 2011. In its communiqué, the meeting “[r]ecognize[d] the situation of Djiboutian prisoners taken by Eritrea and demand[ed] the Government of Eritrea to free all Djibouti Prisoners of War without further delay” and “[c]ondemn[ed] the Government of Eritrea for its continuing supply of ammunitions to the extremist group particularly Al Shabaab whose intention has always been to destabilize the Region”.83

The subsequent 20th extraordinary AHSG session on 27 January 2012, among others, welcomed UN resolution 2023 (2011) which added sanctions against Eritrea and called for their full implementation.84 The CoM, in its 45th ordinary session on 11 July 2012, discussed Eritrea and noted that “Eritrea has not released information on the Djiboutian prisoners of war in its custody and called on Eritrea to abide by international humanitarian law on the treatment of prisoners of war”.85

The impasse continues. The latest communiqués of the 53rd extraordinary CoM session (10 January 2015) and the 27th extraordinary AHSG summit (24 August 2014) make no mention of Eritrea at all.

ERITREA’S STATUS IN IGAD

Context

Eritrea’s two decisions are nothing but a reflection of the challenges in which IGAD finds itself. At the heart of Eritrea’s IGAD membership stalemate is its bitter relationship with Ethiopia that surfaced after their 1998–2000 border war. Regarding the actions taken against it via IGAD, Eritrea mentions Ethiopia’s role and manoeuvres in the actions taken against it in almost all of its communications. The most notable of these actions were IGAD’s

81 Ibid.
82 Ibid.
83 Comm of AHSG’s 19th extraordinary session at 7.
84 Comm of AHSG’s 20th extraordinary session at 4.
85 Comm of the 45th CoM extraordinary session at 2.
call, and thereafter the AU’s Peace and Security Council call, for the imposition of UN sanctions and, when these were imposed in December 2009, IGAD’s subsequent call for more sanctions against Eritrea.

Interpreting the Agreement

The provisions of the Agreement

A literal reading of the Agreement supports neither Eritrea’s claim to resume its membership as if its unilateral suspension had no subsequent effect on its membership status nor IGAD’s decision effectively to bar Eritrea’s re-entry as if it were a non-member. The Agreement, therefore, needs to be interpreted based on conventional rules of treaty interpretation.

Interpretation in the absence of an explicit provision

In the absence of such explicit provisions governing Eritrea’s decisions, conventional rules governing the interpretation of treaties have to be employed. Articles 31–33 of the 1969 Vienna Convention of the Law of Treaties (Vienna Convention) are the most authoritative provisions adopted in international tribunals when there is a need to interpret treaties, regardless of whether the disputants are signatories of, or have ratified or acceded to the Vienna Convention. In the case of IGAD, all members are parties to the Vienna Convention.

Treaty interpretation usually begins with article 31 (general rule of interpretation) which has attained the status of a rule of customary or general international law and provides, in part: “[a] treaty should be interpreted in

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86 Comms of the 33rd CoM extraordinary session: Ext Ord 1 (20 May 2009), paras 5 and 6, Ext Ord 2 (20 May 2009), para 4 and Ext Ord 3 (10 July 2009), para 9; comm of AHSG’s 14th extraordinary session (30 June 2009), para 4; comms of the 33rd CoM ordinary session: general (7–8 December 2009) at 2, on Somalia (7–8 December 2009), paras 6 and 27.
87 Comm of the 190th meeting of the AU Peace and Security Council (22 May 2009), paras 4 and 5(ii).
88 Comm of AHSG’s 18th extraordinary session (4 July 2011) at 5.
good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 31, however, is usually employed in interpreting treaties the provisions of which expressly govern the dispute at hand. Nevertheless, it gives a general direction to the art of treaty interpretation.

Use of precedents
The absence of explicit provisions should, however, not lead one to conclude that there is no legal solution to the case of Eritrea. Nor should the plausible recommendation of amending the Agreement to address such issues stop one from attempting to use the Agreement as it stands to resolve the dispute. International tribunals have long referred to precedents based on actual practice as a persuasive authority in interpreting treaties.91 A treaty interpreter would thus be justified to look into similar experiences in other IROs to discuss the Eritrea case.

There are previous, similar incidents resolved within IRO instruments, where the treaties did not have express provisions governing the incidents. For example, in the withdrawals of Czechoslovakia, Hungary, Poland, Singapore, the UK and the US from UNESCO, of Indonesia from the UN, of North Korea from the International Covenant on Civil and Political Rights and of the Soviet Union and eight of its eastern European allies from the World Health Organization, the respective treaties do not contain provisions on withdrawal. When the members that “withdrew” their membership “rejoined” the organizations, they all found that the organizations had “characterized their conduct as a temporary cessation of participation rather than a unilateral (and unlawful) withdrawal from membership”.92 That in these examples the treaties failed to provide for withdrawal, whereas in the Eritrea case the incident is unilateral suspension by a member, should not stop one from referring to them as examples.

contd

Damme states that the principles of interpretation in arts 31–33 of the Vienna Convention “bind all States as customary international law” but that “[f]rom a formal perspective, they are part of binding treaty language for the contracting parties to the Vienna Convention”: Van Damme, id at 5.


92 Helfer Exiting Treaties, above at note 10 at 1595.
In these cases, the respective IRO did not fail to react to the members’ withdrawal because of the absence of treaty provisions governing withdrawal. In Indonesia’s case, for instance, U Thant made it clear that he did not acknowledge the withdrawal and that he hoped for the resumption of Indonesia’s full co-operation with the UN. Although IGAD did not send a formal letter of response to Eritrea’s decision to suspend its membership, IGAD took actions, as narrated above, to encourage Eritrea to reconsider its decision. In both cases, the organizations (the UN and IGAD) showed that they did not support the self-imposed isolation of the withdrawing/self-suspending member, because all IROs are established to encourage members to continue staying and participating in the organization.

The main difference between the reactions of the IROs in the cited examples and the reaction of IGAD in this regard, however, lies in what happened after the members decided to return to the organizations. Whereas the IROs characterized the more drastic action of “withdrawal” of the concerned members as a temporary cessation of participation and quickly welcomed the members back, IGAD has in effect characterized the less drastic “temporary suspension” of Eritrea as withdrawal of membership. It should not be difficult to see which of these two actions serves the objective of cohesion and harmony extant in treaties.

There is a stark difference between the cited IRO and IGAD examples in the facilitation of the rejoining of temporarily absent members. In the case of Indonesia, for example, it took the UN nine days to allow Indonesia back to the General Assembly. Similarly, when Singapore made its intent to rejoin UNESCO official by depositing its instrument of adhesion on 8 October 2007, it was immediately welcomed as the 193rd member of UNESCO (from which it had pulled out 22 years earlier) and was allowed to attend the 34th session of UNESCO’s General Conference held in Paris eight days later. In the case of Eritrea, however, its 25 July 2011 notice to reactivate its membership has not yet been addressed in numerous IGAD meetings, making it difficult to discern whether for IGAD members Eritrea is in, out or at the gate of the organization.

Experience of Eritrea “rejoining” the AU

The “return” of Eritrea to the AU and the reaction of the AU thereto is a more relevant, vicinal example. In November 2009, Eritrea recalled its AU ambassador in protest at the AU’s failure to condemn Ethiopia’s violations of the Algiers peace agreement by failing to be bound by the decision of the

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Eritrea-Ethiopia Boundary Commission. 94 Although Eritrea’s recall of its AU Ambassador, and the consequences, is and should be distinguishable from the temporary suspension of its IGAD membership, Eritrea in effect distanced itself from participating in the two organizations. In January 2011, Eritrea reopened its Permanent Mission to the AU after several years of absence and appointed Girma Asmerom as its permanent representative at the AU. 95 Not so long thereafter, Asmerom was received by Dr Jean Ping who said that “he was delighted to see Eritrea return to the African Union after several years of absence [and] described Eritrea’s return as a major achievement which has been a priority since he took office three years ago”. 96 This was a reception similar to the initial response of Eng Maalim upon receipt of Eritrea’s decision to return to IGAD which happened seven months after it rejoined the AU. However, whereas Eritrea immediately took its seat at the continental organization (AU) and continues to participate in its activities, Eritrea’s status at the regional organization (IGAD) remains undecided.

Ties of brotherhood
Treaties establishing IROs contain general statements of their overall purposes and give context to their interpretation. 97 Similarly the Agreement contains such statements in its preamble as:

“Considering the well-established ties of brotherhood and fruitful co-operation existing among our peoples and governments … Cognizant of the wide-ranging similarities of present and future challenges and interdependence of our countries … Resolved to pursue comprehensive cooperation on the basis of equality and mutual benefit with the view to achieving economic

97 In the interpretation of treaties, international tribunals often refer to the preamble in the course of interpreting the treaty at hand. Gross states: “it must be admitted that an international tribunal may and often does find guidance in the preamble of a treaty which sets forth the agreed objectives of the parties, in the principles of international law and the general principles of law”: I Gross “Treaty interpretation: The proper role of an international tribunal” (April 1969) 63 Proceedings of the American Society of International Law 108 at 115. In its commentary on what would later become art 31 of the Vienna Convention, the International Law Commission underlined that the preamble of a treaty is part of the “context” of a treaty: “That the preamble forms part of a treaty for purposes of interpretation is too well settled to require comment”: International Law Commission Draft Articles on the Law of Treaties with Commentaries ILC Yb 1966, vol II at 221.
integration ... Inspired by the noble purpose of promoting peace, security and stability, and eliminating the sources of conflict as well as preventing and resolving conflicts in the sub-region …"

These paragraphs show the desire of the founders of IGAD to ensure that the close co-operation of the countries of the Horn was to be maintained at all times by the “well-established ties of brotherhood”. The principles upon which IGAD is founded include: the sovereign equality of all member states; peaceful settlement of inter- and intra-state conflicts through dialogue; and maintenance of regional peace, stability and security. Promotion of peace and stability in the sub-region and creation of mechanisms to prevent, manage and resolve inter and intra-State conflicts through dialogue is one of the objectives in the Agreement.

The preamble, principles and objectives of the Agreement show that IGAD was founded to address the economic and political challenges in this part of the world through a familial interaction of the members. Each member deserves continuous attention. The enhancement of the often deleterious relationship that Eritrea has had with IGAD in the last few years should, therefore, be seen in the light of the preamble, principles and objectives of the Agreement. Thus, although Eritrea for its part damaged the ties of brotherhood by a unilateral absence from and non-participation in IGAD for more than four years, the treatment that it has received after it notified IGAD of its decision to return in July 2011 is equally against the ties of brotherhood envisioned by IGAD’s founders, which include Eritrea.

In these examples, IROs whose founding treaties do not provide for a member’s withdrawal quickly embraced their members that “withdrew” from the organization to uphold the organization’s good objectives. The IROs did not rely on the legal vacuum in the treaties to keep the “returning” members at bay until the confusion could be cleared. For as much as there was no legal provision in support of either side’s claims, the family of nations took the positive step of quickly integrating the estranged members. Even in IROs which expelled members, the embracing back of the expelled members was expeditious as soon as evidence of the rectification of the case for expulsion was submitted by any party. From IGAD’s perspective, taking action in the name of the tie of brotherhood in Eritrea’s case is, in fact, lesser in its gravity than the examples of the other IROs referred to above and IGAD should have found it easy to allow Eritrea to resume the exercise of its membership.

Pacta sunt servanda
One of the key pillars in the law of treaties is the principle that parties to a treaty must perform it in good faith. The duty to act in good faith has also been acknowledged as part of international law, at least since Judge

98 The Agreement, art 6A.
99 Id, art 7.
100 Art 26 of the Vienna Convention provides: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”
Lauterpacht’s statement in the Certain Norwegian Loans case, where he proclaimed: “unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law”.\(^{101}\) The narration of the actions of IGAD officials and organs since the 24 August 2011 incident\(^ {102}\) does not show good faith in their treatment of Eritrea’s intent to resume its participation in IGAD and in their treaty obligation to further the tie of brotherhood. The individuals who were and are directly involved in the Eritrea case in different capacities in IGAD are, therefore, required not only to act in good faith as employees of, or decision makers in, IGAD but also as members or representatives of their governments.

**Effective interpretation**

Interpretation of the Agreement based on the text, context, object and purpose of the document as well as the practices of other IROs cannot exhaust the inquiry in the case of Eritrea. The key issue that has to be addressed now is: what should be done?

In the absence of express provisions regulating the two actions taken by the Eritrean government and the lack of clearly specified procedures on how to proceed with the stalemate, the first question that needs to be answered is who should decide the matter. As it stands, despite Eritrea’s declaration that its re-entry into IGAD was effective immediately, the AHSG is (or should have been) the appropriate organ to assume responsibility for deciding the matter in light of the objectives of the Agreement. Article 9(c) of the Agreement broadly mandates the AHSG to “give guidelines and monitor political issues especially on conflict prevention, management and resolution”. The politico-legal problems that have arisen with Eritrea’s actions require guidelines and monitoring of the AHSG.

The second question that must be answered is how the AHSG should give meaning to the Agreement to the benefit of all. Interpretation has to be done with a view to making the outcome of the interpretive exercise meaningful in the sense of being effective. AHSG’s indecision so far has left Eritrea’s status in limbo for nearly four years. The effective way to act in this case would be to allow Eritrea to resume its full participation in IGAD for the purpose of upholding the “ties of brotherhood” and to allow Eritrea to voice its concerns, if any, within the east African club of nations. In its March 2013 report on Eritrea, for example, the International Crisis Group has recommended, inter alia, that “[m]ember states of … IGAD should welcome Eritrea back and encourage normalization of relations”.\(^ {103}\)

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101 Certain Norwegian Loans (France v Norway) (jurisdiction) [1975] ICJ reports 9 at 53.
102 The different sessions of the AHSG and CoM after July 2011 discussed Eritrea and frequently made recommendations against it, but never raised the issue of the resumption of its participation in IGAD.
CONCLUSIONS AND RECOMMENDATIONS

IGAD has not yet issued a legal statement on the matter and will find it very difficult to argue that Eritrea is not a member of IGAD or should not be allowed to resume full participation. Precedents with other IROs do not support the way Eritrea’s decision to return to IGAD has been handled by the organization. If Eritrea’s decision to self-suspend itself from IGAD (a decision to which IGAD has not reacted) was an undesirable action in light of the organization’s vision to tie the bond of brotherhood in the sub-region, that act was undone by Eritrea’s decision to reactivate its membership, a decision that should have been embraced by the organization. Absent any provision in the Agreement governing self-suspension and reactivation of membership, customary treaty interpretation requires that effective action supportive of the treaty’s objectives be taken.

In the Eritrea case, the Agreement’s objectives would be served if the AHSG accepted Eritrea’s decision to return with an ordinary act of welcome. The practices of other IROs show that a formal letter from IGAD’s executive secretary’s lauding Eritrea’s decision to reactivate its membership and formally informing IGAD members of Eritrea’s decision in the next meeting of the CoM or the AHSG would have been enough to formalize Eritrea’s return to IGAD. Should the decision of the supreme organ (the AHSG) be required, the AHSG in turn should assume its responsibility to provide guidelines in cases of tensions such as this and allow Eritrea back to the organization in conditions favourable to the organization and its members. In other words, since the Agreement is silent on Eritrea’s two decisions, it serves the objectives of IGAD to consider Eritrea to have always been a fully-fledged member of the organization and to allow it to resume its ordinary participation in the organization’s activities.

The most effective and permanent solution, however, would be, as with the practice of all IROs in the event of unforeseen circumstances, to amend the Agreement to provide for suspension, expulsion and rejoining procedures as well as promptly to issue the dispute settlement mechanisms referred to in the Agreement.