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## **The Eritrean-Ethiopian War (1998-2000)**

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forthcoming in *International Law and the Use of Force: A Case-Based Approach* (Oxford University Press, Olivier Corten & Tom Ruys, eds.)

### **I. Facts and context**

The Eritrean-Ethiopian War of 1998-2000 was a tragic conflict that resulted in a widespread loss of life, as well as other injury and damage, for these two developing countries in the Horn of Africa. A unique feature of this incident is that the December 2000 Algiers agreement ending the conflict provided for the establishment of an Eritrea-Ethiopia Claims Commission (claims commission), charged with deciding claims for loss, damage or injury resulting from a violation of international law committed by either country. One of Ethiopia's claims was that Eritrea initiated the armed conflict by an illegal use of force. Thus, the facts and legal positions advanced by the two sides were formally litigated before, and decided by, a five-member arbitral commission of arbitrators of third-country nationalities, which concluded that Eritrea's conduct at the outbreak of the armed conflict constituted a violation of Article 2(4) of the UN Charter.<sup>1</sup>

#### 1. The opening months of the conflict (May-June 1998)

On May 6-7, 1998, small-scale clashes occurred between Eritrean military and Ethiopia militia or police patrols in a remote area along the western part of the Eritrean-Ethiopian boundary near a town called Badme.<sup>2</sup> As the claims commission later found, "it is clear from the evidence that these incidents involved geographically limited clashes between small Eritrean and Ethiopian patrols along a remote, unmarked, and disputed border."<sup>3</sup> Such minor incidents might well have

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<sup>1</sup> The following account draws heavily on the description of the conflict and the legal analysis contained in Sean D Murphy, Won Kidane, and Thomas R Snider, *Litigating War: Arbitration of Civil Injury by the Eritrea-Ethiopia Claims Commission* (Oxford University Press 2013), especially chapters 1 and 4. The author served as counsel to Ethiopia in the proceedings before the Eritrea-Ethiopia Claims Commission.

<sup>2</sup> For conflicting factual accounts by the two countries on the clashes, see Patrick Gilkes and Martin Plaut, *War in the Horn: The Conflict Between Eritrea and Ethiopia* (Discussion Paper 82, Royal Institute of International Affairs 1999) 21-26; Ted Dagne, 'The Ethiopia-Eritrea Conflict' (CRS Report for Congress, 6 July 2000) 2 (CRS Report for Congress).

<sup>3</sup> Partial Award, *Jus Ad Bellum*, Ethiopia's Claims 1-8 (19 December 2005) [12]. The arbitral awards of the claims commission may be found at: (1) Murphy, Kidane, and Snider (n 1) annexes; (2) *Eritrea-Ethiopia Claims Commission*, (2010) 26 RIAA 1; and (3) the website of the Permanent Court of Arbitration, <<https://pcacases.com/web/view/71>>.

gone unnoticed, but they were followed by much more serious action. On the morning of May 12, Eritrean armed forces consisting of soldiers, tanks, and artillery attacked the town of Badme, crossed through the Badme plain to higher ground in the east, and attacked several other areas in Ethiopia's Tahtay Adiabo Wereda, as well as places in the neighboring Laelay Adiabo Wereda.<sup>4</sup> The areas attacked on May 12, the claims commission later found, "were all either within undisputed Ethiopian territory or within territory that was peacefully administered by Ethiopia . . . ."<sup>5</sup> Even during the conflict, the Organization of African Unity (OAU, the predecessor to the current African Union) Ministerial Committee found that Badme and its environs were under Ethiopian administration prior to May 1998 and hence demanded that Eritrea withdraw its forces from the area.<sup>6</sup> Indeed, even "Eritrea accepted that the Badme area had been continuously under Ethiopian authority for a considerable period of time, both before and after independence in 1993," but maintained that the colonial treaties concluded between Italy and Ethiopia established that Badme was part of Eritrea.<sup>7</sup>

Initially, Ethiopian resistance to the invasion was minimal, mostly involving Ethiopian militia and police equipped solely with small arms.<sup>8</sup> Ethiopia moved quickly, however, to deploy its military forces to the region where they took up defensive positions to prevent any further Eritrean advance. Consequently, by June the two armies had assumed positions along a western front, with Eritrea in possession of Ethiopian territory (or at least Ethiopian-administered territory) in Kafta Humera Wereda, Tahtay Adiabo Wereda, and Laelay Adiabo Wereda.<sup>9</sup>

Shortly after their incursion in the west, Eritrean military forces invaded and occupied areas controlled by Ethiopia along the central part of the border in Mereb Lekhe Wereda by crossing the Mereb River at a number of places.<sup>10</sup> Again, though there was some resistance by local Ethiopian militia and police, those individuals quickly fled along with local civilians, and there

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<sup>4</sup> *ibid* [14]

<sup>5</sup> *ibid* [15]. For a third-party account more contemporaneous to the events, see *The Ethiopia-Eritrea War: U.S. Policy Options, Hearing before the Subcomm. on Africa of the House Comm. on Int'l Relations*, 106th Cong. 35 (25 May 1999) (statement of Susan Rice, Assistant Secretary of State for African Affairs) ("A border skirmish occurred on May 6, 1998 at Badme. A week later, Eritrea sent troops and armor into and beyond Badme into territory administered by Ethiopia. After several weeks of fighting, several areas previously administered by Ethiopia . . . fell under Eritrean control.").

<sup>6</sup> Letter dated 24 December 1998 from the permanent representative of Ethiopia to the United Nations addressed to the President of the Security Council (28 December 1998) UN Doc S/1998/1223, annex [21].

<sup>7</sup> Martin Plaut, 'The Conflict and its Aftermath' in Dominique Jacquin-Berdal and Martin Plaut (eds), *Unfinished Business: Ethiopia and Eritrea at War* (Red Sea Press 2004) 93; see also Gilkes and Plaut (n 2) 58–59. Though Ethiopia administered the territory as of May 1998, the Eritrea-Ethiopia Boundary Commission would later agree with Eritrea that the evidence of Ethiopian administration of Badme and other areas was not "sufficiently clear in location, substantial in scope or extensive in time to displace the title of Eritrea that had crystallized as of 1935." Eritrea-Ethiopia Boundary Commission, Decision Regarding Delimitation of the Border [5.95], reprinted in (2002) 41 ILM 1057, and available at < <https://pcacases.com/web/view/99>>.

<sup>8</sup> Partial Award, Western and Eastern Fronts, Ethiopia's Claims 1 & 3 (19 December 2005) [25]–[26]; see CRS Report for Congress (n 2) 8 ("The use of overwhelming force by Eritrea in the May 1998 attack surprised Ethiopian authorities, who were unprepared psychologically and militarily to contain the Eritrean advance.").

<sup>9</sup> Partial Award, Western and Eastern Fronts, Ethiopia's Claims 1 & 3 (n 8) [26].

<sup>10</sup> Partial Award, Central Front, Ethiopia's Claim 2 (28 April 2004) [43].

were no significant Ethiopian armed forces present.<sup>11</sup> As on the western front, Ethiopian forces eventually arrived and assumed defensive positions creating a central front, but Eritrea would continue to occupy Mereb Lekhe Wereda for two years. In this area, Eritrean forces also invaded portions of the neighboring Ahferom Wereda in the same fashion, while hostilities also extended during May 1998 to the nearby mountainous terrain of Irob Wereda.<sup>12</sup> In June 1998, Eritrean forces also invaded Gulomakheda Wereda on the central front, the location of an important border town named Zalambessa. Situated on the road from Addis Ababa to Asmara, Zalambessa was a major communications and transport link between the two countries, with a pre-war population estimated by the claims commission to be between 7,000 and 10,000.<sup>13</sup> After overrunning Zalambessa, Eritrean forces established defensive positions to the south of the town and occupied other portions of the wereda, which they held for some two years.<sup>14</sup> The claims commission would find with respect to the central front:

Eritrean forces moved into areas administered prior to the conflict by Ethiopia, occupied territory, and established field fortifications and trench lines, sometimes permanently and sometimes only for a brief period before returning to adjacent territory administered prior to the conflict by Eritrea. In all cases, they carried out intermittent operations that extended beyond the occupied areas. These operations included artillery fire, intermittent ground patrols, and the placement of defensive fields of mines.<sup>15</sup>

Along the eastern part of the border, conflict also erupted in June in Ethiopia's Elidar Wereda, Dalul Wereda, and Afdera Wereda. Of particular note on this eastern front was the fighting in Elidar Wereda at Bure Town, which is located on the road connecting Ethiopia to the Eritrean port of Assab.<sup>16</sup>

## 2. Ensuing two-year conflict (June 1998-May 2000)

With the advent of the rainy season (mid-June to mid-September), fighting between the two countries largely subsided, with both sides maintaining defensive positions inside their trenches and Eritrean forces in control of portions of Ethiopian (or Ethiopian-administered) territory. Though some shelling continued, both sides focused on the deployment and position of their forces and increasing their armaments and aircraft.<sup>17</sup>

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<sup>11</sup> *ibid*

<sup>12</sup> *ibid* [54], [74]

<sup>13</sup> Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22 (28 April 2004) [30].

<sup>14</sup> Partial Award, Central Front, Ethiopia's Claim 2 (n 10) [60]–[61], [70]; Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22 (n 13) [30] (“After the armed conflict began on the Western Front in May 1998, both Eritrea and Ethiopia began to strengthen their armed forces along what would become the Central Front. From mid-May to early June, Eritrean armed forces attacked at a number of points, first in Ahferom and Merbe Lekhe Weredas, then in Irob and Gulomakheda Weredas.”).

<sup>15</sup> Partial Award, Central Front, Ethiopia's Claim 2 (n 10) [24]; see also Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22 (n 13) [30] (using identical language).

<sup>16</sup> Partial Award, Western and Eastern Fronts, Ethiopia's Claims 1 & 3 (n 8) [59]–[60].

<sup>17</sup> Plaut (n 7) 95–96; CRS Report for Congress (n 2) 7 (“Both Ethiopia and Eritrea purchased sophisticated weapon systems, including fighter planes from Russia, Ukraine and eastern Europe.”).

In February 1999, Ethiopia initiated on the western front a counter-offensive known as “Operation Sunset,” in which it regained “control over virtually all of the territory that Eritrea had occupied [there] for the preceding nine months.”<sup>18</sup> Because Ethiopia used fighter planes and helicopters in support of the operation, Eritrea and other countries criticized Ethiopia for breaking a ban on airstrikes.<sup>19</sup> For several months thereafter, Eritrea repeatedly sought to retake Badme, but failed to do so, including during a major effort in June 1999.

In March 1999, extensive fighting broke out on the central front, at Zalambessa, but Eritrea continued to hold the town and adjacent areas. Sporadic fighting continued there and also occurred on the eastern front, but neither side gained a decisive advantage by the time the rainy season returned in June 1999. In general, the war during this period on the central and eastern fronts was a series of “set piece” engagements, involving exchanges of small amounts of territory, but with considerable loss of life and damage to property.<sup>20</sup>

### 3. Ethiopian incursion into Eritrea (May-June 2000)

On May 12, 2000, Ethiopia launched a major offensive from the area of Badme, followed thereafter by a thrust at Zalambessa on the central front. Ethiopian forces in the west outflanked and broke through the Eritrean lines and then penetrated into Eritrean territory, seizing several Eritrean towns (Barentu, Bimbina, Bishuka, Mailem, Molki, Shambuko, and Tokombia).<sup>21</sup> From there, some Ethiopian forces moved east in Eritrea toward Mai Dima and Mendefera, others traveled west toward Alighidir, Gogne, Haykota, and Teseney, while still others returned to Ethiopia.<sup>22</sup> Of particular importance, Ethiopian troops were within striking distance of Adi Quala, which lay only about 100 kilometers by a good road from the Eritrean capital of Asmara.<sup>23</sup> Ethiopian troops that reached Teseney were engaged by Eritrean troops and retreated south back to Ethiopia through Omhajer and Guluj, and then over the Setit River.<sup>24</sup> After being reinforced, those forces returned to Eritrea and recaptured Alighidir, Guluj, and Teseney on June 12-14.<sup>25</sup>

After its initial success in the west, Ethiopia turned its attention to the central front, launching a major offensive on May 23 during which it recaptured Zalambessa and captured the Eritrean border town of Tserona, pushed Eritrean forces out of Ethiopia, and then advanced into Eritrean

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<sup>18</sup> Partial Award, Western and Eastern Fronts, Ethiopia’s Claims 1 & 3 (n 8) [27]; Plaut (n 7) 96–97.

<sup>19</sup> See, e.g., CRS Report for Congress (n 2) 4.

<sup>20</sup> Plaut (n 7) 104; Partial Award, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 & 22 (n 13) [32].

<sup>21</sup> Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 1, 3, 5, 9–13, 14, 21, 25 & 26 (19 December 2005) [22]; Partial Award, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 & 22 (n 13) [33]; see also CRS Report for Congress (n 2) 9.

<sup>22</sup> Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 1, 3, 5, 9–13, 14, 21, 25 & 26 (n 21) [22]–[23].

<sup>23</sup> Plaut (n 7) 106.

<sup>24</sup> Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 1, 3, 5, 9–13, 14, 21, 25 & 26 (n 21) [23].

<sup>25</sup> *ibid* [24]

territory, capturing the town of Senafe and large parts of the Tserona and Senafe Sub-Zobas.<sup>26</sup> After seizing high positions north of Senafe, Ethiopian forces stopped, and both sides assumed defensive positions along a new front, this time inside Eritrea. For a few days, Ethiopian forces entered Eritrea's Areza, Mai Mene, and Adi Quala Sub-Zobas.<sup>27</sup>

#### 4. Diplomatic efforts to end the conflict

In parallel with these military operations, considerable diplomatic efforts were made to end the war. When the fighting first broke out in May 1998, the United States and Rwanda joined together as mediators, sending representatives to both Asmara and Addis Ababa in an effort to resolve the conflict. After meeting with the two countries, the mediators proposed in early June that a cease-fire be adopted based on certain steps: (1) agreement by both sides to pursue resolution of any disagreements through pacific means; (2) redeployment of Eritrean forces from Badme to positions held before May 6, 1998, and the return of the prior administrative officials to Badme, along with the deployment there of an international observer mission; (3) an investigation into the events of May 6; (4) agreement to delimitation and demarcation of the border; and (5) demilitarization of the border.<sup>28</sup>

Though Ethiopia accepted the proposal, and though these same elements would ultimately become the heart of a final peace agreement nineteen months later, early in the war they were not acceptable to Eritrea, principally because of the requirement to withdraw from the disputed territory, such as Badme, that had been seized.<sup>29</sup> The OAU Council of Ministers urged the parties to accept and implement the proposal,<sup>30</sup> while the UN Security Council commended the effort, condemned the use of force in the conflict (without indicating which side had acted wrongfully), and called upon both parties to cease hostilities.<sup>31</sup> As the conflict dragged along, the US-Rwanda early proposals were incorporated in late 1998 by the OAU into a proposed framework agreement,<sup>32</sup> a step again accepted by Ethiopia<sup>33</sup> and supported by the Security Council,<sup>34</sup> but not

<sup>26</sup> Plaut (n 7) 106–07; Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22 (n 13) [34].

<sup>27</sup> Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22 (n 13) [45], [49], and [53].

<sup>28</sup> See US Press Statement on the US-Rwanda Peace Plan, June 3, 1998, reprinted in Tekeste Negash and Kjetil Tronvoll, *Brothers at War: Making Sense of the Eritrean-Ethiopian War* (2000) 120; Mohammed O Maundi, I William Zartman, Gilbert M Khadiagala, and Kwaku Nuamah, *Getting In: Mediators' Entry Into the Settlement of African Conflicts* (United States Institute of Peace Press 2006) 157–59.

<sup>29</sup> Plaut (n 7) 92–93; Gilkes and Plaut (n 2) 58.

<sup>30</sup> See Letter dated 8 June 1998 from the Permanent Representative of Zimbabwe to the United Nations Addressed to the Secretary-General (9 June 1998) UN Doc S/1998/485.

<sup>31</sup> UNSC Res 1177 (26 June 1998) UN Doc S/RES/1177, 2.

<sup>32</sup> OAU High-Level Delegation: Proposals for a Framework Agreement for a Peaceful Settlement of the Dispute between Eritrea and Ethiopia (7-8 November 1998), reprinted in UN Doc S/1998/1223 (n 6) annex [33], and in Negash and Tronvoll (n 28) 122; see Maundi et al. (n 28) 160–64; Edoardo Greppi, 'The 2000 Algiers Agreements' in Andrea de Guttry, Harry HG Post, and Gabriella Venturini (eds), *The 1998-2000 War between Eritrea and Ethiopia: An International Legal Perspective* (TMC Asser Press 2009) 55-57.

<sup>33</sup> UNSC Res 1226 (29 January 1999) UN Doc S/RES/1226 [4].

<sup>34</sup> *ibid* [1], [3]; UNSC Res 1227 (10 February 1999) UN Doc S/RES/1227 [4]–[5].

by Eritrea.<sup>35</sup>

After Ethiopia's breakthrough on the western front in February 1999, Eritrean President Isaias Afwerki informed the Security Council that Eritrea formally accepted the framework agreement.<sup>36</sup> Since Eritrea continued to hold portions of Ethiopian territory (such as Zalambessa), however, Ethiopia charged that Eritrea did not really accept the framework agreement, and the hostilities continued.<sup>37</sup> Further efforts at diplomacy by various countries, the OAU, the European Union, and the United Nations, including efforts to clarify in greater detail the modalities and arrangements for implementing the framework agreement,<sup>38</sup> failed to bring the parties to a cease-fire.<sup>39</sup>

When Ethiopia launched its counter-offensive in May 2000, the Security Council condemned the renewal of hostilities<sup>40</sup> and then declared an arms embargo on both countries.<sup>41</sup> Intense diplomacy was again pursued to end the conflict, but now Ethiopia had the upper hand in the fighting and was content to push Eritrean forces out of Ethiopia, to try to destroy Eritrea's fighting capacity, and to gain the advantage by seizing Eritrean territory along the border.<sup>42</sup> Eritrea's army, however, remained intact, and after lines solidified between the armies on the Eritrean side of the border, Ethiopia declared on June 1 that the war was finished, and on June 18 both countries agreed to a cease-fire.

##### 5. Cessation of hostilities (June 2000) and peace agreement (December 2000)

From May 29 to June 10, 2000, Eritrea and Ethiopia participated in "proximity talks" under the auspices of the OAU in Algiers. On June 18, the countries signed a cessation of hostilities agreement, by which they committed themselves to a cease-fire and Ethiopia agreed to the redeployment of its forces back to areas under Ethiopian administration prior to May 1998.<sup>43</sup> In

<sup>35</sup> UNGA 'Africa' (1998) UNYB 146–47. Eritrea did seek clarifications regarding the framework agreement, to which the OAU responded. Negash and Tronvoll (n 28) 125, 128.

<sup>36</sup> Plaut (n 7) 98; Statement by the President of the Security Council (27 February 1999) UN Doc S/PRST/1999/9 ("The Security Council welcomes the acceptance by Eritrea at the Head of State level of the OAU Framework Agreement and recalls the prior acceptance of the Agreement by Ethiopia."); Press Statement of 2 March 1999 from the Eritrean Foreign Ministry Accepting the OAU Framework Agreement and Explaining the Continuation of the War, reprinted in Negash and Tronvoll (n 28) 133.

<sup>37</sup> Ethiopian Ministry of Foreign Affairs Response of 10 March 1999 to Eritrea's Acceptance of the OAU Framework Agreement, reprinted in Negash and Tronvoll (n 28) 135; Plaut (n 7) 98–99, 102.

<sup>38</sup> Modalities for Implementation of the OAU Framework Agreement on the Settlement of the Dispute between Ethiopia and Eritrea, July 12, 1999, reprinted in Negash and Tronvoll (n 28) 142; Technical Arrangements for Implementation of the OAU Framework Agreement and its Modalities, reprinted in *ibid* 143.

<sup>39</sup> Plaut (n 7) 99, 101–03; Gilkes and Plaut (n 2) 57–60.

<sup>40</sup> UNSC Res 1297 (12 May 2000) UN Doc S/RES/1297 [1].

<sup>41</sup> UNSC Res 1298 (17 May 2000) UN Doc S/RES/1298 [6].

<sup>42</sup> Plaut (n 7) 106–07.

<sup>43</sup> Agreement on Cessation of Hostilities, Eri.-Eth. (adopted 18 June 2000) 2138 UNTS 86 [1], [9]; see Maundi et al. (n 28) 164–71; Greppi (n 32) 57–59. According to the U.S. Congressional Research Service, there "are no accurate figures of casualties, but many observers say that an estimated 50,000-100,000 were killed in the two-year old war." CRS Report for Congress (n 2) 7.

addition, they agreed to the deployment of a UN peacekeeping force of some 4,200 troops—later called the UN Mission to Ethiopia and Eritrea (UNMEE)—within a twenty-five kilometer-wide zone just inside Eritrea along the Eritrean-Ethiopian border as it existed prior to May 1998.<sup>44</sup> Further, Eritrean forces would remain outside this “temporary security zone,” though Eritrean police and local militia could return.<sup>45</sup>

While the Security Council authorized the establishment and deployment of UNMEE,<sup>46</sup> talks continued for the purpose of reaching a final peace agreement. Those talks culminated in the signing of a final agreement, sometimes referred to as the Algiers agreement, by Eritrea and Ethiopia on December 12, 2000.<sup>47</sup> In it, the parties agreed to a permanent termination of military hostilities and to refrain from the threat or use of force against each other.<sup>48</sup> Further, the parties agreed, in cooperation with the International Committee of the Red Cross, to repatriate all prisoners of war.<sup>49</sup>

Articles 3-5 of the Algiers agreement identified three institutional structures that would assist the parties in their post-war cooperation. First, the agreement provided for an investigation to be carried out with respect to the incidents leading up to and including May 6, 1998, which “could have contributed to a misunderstanding between the parties regarding their common border, including the incidents of July and August 1997.”<sup>50</sup> The investigation would be carried out by an independent body appointed by the OAU Secretary-General, in consultation with the UN Secretary-General, Eritrea, and Ethiopia, and would result in a report being communicated to the OAU and the two countries. This investigation, however, never occurred. Second, the agreement called for the creation of a Eritrea-Ethiopia Boundary Commission (boundary commission), consisting of five arbitrators of third-country nationality, charged with delimiting and demarcating the border.<sup>51</sup> The boundary commission received pleadings from the parties and in 2002 issued its delimitation decision.<sup>52</sup> Third, the agreement provided for the establishment of

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<sup>44</sup> Agreement on Cessation of Hostilities (n 43) [2]–[3], [12]; UNSC Res 1312 (31 July 2000) UN Doc S/RES/1312 [1] (authorizing UNMEE); UNSC Res 1320 (15 September 2000) UN Doc S/RES/1320 [2] (authorizing up to 4,200 troops); see Andrea de Guttry, ‘The UN Mission in Ethiopia and Eritrea (UNMEE)’ in *The 1998-2000 War between Eritrea and Ethiopia* (n 32) 79; Giovanni Cellamare, ‘Caratteri della missione delle Nazioni Unite in Etiopia ed Eritrea (UNMEE)’ [‘Nature of the United Nations Mission in Ethiopia and Eritrea (UNMEE)’], in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* [*Studies of International Law in Honor of Gaetano Arangio-Ruiz*] vol 3 (Editoriale Scientifica 2004) 1571.

<sup>45</sup> Agreement on Cessation of Hostilities (n 43) [11]–[12].

<sup>46</sup> UNSC Res 1312 (n 44); UNSC Res 1320 (n 44).

<sup>47</sup> Agreement, Eri.-Eth. (adopted 12 December 2000) 2138 UNTS 94, 40 ILM 260; see Greppi (n 32) 59–62.

Representatives from Algeria, the European Union, the Organization of African States, and the United States, along with UN Secretary-General Kofi Annan, signed the agreement as witnesses.

<sup>48</sup> Agreement (n 47) art 1.

<sup>49</sup> *ibid* art 2

<sup>50</sup> *ibid* art 3

<sup>51</sup> *ibid* art 4

<sup>52</sup> Eritrea-Ethiopia Boundary Commission, Decision Regarding Delimitation of the Border (n 7); see also Special Report of the Secretary-General on Ethiopia and Eritrea (15 December 2006) UN Doc S/2006/992, enclosure, Statement by the Eritrea-Ethiopia Boundary Commission, List of Boundary Points and Coordinates, annex, reprinted in (2007) 46 ILM 155, 158–59.



the claims commission charged with deciding claims for war-related injuries.<sup>53</sup>

## **II. The positions of the main protagonists and the reactions of third States and international organizations**

### 1. Ethiopia's position

Ethiopia's *jus ad bellum* claim before the claims commission asserted that, beginning on May 12, 1998, and continuing through that month and into June, Eritrea carried out a series of unprovoked and unlawful armed attacks, moving its troops and heavy armor across the *de facto* boundary between the two countries. In the course of moving into Ethiopian (or Ethiopian-administered but disputed) territory, Ethiopia charged that Eritrea attacked not just Ethiopian military and police units, but Ethiopian civilians as well, causing extensive death and injury through shelling, mine-laying, murder, rape, detention, and abduction. According to Ethiopia, the attack began along the western part of the border, but then unfolded over the course of the following days and weeks to encompass key segments of the entire 1,000-kilometer boundary between the two countries. The armed conflict that followed lasted for more than two years.

Though much of the focus of Ethiopia's claim was on the outbreak of the war in May and June 1998 in the border regions, the claim was not so limited temporally or geographically. With respect to the temporal scope, the claim concerned not just the initial launching of the war, but the continuation of it from that time through to December 2000. In other words, it was Ethiopia's contention that the violation continued throughout the period when Eritrea occupied territory that it had seized in May and June, and throughout the period when Ethiopian forces pushed Eritrea out of that territory and pressed into Eritrean territory for the purpose of setting up a defensive zone at key strategic points, pending the conclusion of a final peace agreement that protected Ethiopia from any further threat. As (now Judge) Christopher Greenwood has stated:

The terms in which Articles 2(4) and 51 [of the UN Charter] are couched . . . have the consequence that the modern *ius ad bellum* applies not only to the act of commencing hostilities but also to each act involving the use of force which occurs during the course of hostilities. Any use of force, even after the outbreak of fighting, is prohibited if it cannot be justified by reference to the right of self-defence recognized in Article 51 of the Charter.<sup>54</sup>

Ethiopia's theory, therefore, was that Eritrea engaged in numerous actions after May 1998 that were not strictly necessary for its own self-defense. Rather, Eritrea's acts were efforts to preserve

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<sup>53</sup> Agreement (n 47) art 5. For general assessments of the Commission, see Won Kidane, 'Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Eritrea-Ethiopia Claims Commission in the Hague' (2007) 25 Wis Int'l LJ 23; Pierre D'Argent and Jean d'Aspremont, 'La Commission des Réclamations Erythrée-Ethiopie: Un Premier Bilan' ['Eritrea-Ethiopia Claims Commission: An Initial Assessment'] (2007) 53 Ann Fr Dr Int 347; Pierre D'Argent, 'La Commission des Réclamations Erythrée-Ethiopie: Suite et Fin' ['Eritrea-Ethiopia Claims Commission: Continuation and Conclusion'] (2009) 55 Ann Fr Dr Int 279; Michael J Matheson, 'The Damage Awards of the Eritrea-Ethiopia Claims Commission' (2010) 9 LPICT 1.

<sup>54</sup> Christopher Greenwood, 'The Relationship Between *ius ad bellum* and *ius in bello*' (1983) 9 Rev Int'l Stud 221, 222-23.

and protect its seizure of Ethiopian (or at least Ethiopian-administered) territory; had Eritrea sought solely to protect its own territory, Eritrea could have ended the conflict at any point by stating that it was willing to return to the territory it administered prior to May 1998. As Ethiopia saw it, Eritrea's failure to do so until the summer of 2000, after Ethiopia had reclaimed all its territory and pressed into Eritrean territory to establish a defensive buffer, meant that Eritrea's violation of the *jus ad bellum* continued up until that point. Loss, damage, or injury resulting from that continuing violation of the *jus ad bellum*, according to Ethiopia, was compensable before the claims commission.

With respect to the geographic scope, Ethiopia's contention was that Eritrea's violation of the *jus ad bellum* consisted of not just the movement of troops across a border, but also adverse treatment of Ethiopian nationals and property in Eritrea, seizure of Ethiopians as prisoners of war, and serious harm to the Ethiopian economy. As such, while much of the loss, damage, or injury occurred in the border regions, other losses were suffered far from the border, in towns that were exposed to aerial bombardment, in prisoner of war camps, among Ethiopians living in Eritrea who felt they had no choice but to return to their home country, from Ethiopian property stranded at ports in Eritrea, and among businesses in Ethiopia whose commercial activities were interrupted due to the general outbreak of war.

Based on what it viewed as a violation of Article 2(4) of the Charter, Ethiopia sought compensation from Eritrea for widespread loss, damage, or injury to Ethiopia resulting from the violation, not just in the time and place of the initial invasion, but throughout Ethiopia and throughout the course of the conflict. Thus, even though the *jus ad bellum* finding was focused on the initial invasion, Ethiopia maintained that the invasion sparked an armed conflict that inevitably and inescapably unfolded into a two-year war involving extensive losses to Ethiopia. Ethiopia viewed prior precedents of World War I, World War II, and Iraq's invasion of Kuwait as supporting the proposition that a State that initiates a war is responsible for extensive compensation, though admittedly, for most conflicts there existed no authoritative decision maker (such as the claims commission) to determine what that compensation should be.<sup>55</sup>

## 2. Eritrea's position

Eritrea's position was focused on two prongs. The first prong was to argue that the claims commission had no jurisdiction over Ethiopia's *jus ad bellum* claim. In that regard, Eritrea focused on Article 3 of the Algiers agreement, which had called for the creation of an "independent and impartial body" under the auspices of the OAU. It provided that

[i]n order to determine the origins of the conflict, an investigation will be carried out on the incidents of 6 May 1998 and on any other incident prior to that date which could have contributed to a misunderstanding between the parties regarding their common border, including the incidents of July and August 1997.<sup>56</sup>

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<sup>55</sup> Eritrea-Ethiopia Claims Commission, Decision No 7, Guidance Regarding *Jus Ad Bellum* Liability (27 July 2007), (2007) 46 ILM 1121, [15]-[16].

<sup>56</sup> Agreement (n 47) art 3(1).

Eritrea sought to argue that the existence of Article 3 demonstrated that the Algiers agreement did not give the claims commission any authority to pass upon a claim that required findings with respect to the “origins of the conflict.” That task having been allocated to another body, the claims commission was precluded from doing so itself.

The claims commission rejected Eritrea’s argument, noting that a *factual* inquiry into “origins” and “misunderstandings” is not the same as a determination of the *legal* claim advanced by Ethiopia, which concerned whether Eritrea’s actions in May and June 1998 constituted a violation of the *jus ad bellum*.<sup>57</sup> As the claims commission saw it, determining “the origins of the conflict and the nature of any misunderstandings about the border, had they been made by the impartial body anticipated by Article 3, could have been helpful in promoting reconciliation and border delimitation, but they certainly would not have answered the question of the legality of Eritrea’s resort to force.”<sup>58</sup> The factual inquiries to be undertaken by the two bodies were not the same, and only the claims commission was empowered to determine whether one of the States violated the *jus ad bellum*.<sup>59</sup>

Eritrea’s second prong was to argue that, on the merits, Eritrea’s actions at the outbreak and throughout the armed conflict constituted self-defense. In that regard, Eritrea advanced three alternative arguments.

Eritrea’s first self-defense argument was “that Ethiopia was unlawfully occupying Eritrean territory in the area around Badme,” the area where the initial invasion occurred, and that therefore Eritrea was justified in defending its territory.<sup>60</sup> This argument relied heavily on the decision reached by the boundary commission in April 2002, which delimited the boundary between the two countries in such a way that the town of Badme fell within the territory of Eritrea. As such, Eritrea’s theory was that because Eritrea was correct in May 1998 that Badme was a part of Eritrea, and because Ethiopia therefore was in Eritrean territory in May 1998, then Eritrea was justified in using military force to seize Badme and to expel any Ethiopian government presence.

Eritrea’s second self-defense argument was that Eritrea’s conduct was a response to Ethiopian “incursions into Eritrea” in early May 1998.<sup>61</sup> Eritrea and Ethiopia presented different accounts of what happened on May 6-7 in the area of Badme, both in terms of the numbers of persons involved, the location of what happened, and the nature of the incidents.

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<sup>57</sup> Partial Award, *Jus Ad Bellum* (n 3) [4].

<sup>58</sup> *ibid*

<sup>59</sup> *ibid*

<sup>60</sup> *ibid* [9]

<sup>61</sup> *ibid*

Eritrea's third defense was that its use of force was a permissible response to a "declaration of war" issued by Ethiopia on May 13, 1998.<sup>62</sup> In essence, Eritrea sought to argue that Ethiopia commenced the war by issuing a declaration; having established a state of war between two belligerents, Eritrea was permitted to use military force against Ethiopia.

Each of these three arguments failed before the claims commission and are addressed below in discussing the commission's decision about the legality of Eritrea's actions.

In the event that Eritrea was found responsible for a violation of Article 2(4), Eritrea maintained that the "limited and careful phrasing of the Commission's partial award" meant that reparation should be confined to satisfaction, in the form of the liability finding reached by the claims commission, which could be repeated in a final damages award.<sup>63</sup> Eritrea emphasized that only in very limited circumstances where notorious aggression had occurred (World War I, World War II, and Iraq's 1990 invasion of Kuwait) had the international community imposed an extensive regime of compensation upon a party to an armed conflict, and even then only after a broad multilateral process that had widespread international support. No such process existed in this case; indeed, the Security Council had not condemned Eritrea's conduct as a breach of the peace but rather had approached the conflict in a much more cautious and measured fashion.<sup>64</sup> Later in the proceedings, Eritrea accepted that compensation might be paid, but maintained that the scope of compensation should be strictly confined to the place and time of the initial invasion, and even then contested various aspects of Ethiopia's evidence in that limited sphere.<sup>65</sup>

### **III. Legality of the operation**

#### 1. Eritrea's conduct violated UN Charter Article 2(4)

After weighing the evidence placed before it, the claims commission concluded in its *jus ad bellum* partial award that Eritrea invaded Ethiopia on May 12, 1998, beginning in the area of Badme. The claims commission stated as follows:

The evidence showed that, at about 5:30 A.M. on May 12, 1998, Eritrean armed forces, comprised of at least two brigades of regular soldiers, supported by tanks and artillery, attacked the town of Badme and several other border areas in Ethiopia's Tahtay Adiabo Wereda, as well as at least two places in its neighboring Laelay Adiabo Wereda. On that day and in the days immediately following, Eritrean armed forces then pushed across the flat Badme plain to higher ground in the east. Although the evidence regarding the nature of Ethiopian armed forces in the area conflicted, the weight of the evidence indicated that the Ethiopian defenders were composed merely of militia and some police, who were quickly forced to retreat by the invading Eritrean forces.<sup>66</sup>

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<sup>62</sup> *ibid*

<sup>63</sup> Decision No 7 (n 55) [17].

<sup>64</sup> *ibid* [18]

<sup>65</sup> Final Award, Ethiopia's Damages Claims (17 August 2009) [281].

<sup>66</sup> Partial Award, *Jus Ad Bellum* (n 3) [14].

The claims commission found that Eritrea's attack was in violation of Article 2(4) of the UN Charter,<sup>67</sup> specifically

by resorting to armed force to attack and occupy Badme, then under peaceful administration by Ethiopia, as well as other territory in the Tahtay Adiabo and Laelay Adiabo Weredas of Ethiopia, in an attack that began on May 12, 1998, and is liable to compensate Ethiopia, for the damages caused by that violation of international law.<sup>68</sup>

As indicated in the prior section, Ethiopia's position was that the *jus ad bellum* violation commenced at the outbreak of the war with Eritrea's invasion on the western front in the area of Badme, but continued geographically, spreading along the entire border and affecting persons and property even far from the border, and temporally throughout the duration of the armed conflict. Further, while the violation began in a particular place, Eritrea's military actions were undertaken along all three fronts, and other actions (e.g., mistreatment of Ethiopian civilians in Eritrea) occurred away from the fronts. As such, according to Ethiopia, the *jus ad bellum* violation should not be viewed as having a narrow geographic or temporal reach limited to the time and place of the initial invasion.

The claims commission's findings in April 2004 with respect to Ethiopia's central front claim seemed to support the idea that Eritrea's attack on Ethiopia unfolded over a lengthy period of time and along a substantial part of the border. In that partial award, the claims commission stated:

24. After the armed conflict began on the Western Front in May 1998, both Eritrea and Ethiopia began to strengthen their armed forces along what would become the Central Front. From mid-May to early June, Eritrean armed forces attacked at a number of points, first in Ahferom and Mereb Lekhe Weredas, then in Irob and Gulomakheda Weredas. In Gulomakheda Wereda, the significant border town of Zalambessa (with a pre-war population estimated at between 7,000 and 10,000) was also taken. In all four weredas, Eritrean forces moved into areas administered prior to the conflict by Ethiopia, occupied territory, and established field fortifications and trench lines, sometimes permanently and sometimes only for a brief period before returning to adjacent territory administered prior to the conflict by Eritrea. In all cases, they carried out intermittent operations that extended beyond the occupied areas. These operations included artillery fire, intermittent ground patrols, and the placement of defensive fields of land mines.

. . . .

26. When Ethiopia later introduced substantial numbers of its armed forces into the four weredas, a static, although not fully contiguous, front was created that remained largely the same for nearly two years. Hostilities varied in intensity during that period and included some instances of intense combat during 1999. However, in May of 2000, Ethiopia launched a general offensive that drove all Eritrean armed forces out of the territory previously administered by Ethiopia and took Ethiopian forces deep into Eritrea. Ethiopian armed forces remained in Eritrean territory until late February 2001, when they returned to the

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<sup>67</sup> UN Charter art 2(4).

<sup>68</sup> Partial Award, *Jus Ad Bellum* (n 3) [16]; *ibid* s IV.B [1]; see J Romesh Weeramantry, 'International Law as to the Use of Force' in *The 1998-2000 War between Eritrea and Ethiopia* (n 32) 233 ("no serious criticism can be leveled at the finding that the armed attack by two brigades of Eritrean soldiers, with tank and artillery support . . . contravened Article 2(4) of the UN Charter.").

pre-war line of administrative control pursuant to the Cessation of Hostilities Agreement of June 2000 and the Peace Agreement of December 12, 2000.<sup>69</sup>

In the text of its *jus ad bellum* partial award, the claims commission stated that “once the armed attack in the Badme area occurred and Ethiopia decided to act in self-defense, a war resulted that proved impossible to restrict to the areas where that initial attack was made.”<sup>70</sup> Yet the *dispositif* found at the end of the partial award was directed only at the early part of the war, specifically in the area of Badme on the western front in May 1998. There, the claims commission’s *dispositif* stated that Eritrea violated UN Charter Article 2(4) by “resorting to armed force on May 12, 1998 and the immediately following days to attack and occupy the town of Badme, then under peaceful administration by the Claimant, as well as other territory in the Claimant’s Tahtay Adiabo and Laelay Adiabo Weredas.”<sup>71</sup> Thus, the claims commission declined to include as a part of the Article 2(4) violation Eritrea’s other military actions along the border occurring within days of the initial invasion, including those that involved the movement of troops and armor across other parts of the border into Ethiopia and the seizure of Ethiopian territory, such as the large town of Zalambessa on the central front.

In order for Ethiopia to show that such military actions were part of Eritrea’s *jus ad bellum* violation, the claims commission apparently viewed it as necessary for Ethiopia to prove that all these actions were “a program of pre-planned and coordinated armed attacks in multiple locations.”<sup>72</sup> In the absence of proof that the military actions were “predetermined,” the claims commission viewed it as possible that Eritrea was simply responding to “developing military demands as both Parties sought to control key corridors of attack and defense after it became clear that Ethiopia would not acquiesce in Eritrea’s captures of territory on the Western Front.”<sup>73</sup> Hence, in its *dispositif* for the *jus ad bellum* claim, the claims commission found that Ethiopia’s “contention that subsequent attacks by [Eritrea] along other parts of their common border were pre-planned and coordinated unlawful uses of force fails for lack of proof.”<sup>74</sup>

The claims commission analyzed *the fact of* the movement of Eritrean troops and armor into the Badme area and concluded that, in doing so, Eritrea violated the *jus ad bellum*. The claims commission did not view it as necessary to reach any finding regarding *the intent of* the Eritrean Government, such as whether the Eritrean Government believed that it was simply reclaiming its own territory and therefore was not violating Article 2(4). All that mattered was that Eritrean troops crossed the *de facto* boundary in the area of Badme in large numbers. The claims commission also did not see it as necessary to reach any findings regarding at what governmental level within Eritrea the decision to invade at Badme was reached, or to what extent the invasion

<sup>69</sup> Partial Award, Central Front, Ethiopia’s Claim 2 (n 10) [24], [26].

<sup>70</sup> Partial Award, *Jus Ad Bellum* (n 3) [19].

<sup>71</sup> *ibid* s IV.B [1]

<sup>72</sup> *ibid* [18]

<sup>73</sup> *ibid* [19]

<sup>74</sup> *ibid* s IV.B [2]. For an analysis of the Commission’s decision in the context of the notion of “aggression” in international law, see Ige F Dekker and Wouter G Werner, ‘The Crime of Aggression and the Eritrea-Ethiopia Armed Conflict’ in *The 1998-2000 War between Eritrea and Ethiopia* (n 32) 243.

had been planned in the weeks or months before it happened. As such, the claims commission seems to have applied a standard of strict liability to the initial invasion, one that places little emphasis on the fault or intentions of Eritrea.

At the same time, having determined that Eritrea's armed attack in May 1998 on Badme and nearby areas was a *jus ad bellum* violation, the claims commission decided to limit the violation solely to those places and that time because it could not conclude that the aggressor's further actions, occurring within days or weeks on other parts of the border, were "preplanned" or "predetermined." Apparently, the claims commission's approach with respect to events after the initial invasion did not entail any strict liability; instead, Eritrean preplanning had to be shown in order to establish that the latter conduct was part of a broad plan of aggression – that the Eritrean Government intended that the war expand along the border to other locations – rather than just a reaction to Ethiopia's response.

The claims commission's finding that Ethiopia had not proven Eritrean preplanning for the central and eastern fronts is somewhat in tension with its later findings (related to damages) that military action on those other fronts was reasonably foreseeable to Eritrea at the time of the initial invasion, given the strategic and military value of seizing transportation links within Ethiopian territory in those areas. Apparently the claims commission regarded it as reasonably foreseeable to Eritrea on May 12, 1998 that armed conflict would unfold on the central and eastern fronts, but that nevertheless Eritrea may not have made any plans for taking action in those fronts, even though it in fact took such action within days after the initial invasion. Why the claims commission assumed a requisite level of preplanning for the initial invasion but was unwilling to assume such preplanning for military actions along the border to seize strategic points in Ethiopia in the days after the initial invasion is not clear.

But is preplanning or intent required at all? The claims commission's approach seems to very narrowly circumscribe the conduct that is proscribed by Article 2(4) of the UN Charter, limiting it to the sanctioning of the act of a State in initiating a war. The Article 2(4) prohibition is not so narrowly crafted; instead, it broadly instructs States not to use force against the territorial integrity or political independence of another State, whether preplanned or not, and whether initiating or expanding an armed conflict. Proving the existence of a common plan to engage in aggression may be an important component of *criminally* prosecuting an individual for committing aggression; indeed, at Nuremberg, when judging the culpability of the defendants for "crimes against the peace," the tribunal developed a count concerning the conduct of a person broadly engaging in a common plan to prepare, initiate, and wage aggression.<sup>75</sup> Yet a different count allowed for conviction simply for waging a war of aggression (including for acts taken well into the course of the conflict, such as the waging of submarine warfare against neutral vessels),<sup>76</sup> such that establishing the existence of a common plan is not always required even in the criminal context. Outside the criminal context, for an inter-State violation of the *jus ad*

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<sup>75</sup> International Military Tribunal, Proceedings 27 August 1946 – 1 October 1946, vol XXII, 467–68.

<sup>76</sup> *ibid* 554–57

*bellum*, it is unclear why pre-planning or intent is required at all; the simple fact of moving troops and armor into another State's territory should be sufficient.

A related question is whether the *jus ad bellum* is principally directed only towards the very first action of an armed conflict and the specific military objective envisaged by the aggressor State at that time. Once a State initiates a war in violation of the *jus ad bellum* to achieve that objective, does the *jus ad bellum* drop away, to be replaced instead solely by the *jus in bello* and other relevant rules? Or does the *jus ad bellum* have some continuing relevance for how the parties conduct themselves in expanding the scope and nature of the armed conflict?

The better view is that any actions by the aggressor State that are taken to prevent the defending State from exercising its right of self-defense should be regarded as part of the *jus ad bellum* violation. The Article 2(4) prohibition is not narrowly crafted to the sanctioning of the initiation of a war; it precludes a State not just from using force to attack another State, but from using further force to prevent the other State from exercising its inherent right of self-defense to which it is entitled under international law. Preventing a State from defending itself, whether those defensive actions were anticipated or not by the aggressor, is a use of force against the territorial integrity and political independence of a State just as much as an initial invasion of that State.

The conditions for engaging in self-defense under UN Charter Article 51, especially the restrictions on proportionality and necessity, are understood as operating throughout the course of the armed conflict; if a defending State undertakes action that is not necessary or proportionate, it engages in its own unlawful use of force in violation of Article 2(4).<sup>77</sup> Hence, whatever actions an aggressor takes that serve to maintain, preserve, or extend its aggression are all part of the *jus ad bellum* violation. As such, even if Eritrea's conduct along the other fronts involved entering Ethiopian territory for the purpose of controlling "key corridors of attack and defense" to thwart Ethiopia's efforts at self-defense, Article 2(4) is best understood as prohibiting such action.

A possible explanation for the claims commission's decision to view the *jus ad bellum* violation as limited solely to Eritrea's armed attack in May 1998 on Badme and other areas in Tahtay Adiabo and Laelay Adiabo Weredas might be that, as of December 2005, the claims commission was concerned about the ramifications of a broader *jus ad bellum* finding for the damages phase that was yet to come. If so, then the claims commission was being guided less by legal considerations than by practical concerns. Further, the ultimate decision it reached in August 2009 regarding damages was not meaningfully circumscribed by the narrow *jus ad bellum* finding. Indeed, as explained further below, the claims commission awarded *jus ad bellum* compensation to Ethiopia for loss, damage, and injury suffered at Badme and nearby areas, but also awarded such compensation for losses suffered on the two other fronts, for losses that occurred quite distant from the war fronts, and for losses that occurred throughout the course of the war. Thus, if the purpose of the narrow *jus ad bellum* finding was to limit in time and place the scope of the damages, it did not have such an effect.

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<sup>77</sup> See, e.g., Greenwood (n 54) 222–23.



## 2. Eritrea's conduct was not self-defense under UN Charter Article 51

As previously noted, Eritrea's first self-defense argument was that its conduct was permissible self-defense given that Ethiopia was unlawfully occupying Eritrean territory in the area around Badme, the area where the initial invasion occurred. There were two key difficulties with Eritrea's theory. First, as of May 1998 and continuing throughout the armed conflict, there was no international arbitral or other authoritative decision clarifying whether Badme was part of Eritrea or was part of Ethiopia. Each country claimed Badme as a part of its territory, but throughout the period of the war there was no delimitation let alone demarcation of the boundary. Only with the boundary commission's April 2002 decision, almost two years after the cessation of hostilities, was there an authoritative international decision as to which State possessed sovereignty over Badme. So one problem with Eritrea's approach was that it made the permissibility of conduct during the conflict (who might use force against whom, as well as who was the occupier of another's territory) contingent on a legal determination that was only reached after the conflict was over. Such an approach is inherently undesirable, as it creates considerable uncertainty during an armed conflict relating to disputed territory as to how both the *jus ad bellum* and the *jus in bello* should be applied by the parties to the conflict

Second, to the extent that peaceful administration of territory is important, the evidence before the claims commission strongly indicated that, as of May 1998, Badme and its environs were under the peaceful and effective administration of Ethiopia, not Eritrea. While Eritrea sought to lean on the boundary commission's decision as relevant to the issue of effective administration of territory as of May 1998, that decision was not driven by proof of administration of territory. Instead, the focus of the boundary commission was on the proper interpretation of colonial-era treaties dating back some 100 years, with *de facto* local or regional administration playing very little role. As the Algiers agreement stated, the boundary commission's task was to "delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law."<sup>78</sup> Thus, the boundary commission saw its task as determining the legal boundary to which Eritrea was entitled as of its independence in 1993, not the boundary actually operative on the ground in dividing the effective administration of the two countries as of that time or as of May 1998.

By contrast, contemporaneous with the conflict itself, there existed important information regarding the effective administration of territory by the two countries as of May 1998. Immediately after the outbreak of the armed conflict, various countries and international organizations, including the United Nations and OAU, urged the two sides to withdraw their forces to the positions they occupied prior to May 1998. Among other things, this meant the "redeployment of the Eritrean forces from Badme to positions held prior to May 6, 1998."<sup>79</sup> In other words, it was generally understood that a return to the status quo would require Eritrea to

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<sup>78</sup> Agreement (n 47) art 4(2).

<sup>79</sup> Letter dated 24 December 1998 from the permanent representative of Ethiopia to the United Nations addressed to the President of the Security Council, UN Doc S/1998/1223 (n 6), annex [5].

withdraw its forces from Badme and the surrounding area. In June 1998, the OAU Assembly of Heads of State and Government decided to send a high-level delegation to investigate the armed conflict and make recommendations for its resolution.<sup>80</sup> After meeting itself with the parties, the OAU high-level delegation deputized a committee of ambassadors to meet with the parties and to conduct a fact-finding investigation into the dispute, which occurred from June 30 to July 9, 1998.<sup>81</sup> That committee found that “[w]ith regard to the authority which was administering Badme before 12 May 1998 and on the basis of the information at our disposal, we have reached the conclusion that Badme Town and its environs were administered by the Ethiopian authorities before 12 May 1998.”<sup>82</sup>

After further investigation and review of the matter by a committee of ministers, the OAU high-level delegation issued, in early November 1998, a statement and a set of proposals for a framework agreement to end the conflict. Those proposals included one stating that “the armed forces presently in Badme Town and its environs, should be redeployed to the positions they held before 6 May 1998 as a mark of goodwill and consideration for our continental Organization.”<sup>83</sup> The proposals for a framework agreement were endorsed at the OAU summit in December 1998.<sup>84</sup> Given that Eritrean military forces at that time occupied Badme, the OAU’s proposal tacitly acknowledged that Eritrean forces were not in Badme prior to May 1998. Moreover, the OAU high-level delegation expressly confirmed to Ethiopia that the recommendation was referring to the withdrawal of Eritrea from Badme and its environs, which were administered by Ethiopia prior to May 1998.<sup>85</sup> The European Union endorsed the proposals,<sup>86</sup> as did the Security Council, which specifically urged Eritrea to accept them.<sup>87</sup>

Likewise, an agreement crafted in July 1999 in the wake of diplomacy by various countries, the OAU, the European Union, and the United Nations tried to establish certain “modalities” for ending the conflict, including that the “Eritrean Government commits itself to redeploy its forces outside the territories they occupied after 6 May 1998.”<sup>88</sup> Again, the tacit understanding was that in May 1998 Eritrea moved its forces into certain territory, the most well-known of which was Badme, and would have to depart from that territory in order for the conflict to end.

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<sup>80</sup> *ibid* [3]. The delegation was led by the Chairman of the OAU Assembly, a role filled at the time by the President of Burkina Faso, and included the OAU Secretary-General and the Heads of State of Djibouti, Rwanda, and Zimbabwe.

<sup>81</sup> *ibid* [28]

<sup>82</sup> *ibid* [21]

<sup>83</sup> OAU High-Level Delegation: Proposals for a Framework Agreement for a Peaceful Settlement of the Dispute between Eritrea and Ethiopia, recommendation 3, reprinted in *ibid* annex [33], and in Negash and Tronvoll (n 28) 122.

<sup>84</sup> Letter dated 24 December 1998 from the permanent representative of Ethiopia to the United Nations addressed to the President of the Security Council, UN Doc S/1998/1223 (n 6).

<sup>85</sup> *ibid* [36]

<sup>86</sup> *ibid* [43]

<sup>87</sup> UNSC Res 1227 (n 34) [5].

<sup>88</sup> Modalities for Implementation of the OAU Framework Agreement on the Settlement of the Dispute between Ethiopia and Eritrea, 12 July 1999, reprinted in Negash and Tronvoll (n 28) 142.

During the course of the conflict, as previously noted, Ethiopia successfully expelled Eritrean forces from Badme and its environs in February 1999. A further counter-offensive in May 2000 pushed all Eritrean forces out of Ethiopian territory and allowed Ethiopia to press into Eritrean territory.<sup>89</sup> At that point, requiring that *Ethiopian* forces redeploy so as to leave Eritrean territory and return to territory possessed by Ethiopia prior to May 1998 became essential to ending the conflict. Thus, the cessation of hostilities agreement, concluded by the two countries in June 2000, established a scheme by which Ethiopian forces would redeploy to territory that Ethiopia controlled prior to May 1998, pursuant to plans submitted to and agreed upon by UNMEE.<sup>90</sup> Specifically, the cessation of hostilities agreement in paragraph 9 stated that “Ethiopia shall submit redeployment plans for its troops from positions taken after 6 February 1999, and which were not under Ethiopian administration before 6 May 1998, to the Peacekeeping Mission. This redeployment shall be completed within two weeks after the deployment of the Peacekeeping Mission and verified by it.”<sup>91</sup>

To fulfill its mandate, UNMEE had to establish the line behind which Ethiopian forces must redeploy and then monitor whether the redeployment had occurred. In drawing that line, UNMEE had to determine which areas were and were not under “Ethiopian administration” as of May 1998. The “UNMEE line” as it became known was therefore an important on-the-ground determination by a third-party during the course of the conflict as to which territory was administered by whom at the outbreak of conflict.

In light of this background, the claims commission saw the UNMEE line as most relevant in considering both *jus ad bellum* and *jus in bello* violations. Use of the UNMEE line first occurred in the context of applying the *jus in bello* to claims arising in the central front;<sup>92</sup> to the extent that certain violations of the *jus in bello* only occurred in “occupied territory,” it was necessary to determine whether a belligerent had seized and “occupied” territory of the opposing belligerent. Rather than rely on the boundary commission’s 2002 determination decision (based largely on colonial-era treaties), the claims commission relied on the UNMEE line established at the end of the conflict (based on the United Nations’ best understanding of what territory the two belligerents possessed at the outbreak of the conflict). The claims commission stated in its central front partial award:

For the purposes of its assigned tasks, the Claims Commission concludes that the best available evidence of the areas effectively administered by Ethiopia in early May 1998 is the agreement on the areas to which Ethiopian armed forces were to be re-deployed, as set forth in paragraph 9 of the Cessation of Hostilities Agreement of June 18, 2000.<sup>93</sup>

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<sup>89</sup> Partial Award, Central Front, Ethiopia’s Claim 2 (n 10) [26].

<sup>90</sup> UNSC Res 1312 (n 44); UNSC Res 1320 (n 44).

<sup>91</sup> Agreement on Cessation of Hostilities (n 43).

<sup>92</sup> In this respect, the Commission’s *jus ad bellum* partial award should be read in conjunction with the earlier partial award on the central front, where the issue was first joined.

<sup>93</sup> Partial Award, Central Front, Ethiopia’s Claim 2 (n 10) [31].

That use of the UNMEE line for purposes of the *jus in bello* in the central front proceeding was then used again for purposes of the *jus ad bellum*.<sup>94</sup>

Badme and its environs, as well as the other territories seized by Eritrea in May and June 1998, were on the Ethiopian side of the UNMEE line. When Ethiopian forces redeployed to those areas, including Badme, after the cessation of hostilities, UNMEE regarded Ethiopia as being in compliance with Ethiopia's obligation to redeploy to the territory it possessed at the outbreak of the war. As such, the claims commission found that the areas "initially invaded by Eritrean forces [on May 12, 1998] were all either within undisputed Ethiopian territory or within territory that was peacefully administered by Ethiopia and that later would be on the Ethiopian side of the line to which Ethiopian armed forces were obligated to withdraw in 2000" under the cessation of hostilities agreement.<sup>95</sup>

Though it used the UNMEE line for the purpose of applying the *jus in bello* and *jus ad bellum*, the claims commission was careful to assert that doing so had no effect on the lawful boundary between the two countries as determined by the boundary commission.<sup>96</sup> Rather, the claims commission was simply fulfilling its task of applying the relevant laws of war to an armed conflict in a time frame where the legal boundary had not yet been delimited or demarcated. In the context of applying the *jus in bello* for the central front claims, the claims commission said that it

considers that, under customary international humanitarian law, damage unlawfully caused by one Party to an international armed conflict to persons or property within the territory that was peacefully administered by the other Party to that conflict prior to the outbreak of the conflict is damage for which the Party causing the damage should be responsible, and that such responsibility is not affected by where the boundary between them may subsequently be determined to be.<sup>97</sup>

Thus, the key question with respect to Eritrea's first self-defense argument was whether a country (such as Eritrea) that believes it has a valid claim to territory that is peacefully occupied by another country (such as Ethiopia) may use military force to seize the territory. While Article 2(4) of the UN Charter is not specific to the issue, the UN General Assembly's 1970 Declaration on Friendly Relations helps clarify the meaning of Article 2(4) by providing: "Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries

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<sup>94</sup> Partial Award, *Jus Ad Bellum* (n 3) [15]; see Christian Ponti, 'The Eritrea-Ethiopia Claims Commission on the Threat or Use of Force and Individual Self-Defence' in *The 1998-2000 War between Eritrea and Ethiopia* (n 32) 270 (finding the Commission's approach reasonable).

<sup>95</sup> Partial Award, *Jus Ad Bellum* (n 3) [15]; see also Partial Award, Central Front, Ethiopia's Claim 2 (n 10) [24] ("In all four weredas, Eritrean forces moved into areas administered prior to the conflict by Ethiopia, occupied territory, and established field fortifications and trench lines . . .").

<sup>96</sup> See Weeramantry (n 68) 236 ("the Claims Commission demonstrated a good deal of fidelity to the notion of respectful coexistence"); but see Christine Gray, 'The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?' (2006) 17 EJIL 699, 712 ("This Partial Award serves to undermine the Boundary Commission's Delimitation Decision of April 2002 and thus arguably to encourage Ethiopia in its refusal to comply with that Decision.").

<sup>97</sup> Partial Award, Central Front, Ethiopia's Claim 2 (n 10) [27].

of another State or as a means of solving international disputes, *including territorial disputes and problems concerning frontiers of States.*"<sup>98</sup> Reflecting on the matter, Oscar Schachter argued:

In view of the considerable number of territorial disputes in the world at present, the claim that Article 2(4) does not apply to the use of force to recover territory by the rightful owner would, if sustained, go a long way toward reducing the scope of the prohibition against force. . . . Underlying this interpretation is a general awareness among governments that an exception for recovering "illegally occupied" territory would render Article 2(4) nugatory in a large and important group of cases involving threats of force.<sup>99</sup>

Citing to the 1970 Declaration, to Schachter, and to other authorities, the claims commission rejected Eritrea's first defense, noting that "the practice of States and the writings of eminent publicists show that self-defense cannot be invoked to settle territorial disputes."<sup>100</sup> Echoing Schachter's conclusion, the claims commission noted that "border disputes between States are so frequent that any exception to the prohibition of the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law."<sup>101</sup>

Embedded within this conclusion appears to be an important temporal point. Eritrea *could not* use force to seize disputed territory it regarded as illegally occupied by Ethiopia, when Ethiopia had administered that territory for many years. By contrast, Ethiopia *could* use force to reclaim territory it regarded as illegally occupied by Eritrea, so long as it did so shortly after Eritrea seized the territory by force. In other words, the fact that a State has successfully used force to occupy disputed territory does not preclude defensive action by another State that had been peacefully administering the territory, so long as the action is undertaken immediately or as soon as diplomatic efforts are exhausted. Article 2(4) only precludes a State from using force to seize control of disputed territory that has been peacefully administered by another State for a long period of time.

Eritrea's second self-defense argument was that Eritrea's conduct was lawful in response to Ethiopian "incursions into Eritrea" in early May 1998.<sup>102</sup> Eritrea and Ethiopia presented different accounts of what happened on May 6-7 in the area of Badme, both in terms of the numbers of persons involved, the location of what happened, and the nature of the incidents. Ultimately, the claims commission found it unnecessary to resolve the conflicting factual accounts because it viewed the matter, even on Eritrea's account, as not rising to the level that would justify Eritrean armed force in self-defense.

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<sup>98</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625, annex (emphasis added).

<sup>99</sup> Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers 1991) 116.

<sup>100</sup> Partial Award, *Jus Ad Bellum* (n 3) [10].

<sup>101</sup> *ibid*

<sup>102</sup> *ibid* [9]

The claims commission began its analysis by noting that resort to the use of armed force is only permissible if authorized by the UN Security Council or when exercised in self-defense in accordance with Article 51 of the UN Charter.<sup>103</sup> As there was no Security Council authorization for Eritrea to use armed force, Eritrea's argument had to rely on self-defense as set forth in Article 51, which recognizes an inherent right to self-defense against an "armed attack," and contemplates a State acting in self-defense reporting to the Security Council that it is doing so.<sup>104</sup>

The claims commission did not regard whatever Ethiopia may have done on May 6-7 as constituting an "armed attack" against Eritrea. According to the claims commission, "[l]ocalized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter."<sup>105</sup> On either Eritrea's or Ethiopia's account of what happened in early May, the claims commission saw these incidents as involving

geographically limited clashes between small Eritrean and Ethiopian patrols along a remote, unmarked, and disputed border. The Commission is satisfied that these relatively minor incidents were not of a magnitude to constitute an armed attack by either State against the other within the meaning of Article 51 of the UN Charter.<sup>106</sup>

Moreover, the claims commission appears to have regarded Eritrea's failure to report to the UN Security Council that it was acting in self-defense as a form of evidence that Eritrea, in early May 1998, did not regard itself as the object of an armed attack necessitating the exercise of a right of self-defense.<sup>107</sup> A further element that appears to have influenced the claims commission's reasoning was the existence of a bilateral process for resolving border problems, which was functioning at the ministerial level in early May 1998. Eritrea and Ethiopia had set up a joint body to discuss border problems, which was meeting in Addis Ababa on May 8, 1998. While the claims commission did not expressly draw any conclusion from the existence of that process, the claims commission did note its existence and further noted that the Eritrean delegation left Addis Ababa on the night of May 8.<sup>108</sup> The implication of the claims commission's observations might be that it regarded Eritrea as having a meaningful avenue for raising whatever concerns it might have had about the May 6-7 incident, and that Eritrea's failure to pursue fully that avenue called into question that its actions on May 12 were truly in response thereto.

Having concluded that Eritrea was not the object of an "armed attack" by Ethiopia, the claims commission found that Eritrea had no basis for resorting to self-defense against Ethiopia. Even

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<sup>103</sup> *ibid* [11]

<sup>104</sup> See UN Charter art 51.

<sup>105</sup> Partial Award, *Jus Ad Bellum* (n 3) [11]. For criticism that the Commission should have been more specific about what happened in these clashes, so as to allow for a better understanding of what constitutes an "armed attack," see Weeramantry (n 68) 238; Ponti (n 94) 274. For criticism of the general idea that a threshold exists below which a use of force cannot be considered an "armed attack," see Michael J Matheson, *International Civil Tribunals and Armed Conflict* (Martinus Nijhoff Publishers 2012) 252–55.

<sup>106</sup> Partial Award, *Jus Ad Bellum* (n 3) [12].

<sup>107</sup> *ibid* [11]

<sup>108</sup> *ibid* [13]

had the May 6-7 incidents been regarded as an “armed attack,” it seems likely that Eritrea would have had difficulty in establishing that the extensive deployment of military armor and personnel across the border was a necessary or proportionate response to the May 6-7 incidents. The claims commission, however, had no need to reach that issue.

Eritrea’s third and final argument relating to self-defense was that its use of force was a permissible response to a “declaration of war” issued by Ethiopia on May 13, 1998.<sup>109</sup> One obvious problem with this defense was the timing; Eritrean military forces crossed into Ethiopia on May 12, a full day before Ethiopia’s alleged “declaration of war.” The claims commission, however, focused on the terms of the declaration – which was issued by the Ethiopian Council of Ministers and Parliament – and noted that the declaration did not, in fact, “declare war” on Eritrea or declare there to be a state of war as between the two countries.<sup>110</sup> Rather, the resolution condemned Eritrea’s May 12 invasion, stated that Ethiopia would not accept Eritrea’s ensuing seizure of territory, and asserted that Ethiopia would act in self-defense until such time as Eritrea’s forces either withdrew from or were forced out of that territory. The claims commission saw this as a standard assertion of a right of self-defense by Ethiopia, not a *casus belli* for Eritrea. The nature of the declaration as an exercise of the inherent right of self-defense was consistent with the fact that Ethiopia reported to the UN Security Council that it was taking defensive action, as permitted under the terms of Article 51 of the UN Charter.<sup>111</sup>

### 3. Eritrea was obligated to pay compensation to Ethiopia

In its final award on damages for Ethiopia, the claims commission applied a proximate-cause standard in which it determined “what injury was proximately caused by Eritrea’s delict, informed by judgments regarding the consequences that should have been reasonably foreseeable to Eritrea’s military and civilian leaders at the time of its unlawful action.”<sup>112</sup> The commission concluded that reasonable foreseeability did not limit the damages solely to the time and place of the initial invasion.<sup>113</sup> At the same time, the commission was of the opinion that it was not reasonably foreseeable to Eritrea that its invasion would lead to all of the types of injury for which Ethiopia was now claiming compensation.<sup>114</sup> Instead, the commission advanced a more “nuanced” view, saying that

it agrees that the test of foreseeability should extend to a broader range of outcomes than might need to be considered in a less momentous situation. A substantial resort to force is a serious and hazardous matter. A party considering this course is bound to consider matters carefully, weighing the costs and possible bad outcomes, as well as the outcome it seeks. This is particularly so given the uncertainties of armed conflict. At the same time, if a party is deemed to foresee too wide a range of possible results of its action, reaching

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<sup>109</sup> *ibid* [9]

<sup>110</sup> *ibid* [17]

<sup>111</sup> *ibid*

<sup>112</sup> Final Award, Ethiopia’s Damages Claims (n 65) [284].

<sup>113</sup> *ibid*

<sup>114</sup> *ibid* [290]

too far into the future, or too far from the battlefield, foreseeability loses meaning as a tool to assess proximate cause. If all results are foreseeable, the test is meaningless.<sup>115</sup>

The claims commission then applied its test to the three fronts along the Eritrea-Ethiopia border, for different categories of alleged loss, damage, or injury. In doing so, the commission indicated several factors that it considered in setting its levels of compensation. First, the commission did not take into account a desire to deter future violations of the *jus ad bellum* when setting levels of compensation; rather, the commission's role was simply to apply the law of state responsibility to the claim before it.<sup>116</sup> Second, the commission did not aspire to establish a precise quantification of each type of harm suffered, because doing so was far too difficult given the scale of injury at issue. Rather, the commission pursued its "best assessment, drawing upon a variety of indicators," which "frequently involved rough approximations."<sup>117</sup> Third, the commission regarded injury resulting solely from a *jus ad bellum* violation as meriting a lower level of compensation than a comparable injury resulting from a violation of the *jus in bello*. The commission regarded the latter as inherently more grave<sup>118</sup> and expressed concern that failing to distinguish between the two might undercut incentives for an aggressor State to comply with the *jus in bello*.<sup>119</sup> Fourth, the commission regarded Eritrea's violation of the *jus ad bellum* as "different in magnitude and character from the aggressive uses of force marking the onset of the Second World War, the invasion of South Korea in 1950, or Iraq's 1990 invasion and occupation of Kuwait."<sup>120</sup> As such, Ethiopia was apparently entitled to lesser amounts of compensation than the victim States of those other conflicts. Finally, the commission factored into its quantum of damages a concern "that the financial burden imposed on Eritrea . . . not be so excessive, given Eritrea's economic condition and its capacity to pay, as seriously to damage Eritrea's ability to meet its people's basic needs."<sup>121</sup>

All told, the claims commission awarded to Ethiopia \$87,260,520 million in compensation for Eritrea's violation of the *jus ad bellum*.<sup>122</sup> As of 2016, such compensation has not yet been paid.

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<sup>115</sup> *ibid*

<sup>116</sup> *ibid* [308]

<sup>117</sup> *ibid* [310]

<sup>118</sup> *ibid* [311]

<sup>119</sup> *ibid* [316]

<sup>120</sup> *ibid* [312]

<sup>121</sup> *ibid* [313]

<sup>122</sup> The claims commission awarded compensation to Ethiopia for the following categories: human suffering and lost income associated with internal displacement of persons (\$45,000,000); Ethiopian civilian deaths and injuries (\$8,500,000); damage to civilian property, primarily from shelling (\$6,000,000); damage to public buildings and infrastructure (\$3,500,000); looting of, destruction of, and damage to religious institutions (\$2,500,000); destruction in Zalambessa (\$5,605,000); deaths and injuries caused by landmines (\$1,500,000); destruction of Disaster Prevention and Preparedness Bureau facilities in Adigrat (\$250,000); damage to other government facilities on the central front (\$162,500); other government losses on the central front (\$75,000); looting of property from the Relief Society of Tigray (\$125,000); damage in Adi Goshu (\$150,000); shelling damage in Sheraro (\$625,000); damage caused by the attack on the Mekele airport (\$65,000); profits lost by Ethiopian Airlines (\$4,000,000); failing to provide Ethiopian Airlines access to its bank accounts at the Bank of Eritrea (\$1,703,020); and reconstruction and assistance to internally displaced persons (\$7,500,000). *ibid dispositif*, s XII.B.



#### IV. Conclusion: precedential value

The claims commission's *jus ad bellum* findings are of considerable precedential value. The commission considered and addressed several important and complicated issues concerning law on the resort to force, self-defense, and reparation. Rarely have such claims been litigated and rarer still have decisions been issued on these matters. There are various aspects of the claims commission's findings that can be questioned, if not criticized, but given the limited resources and time frame under which the commission operated, the commission performed extremely well.<sup>123</sup>

The claims commission concluded that a large-scale, transborder military operation constituted a violation of Article 2(4) of the UN Charter, a finding that confirms conventional *jus ad bellum* doctrine. Further, the commission made important findings with respect to the law on self-defense, specifically that: (1) a State may not use armed force to seize disputed territory peacefully occupied by another State; (2) a State may not use armed force in response to geographically-limited clashes between patrols along an unmarked and disputed border; and (3) a State may not use armed force solely in reaction to another State's declaration that it will act in self-defense. Finally, the commission analyzed the conditions under which reparation should be provided for a violation of the *jus ad bellum*, advancing a proximate cause standard as well as other standards when calculating compensation for various categories of harm.

The most limiting feature of the claims commission's findings ultimately may be their parsimony; it is not easy to ascertain from the awards the scope and nature of the evidence upon which the commission's conclusions were based, which in turn may cause difficulties for future tribunals that attempt to rely upon those conclusions with respect to entirely different fact patterns and evidentiary foundations.

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<sup>123</sup> See Weeramantry (n 68) 240 (“[T]he Commission properly exercised its jurisdiction over the *jus ad bellum* claim and its decision as to the merits is generally consistent with modern international legal rules pertaining to the use of force.”).