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Sean D. Murphy

George Washington University Law School, smurphy@law.gwu.edu

Won Kidane

Thomas R. Snider

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THE *JUS AD BELLUM* AND THE 1998 INITIATION OF THE ERITREAN-ETHIOPIAN WAR

Chapter IV

SEAN MURPHY, WON KIDANE, & TOM SNIDER,
*LITIGATING WAR: MASS CIVIL INJURY AND THE
ERITREA-ETHIOPIA CLAIMS COMMISSION*
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The dominant area of international law upon which claims before the Eritrea-Ethiopia Claims Commission were based was the *jus in bello*, or the law operating as between two belligerents *after* an armed conflict has arisen. As discussed in the remaining chapters of this book, much of the Commission's decision-making turned on treaties and customary rules of the *jus in bello*, in particular the rules found in the 1907 Hague Regulations or the 1949 Geneva Conventions. Further, for virtually all of the subject-matter areas that arose before the Commission, whether the *jus in bello* or other areas (such as diplomatic law or law on expropriation of property), there were claims by *both* sides against the other, thus forcing Eritrea and Ethiopia simultaneously to advance and defend claims in the same general areas. Finally, when claims were advanced, they normally did not have cross-cutting effects upon other claims; most claims stood or fell on their own, without significant ramifications for other areas of claims.

One type of claim filed before the Commission, however, was quite different from all the other claims. This claim concerned the *jus ad bellum*, or the law on when a state may resort to a use of military force against another state, one of the most important issues for the international legal system. In this instance, only one of the two countries – Ethiopia – claimed that the other had violated the *jus ad bellum*, such that there was no symmetry in the approach taken by the two countries in this area. Further, this type of claim possessed certain very special characteristics.

First, as a political matter, the assertion that one state unlawfully invaded another is very serious, both for the state so charged and for the state that sees itself as victimized. Passing upon such a claim can have important implications for understanding the past, for the existing relations of the two countries, and for future operation of the *jus ad bellum* and its ability to be adjudicated.

Second, the claim raised several very difficult questions about establishing a violation of the *jus ad bellum*. What standard of liability should be applied in assessing culpability for such a violation; is a State strictly liable when troops move across a border or must some form of intent to invade be proven? Must it be established that the acts at issue were planned in advance? That they were ordered at a certain level of governmental authority? What types of evidence are needed to establish that the violation occurred? Is the burden on the claimant state to present all such evidence or, having established the fact of an invasion, does some amount of the burden shift to the respondent state? Is the *jus ad bellum* violation only the first step taken by the respondent state when breaching the peace, such that when the other state reacts in defense, the *jus ad bellum* is no longer relevant? Or does the *jus ad bellum* continue to regulate the aggressor's conduct during the armed conflict? When there is a contested border, can a violation of the *jus ad bellum* occur, or are the states freely able to use force to reclaim what they regard as their own territory? What is the relevance of a boundary decision that, after the conflict is over, definitively establishes that border in favor of one state or the other? What defenses are available against an allegation that the *jus ad bellum* has been violated?

Third, the claim raised equally difficult and important questions regarding the appropriate reparation for the violation of the *jus ad bellum*. Is the finding by a tribunal that a violation of the *jus ad bellum* has occurred alone sufficient reparation? If, instead, compensation is owed, what should be the scope of harm to which that compensation is directed? Perhaps there should only be compensation for loss, damage, or injury that occurred in the immediate time and place of the violation of the *jus ad bellum*. Or perhaps a successful *jus ad bellum* claim would support all claims brought by a victim state for any proven loss, damage, or injury resulting from the armed conflict spawned by the violation. If the latter, there might be no need to establish that some other violation of international law also occurred, such as with respect to the *jus in bello*. Instead, all the victim state would need to prove was the existence of the loss, damage, or injury, an approach that was taken by the U.N. Security Council when it set up the U.N. Compensation Commission, an institution charged with determining the compensation Iraq owed for its invasion and occupation of Kuwait in 1990-91.

Even more far-reaching, a violation of the *jus ad bellum* might create responsibility for the aggressor state for *all* loss, damage, or injury that resulted from the war by *either* side. "But for" the conduct of the aggressor state, there would be no such loss, damage, or injury at all by either side and, as such, arguably all blame should be placed upon that state. Even if not taken to that consequentialist extreme, a successful *jus ad bellum* claim might at least minimize recovery by the aggressor state against the defender state for the latter's violation of the *jus in bello*, perhaps on a theory of joint liability or "unclean hands."

The Commission and the Parties faced considerable challenges in addressing these issues. This chapter explains the decisions reached by the Commission, starting first with the question of the Commission's jurisdiction, and then moving to Ethiopia's framing of the claim, the Commission's decision that Eritrea had violated the *jus ad bellum*, and the compensation awarded by the Commission to Ethiopia.

A. Jurisdiction Over *Jus Ad Bellum* Claim

Many aspects of the Commission's jurisdiction over the *jus ad bellum* violation were not at issue. The alleged conduct was all committed by Eritrean military forces or government personnel, so there was no question as to the attribution of the alleged conduct. The dates during which the alleged conduct occurred all fell within the jurisdictional time period set by the Commission in its Decision No. 1, meaning from May 1998 to December 2000. The claim clearly "related" to the armed conflict, and the loss, damage, or injury allegedly resulted from a "violation of international law"—the *jus ad bellum*.¹

One potential problem concerned Article 5, paragraph 1, of the December 2000 Peace Agreement, which provided in part that "[t]he Commission shall not hear claims arising from the cost of military operations, preparing for military operations, or the use of force, except to the extent that such claims involve violations of international humanitarian law."² Inclusion of the words "use of force" in this clause arguably meant that the Commission was not intended to have jurisdiction over any *jus ad bellum* claim because such a claim arises from "the use of force."

At a meeting of the Parties with the Commission in July 2001, however, the representatives from both governments expressly informed the Commission that the Article 5 clause did not preclude a *jus ad bellum* claim. Instead, both Parties confirmed that they interpreted the clause as only carving out from the Commission's jurisdiction a claim "arising from the cost of . . . the use of force," meaning that a state could not advance a claim based on its expenditures in waging war. The structure of the clause lent itself to such an interpretation because "the cost of" appears to modify all three of the following elements. Weighing against the interpretation, however, was the apparent redundancy in the three elements, as well as the general intuition that perhaps two states submitting bilateral war-related claims to a commission would agree to take the *jus ad bellum* issue off the table (or, to put it another way, would not be able to agree to keep it on the table).

In any event, the Commission accepted the Parties' interpretation,³ stating in a letter issued in July 2001:

¹ Professor Christine Gray has asserted that "there is no suggestion in Article 5 that [the Commission's] jurisdiction would extend to" the *jus ad bellum*. Christine Gray, *The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?*, 17 E.J.I.L. 699, 704 (2006). The Commission's jurisdiction, however, extended to "violations of international law," and there is no principled basis for saying that a violation of the *jus ad bellum* is not a violation of international law.

² Agreement, Eth.-Erit., Dec. 12, 2000, 21 U.N.T.S. 94 (Annex 2) [hereinafter "December 2000 Algiers Agreement"].

³ Professor Gray regards the Commission's conclusion as "not logically necessary," Gray, *supra* note 1, at 705, but it would seem much more illogical for a bilateral arbitral

The Commission notes the agreement of the Parties that the last sentence of Article 5, paragraph 1 of the Agreement of 12 December 2000, despite its wording, was intended to mean that claims of compensation for all costs of military operations, all costs of preparing for military operations, and all costs of the use of force are excluded from the jurisdiction of the Commission, without exception. Consequently, the Commission shall respect that interpretation of the provision.⁴

Even so, at the hearing before the Commission, Eritrea attempted to argue that the Commission did not have jurisdiction over Ethiopia's *jus ad bellum* claim. Given the difficulty of undoing the Commission's prior decision regarding Article 5(1), Eritrea focused on a different article of the December 2000 Peace Agreement – Article 3.⁵ Article 3 called for the creation of an “independent and impartial body” under the auspices of the Organization of African Unity (OAU) (later the African Union), in consultation with the United Nations, with the following mandate:

In 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 1997.⁶

The “incidents of 6 May 1998” referred to certain clashes between Eritrean soldiers and Ethiopian border patrols, in which Eritrea claimed that several Eritrean soldiers were killed.⁷ An incident prior to May 1998 that also received some attention at the time concerned an encounter between patrols from the two countries in an isolated area along the border known as Bada-Adi Murug in Dalul Wereda (also known as Bada Tigray) in July 1997, during which no armed conflict occurred.

As it turned out, the OAU never established this “independent and impartial body,” and therefore the “origins of the conflict” were never analyzed and reported upon by it. Even so, Eritrea sought to argue that the existence of Article 3 demonstrated that Article 5 was not intended to give the Commission any authority to pass upon a claim that required findings with

commission to disregard the unequivocal interpretation placed upon a bilateral agreement by the two states to that agreement just six months after its conclusion. As of July 2001, both parties were still contemplating the claims they would file by that coming December, and no doubt both envisaged the possibility of filing a *jus ad bellum* claim.

⁴ Partial Award, *Jus Ad Bellum*, Ethiopia's Claims 1-8, para. 5, n. 2 (Dec. 19, 2005) (Annex 20) [hereinafter “Ethiopia's *Jus Ad Bellum* Claims, Partial Award”];

⁵ Ethiopia's *Jus Ad Bellum* Claims, Partial Award, para. 3.

⁶ December 2000 Algiers Agreement, art. 3; for further discussion, see Chapter I(E).

⁷ See Ethiopia's *Jus Ad Bellum* Claims, Partial Award, paras. 9, 12.

respect to the “origins of the conflict.” That task having been allocated to another body, the Claims Commission was precluded from doing so itself.

Given that the express language of neither Article 3 nor Article 5 precluded the Commission from deciding a *jus ad bellum* claim, Eritrea’s position was based upon an implication. Counting against that implication was the apparent care in the crafting of Article 5, with its considerable detail as to the types of claims that might be presented to the Commission, including the explicit exclusion of certain claims (such as for the costs of military operations) of far less significance than a claim for violation of the *jus ad bellum*. As such, Eritrea’s argument was difficult to make, but it did provide the Commission with an opportunity to avoid the *jus ad bellum* claim if it was looking for a way to do so.

The Commission, however, 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*.⁸ As the Commission saw it, determining “the origins of the conflict and the nature of any misunderstandings about the border, had they been made by an 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.”⁹ The factual inquiries to be undertaken by the two bodies were not the same, and only the Commission was empowered to determine whether one of the States violated the *jus ad bellum*.¹⁰

One critic has asserted that “there is in the Partial Award on the *jus ad bellum* claims little sign of any respect for the division of functions” between the Claims Commission and the OAU body.¹¹ Yet the Commission’s decision was fully consistent with an earlier decision in

⁸ *Id.*, para. 4.

⁹ *Id.*, para. 5.

¹⁰ *Id.*

¹¹ Gray, *supra* note 1, at 707. Professor Gray also says that had the parties intended the Commission to have jurisdiction over a *jus ad bellum* violation, “it seems inconceivable that ... they would have appointed the arbitrators they did” because “the main area of expertise of a majority of the arbitrators is in private international law and international commercial arbitration, rather than the field of *ius ad bellum*.” *Id.*; *see also id.*, at 721, n. 89. On that logic, presumably Professor Gray would also have doubts about the Commission’s jurisdiction over claims relating to the means and methods of warfare, human rights, diplomatic law, and any other non-commercial areas of international law given that none of those issues purportedly fell with the “main” expertise she asserts was possessed by the majority of the commissioners. Further, the comment sets an odd standard, in that the main area of expertise of the majority of the International Court of Justice is never on the *jus ad bellum*, yet its *jus ad bellum* decisions are typically not impugned on that ground. In fact, the assertion is quite misleading in suggesting that the Commission lacked expertise on the *jus ad bellum*. For example, Commissioner George

2001 addressing the overall structure of the institutions established by the December 2000 Peace Agreement. In its Decision No. 1 of August 2001 (taken before the Parties' claims were filed), the Commission considered whether it had the authority to pass upon claims that arose before the outbreak of armed conflict in May 1998. In deciding that it did not have such authority, the Commission pointed to two other institutions created by the December 2000 Peace Agreement: the Boundary Commission established under Article 4 to decide competing boundary claims existing prior to May 1998, and the OAU body to be established under Article 3 to investigate "the incidents of 6 May 1998 and on any other incident prior to that date." In Decision No. 1, the Commission characterized those two "mechanisms" as having "the primary responsibility for deciding questions relating to the boundary and for assessing the character and consequences of controversies between the Parties before the outbreak of the armed conflict in May 1998."¹² By contrast, a *jus ad bellum* violation that allegedly occurred on May 12, 1998 to start the armed conflict was within the scope of the Claims Commission's jurisdiction. The Commission's view as to the division of functions seems quite logical.

The Commission's decision on its jurisdiction over the *jus ad bellum* claim was also consistent with the position it had taken with respect to Eritrea's claim that Ethiopia violated the *jus in bello* when repatriating Eritrean prisoners of war. Ethiopia had sought to argue that the Commission should not exercise jurisdiction over such a claim because a different article of the December 2000 Peace Agreement – Article 2 – contemplated a role for a different institution (the International Committee of the Red Cross) in monitoring release and repatriation. The Commission rejected Ethiopia's view, stating that it "finds no basis in the text of either Article 2

Aldrich served from 1959 until 1981 as a lawyer for the U.S. Government, working extensively on politico-military affairs at a time when the United States was involved in and reacting to a variety of military interventions. He ultimately rose to the level of Deputy Legal Adviser of the U.S. Department of State, advising the Secretary of State and testifying before Congress on various use of force issues. Far from having expertise only in commercial law, Aldrich served as the Legal Adviser to Henry Kissinger for the Vietnam peace negotiations and headed the U.S. delegation to the Geneva Conference that produced the 1977 Protocols to the Geneva Conventions. He also served briefly as a Member of the U.N. International Law Commission. As such, he possessed considerable expertise in a wide range of the issues that came before the Commission, including on the *jus ad bellum*, and such expertise was well-known when he was appointed by Ethiopia to the Commission. Similarly, John Crook, appointed by Eritrea, served almost thirty years in the U.S. Department of State Office of the Legal Adviser, *inter alia*, appearing before the International Court of Justice in the *Oil Platforms* case. He also served for several years as General Counsel of the Multinational Force and Observers, an international organization operating an 1,800-soldier peacekeeping force in the Sinai Desert in Egypt. Certainly it is true that there were varying levels of expertise among the other commissioners on different areas of international law, but overall the group was uniquely well-qualified to address the myriad issues that came before them.

¹² Eritrea-Ethiopia Claims Commission, Decision No. 1 on the Commission's Mandate/Temporal Scope of the Jurisdiction (Aug. 2001) (Annex 3).

or Article 5 for the conclusion that its jurisdiction over claims covered by Article 5 is repealed or impaired by the provisions of Article 2.”¹³

B. Claim That the *Jus Ad Bellum* Was Violated

1. Basic Claim

Ethiopia’s basic *jus ad bellum* claim 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.

The alleged invasion began on May 12, 1998 with thousands of Eritrean soldiers, supported by tanks, artillery, and other large weapons, at the town of Badme, which is located in the western part of the two countries’ border, in the Tigray Region (an area that became known as the “Western Front”). The attack allegedly commenced with heavy shelling, even though Ethiopia maintained that Badme and its environs contained no Ethiopian military units, only local police and militia equipped with small arms. According to Ethiopia, the invasion began in the Badme area but then spread to numerous Ethiopian kebeles in the Tahtay Adiabo *Wereda*, which were seized and occupied by Eritrea for nearly a year. Towns and villages in the neighboring Laelay Adiabo and Kafta Humera *Weredas* were also allegedly exposed to Eritrean shelling and incursions by Eritrean soldiers.¹⁴

While the May 1998 attack began in the west, Ethiopia alleged that within two days of the initial attack, thousands of Eritrean forces also crossed the Mareb River in the central part of the border into the Mareb Lekhe and Aferom *Weredas*, also part of the Tigray Region (an area that became known as the “Central Front”).¹⁵ This incursion, which included extensive shelling, was allegedly closely followed by further attacks along that front in the Irob and Gulomakheda *Weredas*. In particular, Ethiopia maintained that Eritrea launched an attack upon and seized the border town of Zalambessa in Gulomakheda *Wereda*, a strategic location given that it lies on the

¹³ Partial Award, Prisoners of War, Eritrea’s Claim No. 17 (July 1, 2003) (Annex 24).

¹⁴ Partial Award, Western and Eastern Fronts, Ethiopia’s Claims 1 & 3 (Dec. 19, 2005) (Annex 27) [hereinafter “Ethiopia’s Western/Eastern Front Claims, Partial Award”].

¹⁵ Ethiopia’s *Jus ad Bellum* Claims, Partial Award, para. 18.

principal road connecting the capitals of the two countries.¹⁶ As Ethiopia saw it, Eritrea continued to occupy much of this territory for nearly two years.¹⁷

Finally, Eritrea allegedly also crossed the eastern part of the border with thousands of soldiers and armored vehicles in May 1998 in the Dalul Wereda of Ethiopia's Afar Region, and then in June attacked the town of Bure and its environs in Elidar Wereda (an area that became known as the "Eastern Front").¹⁸ The value to Eritrea in this attack would be to cut off Ethiopia's road and rail links to ports in Djibouti.¹⁹ Eritrea purportedly continued to occupy some of these areas and to conduct armed incursions and artillery attacks in the nearby Afdera Wereda for the duration of the war.

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 U.N. 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.²⁰

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 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

¹⁶ Final Award, Ethiopia's Damages Claims (Aug. 17, 2009) (Annex 16) [hereinafter "Ethiopia's Damages, Final Award"].

¹⁷ Partial Award, Central Front, Ethiopia's Claim 2 (Apr. 28, 2004) (Annex 12) [hereinafter "Ethiopia's Central Front Claim, Partial Award"].

¹⁸ Ethiopia's Western/Eastern Front Claims, Partial Award, paras. 59-61; Ethiopia's *Jus ad Bellum* Claims, Partial Award, para. 18.

¹⁹ Ethiopia's Damages, Final Award, para. 303.

²⁰ Christopher Greenwood, *The Relationship Between Ius Ad Bellum and Ius in Bello*, 9 REV. INT'L STUD. 221, 222-223 (1983).

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 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.

2. Formulation of the Claim in the Pleadings

As indicated in the prior section, Ethiopia maintained that Eritrea's violation of the *jus ad bellum* claim resulted in a wide range of loss, damage, or injury suffered by Ethiopia. Given the breadth of the *jus ad bellum* claim, the losses associated with that claim occurred in the same time and place as many other alleged losses resulting from violations of other norms of international law, notably the *jus in bello*. Along the battle fronts, Ethiopia maintained that Eritrea destroyed buildings in particular towns in part due to lawful military targeting and in part due to unlawful military destruction undertaken for reasons unrelated to military advantage. Similarly, away from the battle fronts, Ethiopia alleged that loss, damage, or injury attributable to the *jus ad bellum* violation occurred side-by-side with losses attributable to the *jus in bello*.²¹

For example, Ethiopia alleged that some Ethiopians held as prisoners of war died in captivity at a much younger age than they normally would have outside of captivity. The mere detention of prisoners of war is not a violation of the *jus in bello*, therefore compensation for the early death of Ethiopian prisoners of war could only be based upon Eritrea's violation of the *jus ad bellum*—had Eritrea not initiated the war, there would have been no prisoners of war and no early death in captivity. Yet in the same camps and at the same time, Ethiopia alleged that Ethiopian prisoners of war suffered injuries from Eritrean beatings and other acts that violated the *jus in bello*.

Due to the enormous amount of side-by-side violations (*jus ad bellum* and *jus in bello*), Ethiopia saw it as most efficient to embed *jus ad bellum* components in each of its eight claims, rather than aggregate all the *jus ad bellum* losses together in a single claim. Thus, Ethiopia filed a

²¹ For further discussion, see Chapter VIII.

single claim (Claim No. 4) addressing prisoners of war, with some losses associated with violations of the *jus in bello* and other losses associated with the *jus ad bellum*. Proceeding with any one of Ethiopia's claims as presented to the Commission would have required addressing, as one aspect of the claim, whether Eritrea had violated the *jus ad bellum*.

The Commission did not wish to proceed with Ethiopia's claims in this fashion. Had the Commission done so, it would have had to decide at a very early stage in its proceedings whether the *jus ad bellum* had been violated. No matter which Ethiopian claim it took up first, the Commission would have been confronted with the *jus ad bellum* as one component of that claim, and would have had to analyze all the relevant facts and law on that issue in order to dispose of the claim. Instead, the Commission's preference was to address at the outset a reasonably manageable claim in terms of the amount of alleged loss, damage, or injury, and to that end chose the prisoner-of-war claims for the first round of written and oral pleadings. So as to avoid the *jus ad bellum* component of that claim and Ethiopia's other claims, the Commission simply ordered that alleged breaches of the *jus ad bellum* be set aside and that the parties not address that component of Ethiopia's eight claims when briefing and arguing those claims. As such, when disposing of those claims, the Commission issued partial awards which contained a finding that claims "based on alleged breaches by the Respondent of the *jus ad bellum* are deferred for decision in a subsequent proceeding."²²

Only three years after its creation, on March 23, 2004, did the Commission order Ethiopia to submit a Memorial in support of the portions of its claims that related to Eritrea's alleged unlawful use of force. Ethiopia submitted its Memorial on November 1, 2004, to which Eritrea filed a Counter-Memorial on January 17, 2005. The issue was argued before the Commission at an oral hearing in April 2005, and the Commission's partial award on the *jus ad bellum* was rendered in December of that year.

In short, the Commission essentially chose to reorganize Ethiopia's pleadings so as to create a consolidated *jus ad bellum* claim, one that would be addressed relatively late in the Commission's proceedings, after both the Parties and the Commission had greater experience in how claims would be addressed by the Commission and had much more information about how the conflict commenced and unfolded. While Ethiopia's approach made sense in theory, the Commission's approach was practical and understandable.

Having said that, prior to the point at which the *jus ad bellum* claim was addressed head-on, the Commission was drawn into reviewing and passing upon certain facts relevant to that claim. After the first round of hearings on the prisoner of war claims, the Commission chose to take up the Central Front claims of both sides, meaning claims that concerned the *jus in bello* along the central part of the border between the two countries. In the course of deciding those claims in April 2004 (a full year before the *jus ad bellum* hearing), the Commission made certain

²² See, e.g., Partial Award, Prisoners of War, Ethiopia's Claim No. 4 (July 1, 2003) (Annex 25).

factual findings about how the fighting along that front unfolded in May and June 1998, which had important implications for its later finding on the *jus ad bellum* violation. Moreover, at the same time that the Commission was considering the *jus ad bellum* claim, it was also disposing of the *jus in bello* claims concerning the Eastern and Western Fronts, which also required considering facts regarding how the armed conflict arose along those parts of the border. Consequently, in considering the facts that were placed before the Commission to establish the *jus ad bellum* violation, it is important to take note of the evidence presented to the Commission not just as a part of the disposition of that particular violation, but all the evidence presented with respect to the fighting along the three fronts as well.

3. Evidence in Support of the Claim

As is the case for all of the Commission's awards, it is difficult to see within the *jus ad bellum* partial award (and the associated damages award) exactly what evidence was presented by Ethiopia in support of its claim and what evidence was marshaled by Eritrea in its defense. The Commission provides some cursory information at the beginning of its awards as to the degree of evidence that was provided, such as the names of fact or expert witnesses at the hearing and, in the course of its discussion on the merits, the Commission will occasionally indicate in a general sense that it found convincing or unconvincing certain information. Yet there is no detailed discussion of the quantity and quality of the vast amounts of information that was submitted to the Commission as annexes to the Parties' pleadings.

This is not to say that the Commission failed to consider and address that evidence; indeed, by all accounts, it appears that the Commission fully considered and understood the vast amounts of evidence placed before it and acted accordingly. Like other tribunals, including the International Court of Justice, much is left unsaid in the final decision. Yet the authoritativeness of the Commission's findings, including its finding on the *jus ad bellum*, may be lessened by a failure to explain in greater detail the full evidentiary basis for its findings—why it is that it believed certain actions happened in certain places at certain times, and why contrary assertions were not credible.²³ Moreover, the value of the Commission's findings for future tribunals is likely to be diminished by not knowing exactly what evidence was presented that convinced or failed to convince the Commission.

a. Sworn Declarations and Statements

In the course of their arguments about what happened in May and June 1998 and thereafter as the war unfolded, the Parties placed before the Commission numerous sworn statements by individuals who provided either first-hand accounts of the events at issue or who were in a position to have credible information about those events, many of which involved the

²³ See, e.g., Gray, *supra* note 1, at 714 (“It seems almost unbelievable that such an important issue as the illegal use of force, in a case where the facts were contested, and potentially involving extensive liability, could be disposed of in this apparently cursory way.”)

outbreak of the war. In numerous instances, those statements took the form of sworn witness declarations or were in the form of “claims forms,” many of which were signed and sworn to, while others were not.²⁴ Further, the Parties presented to the Commission expert reports, often by retired military personnel or persons previously associated with non-governmental organizations operating in the region, as to why certain military movements were tactically or strategically taken, what kinds of damage might be inflicted by certain types of weaponry, where and how many persons were displaced, the presence and effects of landmines, and other matters.

For example, with respect to the Western Front, where it was alleged by Ethiopia that Eritrea initially invaded, Ethiopia presented to the Commission 197 sworn declarations from civilians, 18 sworn declarations from Ethiopian military officers, 10 sworn “claims forms” from civilians, and 31 summary translations of claims forms.²⁵ Likewise, for the Eastern Front, Ethiopia submitted 144 sworn declarations from civilians, 9 sworn declarations from Ethiopian military officers, 6 sworn “claims forms” from civilians, four sworn claims forms from government agencies, and 65 summary translations of claims forms.²⁶ Conversely, Eritrea defended against Ethiopia’s Western and Eastern Front claims with 13 sworn witness declarations and 1 expert report.²⁷ The Commission did not indicate the specific number of sworn declarations filed for the Central Front proceeding, but indicated that “large numbers of sworn declarations” were filed by both sides, and that signed and sworn-to claims forms were filed as well.²⁸ Many of these declarations and claims forms related to Ethiopia’s *jus in bello* claims, but several related to the outbreak of the conflict as well. The Commission did not specify the declarations and claims forms on which it relied in reaching its conclusions regarding the *jus ad bellum*, but presumably gave (perhaps significant) weight to some of this evidence.

b. Contemporaneous Documents

In some instances, documents and information contemporaneous to the conflict were provided to the Commission, such as maps, satellite imagery, photographs, military orders, and government reports.²⁹ One particular piece of evidence of considerable relevance to Ethiopia’s *jus ad bellum* claim was the letter Ethiopia sent to the U.N. Security Council on May 19, 1998, informing the Council that a “war of aggression” had been launched by Eritrea on May 12 and that Ethiopia intended to “take all the necessary measures that the situation demands to safeguard

²⁴ Ethiopia’s Central Front Claim, Partial Award, para. 21 (Annex 12).

²⁵ Ethiopia’s Western /Eastern Front Claims, Partial Award, para. 21 (Annex 27).

²⁶ *Id.*

²⁷ *Id.*, para. 23.

²⁸ Ethiopia’s Central Front Claim, Partial Award, para. 21 (Annex 12).

²⁹ *See, e.g., id.*, para. 22.

the sovereignty and territorial integrity of our country.”³⁰ As discussed below, that letter (and the absence of any counter-part letter by Eritrea to the Security Council) proved significant in establishing that, at the time in question, Ethiopia regarded itself as the victim of an armed attack, whereas Eritrea did not.

Though contemporaneous evidence had considerable value, it was not necessarily deemed probative by the Commission. Ethiopia presented to the Commission a series of alleged intercepts of Eritrean military communications contemporaneous to the alleged Eritrean invasion, but the Commission only gave them “limited weight,” both because they were filed at a point late in the proceeding and because they provided ambiguous information.³¹

c. Witness Testimony

In the context of arguing their positions to the Commission on the outbreak of the war, the two Parties presented to the Commission both fact witnesses and expert witnesses, which the Commissions sometimes acknowledged in the course of its partial award. For instance, in presenting their positions on the outbreak of the war on the Central Front and the ensuing events, Ethiopia presented as fact witnesses Ethiopian Brigadier General Alemu Ayele and Mr. Tsegaye Temalow, and as an expert witness a retired U.S. general, Charles W. Dyke. Eritrea responded with its own fact witnesses, Dr. Efrem Fesseha Kidanemariam and Colonel Abramham Ogbasellassie, and as expert witnesses a retired Canadian major, Paul Noack, and Canadian colonel, Jake Bell.³² Here again, much of this evidence related to Ethiopia’s *jus in bello* claims as well as the outbreak of the conflict, but the Commission presumably relied on this evidence in reaching its conclusions concerning the *jus ad bellum*.

d. Decisions by International Organizations

Information was presented to the Commission with respect to decisions of international organizations in reaction to the outbreak of the armed conflict between Eritrea and Ethiopia, principally that of the OAU and the United Nations. Ultimately, the Commission’s decision as to the location of the *de facto* boundary between Eritrea and Ethiopia at the outbreak of the war was driven by the view taken by a U.N. peacekeeping mission, which worked considerably to Ethiopia’s favor. On the other hand, the U.N. Security Council’s lack of condemnation of Eritrea for engaging in a breach of the peace worked against Ethiopia’s claim that Eritrea had undertaken a widespread violation of the *jus ad bellum* and also diminished the Commission’s willingness to grant extensive damages for such a violation.

³⁰ Charge d’Affaires, A.I., Letter Dated 19 May 1998 from the Charge d’Affaires, A.I., of the Permanent Mission of Ethiopia to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/414, at 2, 4 (May 19, 1998).

³¹ Ethiopia’s Western /Eastern Front Claims, Partial Award, para. 22.

³² Ethiopia’s Central Front Claim, Partial Award, para. 22.

e. Accounts in Scholarly Books and Articles

Various articles, books, and expert statements were available to the Commission with respect to the outbreak of the war. For example, Harold Marcus in his highly regarded *A History of Ethiopia*, recounts the events of early May 1998 as initially a typical low-level border incident, yet one that was followed by a large-scale armored assault by Eritrea on the town of Badme and its environs.³³ The Commission ultimately chose not to cite in its partial award such sources (just as it generally did not cite to specific sources of evidence), but such scholarly accounts may have been of value and interest to the Commission.

C. Commission's Conclusion that the *Jus ad Bellum* Was Violated

After weighing the evidence placed before it, the Commission concluded in its *jus ad bellum* award that Eritrea invaded Ethiopia on May 12, 1998, beginning in the area of Badme in what would later become known as the Western Front. The 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 the 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.³⁴

Given that there was no basis for arguing that Eritrea was acting in self-defense (discussed *infra* in this chapter in section D), the Commission found that the attack violated Article 2(4) of the U.N. Charter, which provides that all U.N. members "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."³⁵ Specifically, the Commission stated:

Consequently, the Commission holds that Eritrea violated Article 2, paragraph 4, of the Charter of the United Nations 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,

³³ HAROLD MARCUS, *A HISTORY OF ETHIOPIA* 253 (updated ed. 2002).

³⁴ Ethiopia's *Jus Ad Bellum* Claims, Partial Award, para. 14.

³⁵ U.N. Charter art. 2, para. 4.

1998, and is liable to compensate Ethiopia, for the damages caused by that violation of international law.³⁶

As indicated above in Section A, Ethiopia's theory 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 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 Commission's findings with respect to Ethiopia's Central Front claim in April 2004 seemed to support the idea that Eritrea's attack on Ethiopia unfolded over a lengthy period of time and place, with Eritrea invading Ethiopia, Ethiopia responding in self-defense, and then a lengthy standoff occurring until Ethiopia succeeded in pushing Eritrea out of Ethiopia and bringing about a final peace. There, the 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

³⁶ Ethiopia's *Jus Ad Bellum* Claims, Partial Award, para. 16; id., § IV, para. B(1).

returned to the pre-war line of administrative control pursuant to the Cessation of Hostilities Agreement of June 2000 and the Peace Agreement of December 12, 2000.³⁷

In the text of its *jus ad bellum* partial award, the 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.”³⁸ 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 Commission’s *dispositif* stated that Eritrea violated U.N. 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.”³⁹ Thus, the 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 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.”⁴⁰ In the absence of proof that the military actions were “predetermined,” the 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.”⁴¹ Hence, in its *dispositif* for the *jus ad bellum* claim, the 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.”⁴²

The Commission’s finding touches upon several of the questions raised at the beginning of this chapter. The 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 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

³⁷ Ethiopia’s Central Front Claim, Partial Award, paras. 24, 26.

³⁸ Ethiopia’s *Jus Ad Bellum* Claims, Partial Award, para. 19.

³⁹ *Id.*, § IV, para. B(1).

⁴⁰ *Id.*, para. 18.

⁴¹ *Id.*, para. 19.

⁴² *Id.*, § IV, para. B(2).

troops crossed the *de facto* boundary in the area of Badme in large numbers. The 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 had been planned in the weeks or months before it happened. As such, the 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 a *jus ad bellum* violation occurred by Eritrea's armed attack in May 1998 on Badme and other areas in Tahtay Adiabo and Laelay Adiabo *Weredas*, the 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 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 as a reaction to Ethiopia's response.

The Commission's finding that there was no proven preplanning for the Central and Eastern Fronts is somewhat in tension with its later findings that military action on those other fronts was reasonably foreseeable to Eritrea at the time of the initial invasion (see Section E(2) below), given the strategic and military value of seizing transportation links within Ethiopian territory in those areas. Apparently the 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 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 Commission's approach seems to very narrowly circumscribe the conduct that is proscribed by Article 2(4) of the U.N. 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.⁴³ Yet a different count allowed for conviction simply for waging a war of aggression (including for acts taken

⁴³ International Military Tribunal Proceedings Vol. XXII, at 467-68.

well into the course of the conflict, such as the waging of submarine warfare against neutral vessels),⁴⁴ 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 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 at just the very first action of an armed conflict and to 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* norm drop away, to be replaced instead solely by the *jus in bello* and other relevant norms? 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?

A hypothetical helps clarify the issue. Assume that State A violates the *jus ad bellum* by invading and seizing an island of State B. State B indicates that it intends to engage in self-defense so as to reclaim control of its island and begins mustering its air and naval fleet toward that end. Fearing that State B might succeed, State A then engages in a systematic military campaign that destroys State B's military capacity, causes extensive collateral civilian casualties in pursuing those military objectives, ultimately deposes State B's government, and installs a new government that acquiesces to State A's sovereignty over the island. Is State A's violation of the *jus ad bellum* solely limited to the initial invasion of the island? Under the Commission's theory as to how the *jus ad bellum* operates, that would appear to be the case. State A did not initially plan to subjugate State B; that only unfolded in the course of the armed conflict as a necessary response to prevent State B from exercising its right of self-defense.

The better view is that any actions by State A that are taken to prevent State B 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 U.N. 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).⁴⁵ 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

⁴⁴ *Id.* at 554-57.

⁴⁵ *See, e.g.*, Greenwood, *supra* note 20, at 222-23.

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 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 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 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. As explained further below, the Commission awarded *jus ad bellum* compensation to Ethiopia for loss, damage, and injury suffered at Badme and elsewhere in the Tahtay Adiabo and Laelay Adiabo Weredas in May 1998, 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 is not at all clear that doing so had such an effect.

D. Unsuccessful Defenses

1. A State May Not Use Armed Force to Seize Disputed Territory Peacefully Occupied by Another State

Eritrea’s first defense as to why its conduct was legal was to argue that Ethiopia was “unlawfully occupying Eritrean territory in the area around Badme,” the area where the initial invasion occurred.⁴⁶ This defense relied heavily on the decision reached by the Eritrea-Ethiopia 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.

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 who exercised sovereignty over Badme. So one problem with Eritrea’s approach was that it made the permissibility of conduct during the conflict (who might

⁴⁶ Ethiopia’s *Jus Ad Bellum* Claims, Partial Award, para. 9.

use force against whom, as well as who was the occupier of another's territory) contingent on a legal determination that would only be reached long 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 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 Commission's 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 (see Chapter I), with *de facto* local or regional administration playing very little role. As the December 2000 Peace 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."⁴⁷ 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 May 1998, as discussed in Chapter I(D). Among other things, this meant the "redeployment of the Eritrean forces from Badme to positions held prior to May 6, 1998."⁴⁸ In other words, it was generally understood that a return to the status quo would require Eritrea to 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 (the "OAU High-Level Delegation") to investigate the armed conflict and make recommendations for its resolution.⁴⁹ 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, 1998.⁵⁰ That committee found that

⁴⁷ December 2000 Algiers Agreement, art. 4(2).

⁴⁸ Permanent Representative to Ethiopia, Letter dated 24 December 1998 from the Permanent Representative to Ethiopia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1998/1223, para. 5 (Dec. 28, 1998).

⁴⁹ *Id.*, para. 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.

⁵⁰ *Id.*, para. 28.

“[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.”⁵¹

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.”⁵² The proposals for a framework agreement were endorsed at the OAU summit in December 1998.⁵³ 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 1998.⁵⁴ The European Union endorsed the proposals,⁵⁵ as did the Security Council, which specifically urged Eritrea to accept them.⁵⁶

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.”⁵⁷ 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 must depart from that territory in order for the conflict to end.

Ultimately, during the course of the conflict, 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

⁵¹ *Id.*, para. 21.

⁵² OAU High-Level Delegation: Proposals for a Framework Agreement for a Peaceful Settlement of the Dispute between Eritrea and Ethiopia, 7-8 November 1998, recommendation 3. *reprinted in id.*, para. 33, *and in* TEKESTE NEGASH & KJETIL TRONVOLL, *BROTHERS AT WAR: MAKING SENSE OF THE ERITREAN-ETHIOPIAN WAR* 122 (2000).

⁵³ U.N. Doc. S/1998/1223 (Dec. 28, 1998).

⁵⁴ *Id.*, para. 36.

⁵⁵ *Id.*, para. 43.

⁵⁶ S.C. Res. 1227, para. 5, U.N. Doc. S/RES/1227 (Jan. 29, 1999).

⁵⁷ Modalities for Implementation of the OAU Framework Agreement on the Settlement of the Dispute between Ethiopia and Eritrea, 12 July 1999, *reprinted in* NEGASH & TRONVOLL, *supra* note 33, at 142.

territory.⁵⁸ At that point, the means for ending the conflict shifted to include a requirement that *Ethiopian* forces must redeploy so as to depart from Eritrean territory and return to territory possessed by Ethiopia prior to May 1998. 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 a U.N. peacekeeping mission, which became known as the U.N. Mission in Eritrea and Ethiopia (UNMEE).⁵⁹ 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. The redeployment shall be completed within two weeks after the deployment of the Peacekeeping Mission and verified by it.⁶⁰

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.

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;⁶¹ to the extent that certain violations of the *jus in bello* only occur 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 (based largely on colonial-era treaties), the Claims Commission relied on the UNMEE line established at the end of the conflict (based

⁵⁸ Ethiopia Central Front Claim, Partial Award, para. 26.

⁵⁹ S.C. Res. 1312, U.N. Doc. S/RES/1312 (July 31, 2000); S.C. Res. 1320, U.N. Doc. S/RES/1320 (Sept. 15, 2000).

⁶⁰ Permanent Representative of Algeria, Letter dated 19 June 2000 from the Permanent Representative of Algeria to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2000/601, para. 9 (June 19, 2000).

⁶¹ Professor Gray laments the minimal treatment of this issue in the Commission’s *jus ad bellum* partial award, Gray, *supra* note 1, at 710, but that partial award should be read in conjunction with the earlier partial award on the Central Front, where the issue was first joined. Curiously, Professor Gray appears to agree that, in the disputed territory peacefully administered by Ethiopia, Eritrea was exposed to norms that apply to an occupying force, *id.* at 712, but was not exposed to norms that preclude the use of force to seize territory.

on the United Nations's 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, 2000.⁶²

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*.⁶³

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 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.⁶⁴

Though it used the UNMEE line for the purpose of applying the *jus in bello* and *jus ad bellum*, the 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.⁶⁵ Rather, the 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

⁶² *Id.*, para. 31.

⁶³ Ethiopia's *Jus Ad Bellum* Claims, Partial Award, para. 15.

⁶⁴ *Id.*, para. 15; *see also* Ethiopia's Central Front Claim, Partial Award, para. 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 . . .").

⁶⁵ *But see* Gray, at 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.")

responsible, and that such responsibility is not affected by where the boundary between them may subsequently be determined to be.⁶⁶

In light of this, the key question with respect to Eritrea's first defense to the *jus ad bellum* claim 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. Though apparently some commentators think that such a seizure is permissible,⁶⁷ the proposition does not sit well with contemporary rules on the use of force. While Article 2(4) of the U.N. Charter is not specific to the issue, the highly-regarded U.N. Declaration on Friendly Relations, adopted in 1970, sought to help clarify the meaning of Article 2(4) with the following statement:

*Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.*⁶⁸

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

⁶⁶ Ethiopia's Central Front Claim, Partial Award, para. 27.

⁶⁷ Gray, *supra* note 1, at 710. Professor Gray does not directly address the temporal problem here, which is that, at the time Eritrea acted, there was no authoritative delimitation of the boundary. Her position appears to be that, if a state uses force to seize disputed territory that is under the peaceful administration by another state, no violation of the *jus ad bellum* has occurred (nor can the territory seized be regarded as "occupied") if at some later point an international body finds that the state was correct about its sovereign rights to the disputed territory. If so, then presumably it also cannot definitively be said that a violation of the *jus ad bellum* has occurred (or that territory has been "occupied") unless there is an international body that has found that the state was incorrect about its sovereign rights to the disputed territory. Given the lack of authoritative delimitation of many disputed land and maritime boundaries, such an approach is problematic. Further, while Professor Gray characterizes the administration of disputed territory as "illegal" if at some later point the territory is determined by an international body as being under the sovereignty of another state, *id.* at 710-11, international bodies that resolve land and maritime boundaries (including the Eritrea-Ethiopia Boundary Commission) do not characterize such prior administration of disputed territory in that way. The illegality arises if the administering state fails to withdraw from the disputed territory once sovereignty over it is authoritatively resolved.

⁶⁸ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXXV), Annex; 25 GAOR, Supp. (No. 28) 121; 9 I.L.M. 1292 (1970)

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.⁶⁹

Citing to the 1970 Declaration, to Schachter, and to other authorities, the 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.”⁷⁰ Echoing Schachter’s conclusion, the 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.”⁷¹

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 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.

2. A State May Not Use Armed Force in Response to Geographically-Limited Clashes Between Patrols Along an Unmarked and Disputed Border

Eritrea’s second defense to Ethiopia’s *jus ad bellum* claim was that Eritrea’s conduct was lawful self-defense in response to Ethiopian “incursions into Eritrea” in early May 1998.⁷² 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 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.

The Commission began its analysis by noting that resort to the use of armed force is only permissible if authorized by the U.N. Security Council or when exercised in self-defense in

⁶⁹ OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 116 (1991).

⁷⁰ Ethiopia’s *Jus Ad Bellum* Claims, Partial Award, para. 10.

⁷¹ *Id.*, para. 10.

⁷² *Id.*, para. 9.

accordance with Article 51 of the U.N. Charter.⁷³ 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.⁷⁴

The Commission did not regard whatever Ethiopia may have done on May 6-7 as constituting an "armed attack" against Eritrea. According to the 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."⁷⁵ On either Eritrea's or Ethiopia's account of what happened in early May, the 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.⁷⁶

Moreover, the Commission appears to have regarded Eritrea's failure to report to the U.N. Security Council that it was acting in self-defense as a form of evidence that Eritrea itself, in early May 1998, did not regard itself as the object of an armed attack necessitating the exercise of a right of self-defense.⁷⁷ A further element that appears to have influenced the Commission's reasoning was the existence of a bilateral process for resolving border problems, one that was functioning at the ministerial level in early May 1998. After the incident at Bada-Adi Murug in July 1997 (discussed *supra* in Section A of this chapter), Eritrea and Ethiopia set up a joint body to discuss border problems. That body was meeting in Addis Ababa on May 8, 1998, to discuss border problems. While the Commission did not expressly draw any conclusion from the existence of that process, the Commission did note its existence and further noted that the Eritrean delegation left Addis Ababa on the night of May 8.⁷⁸ The implication of the 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, but failing to fully pursue that avenue, thus calling into question that its actions on May 12 were truly in response to the May 6-7 incidents.

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

⁷³ *Id.*, para. 11.

⁷⁴ *See* U.N. Charter art. 51.

⁷⁵ Ethiopia's *Jus Ad Bellum* Claims, Partial Award, para. 11.

⁷⁶ *Id.*, para. 12.

⁷⁷ *Id.*, para. 11.

⁷⁸ *Id.*, para. 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 Commission, however, had no need to reach that issue.

3. A State May Not Use Armed Force Solely as a Reaction to Another State’s Declaration that It Will Act in Self-Defense

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, 1998.⁷⁹ 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.

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 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.⁸⁰ 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 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 U.N. Security Council that it was taking defensive action, as permitted under the terms of Article 51 of the U.N. Charter.⁸¹

E. Scope of Damages for the *Jus ad Bellum* Violation

1. Parties’ Radically Different Positions

Although the Commission’s *jus ad bellum* finding was directed at the early part of the war, specifically in the area of Badme on the Western Front, the Commission left open the scope of damages that might flow from that violation. Article 5 of the December 2000 Peace Agreement allowed for claims for loss, damage, or injury resulting from a violation of international law, so the key question on damages for the *jus ad bellum* violation concerned what damage “resulted” from Eritrea’s initiation of the war. In its 2005 *jus ad bellum* partial award, the Commission suggested a certain breadth to the scope of damages when it stated that “once

⁷⁹ *Id.*, para. 9.

⁸⁰ *Id.*, para. 17.

⁸¹ *Id.*

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.”⁸²

The Commission’s “damage phase” consisted of two rounds of written and oral pleadings, with the first round devoted to one group of claims brought by the two states (Group No. 1 claims) and the second round devoted to a second group of claims (Group No. 2 claims). The first group included the damages for Eritrea’s breach of the *jus ad bellum*.⁸³ A hearing on this first group was held in April 2007; immediately after the hearing, the Commission met with the Parties to provide informal guidance for their preparations with respect to the second group of claims.⁸⁴ Moreover, in July 2007, the Commission issued its Decision No. 7, entitled “Guidance Regarding *Jus Ad Bellum* Liability.” A hearing on the Group No. 2 claims, which included further arguments on the damages for Eritrea’s breach of the *jus ad bellum*, took place in May 2008. The Commission then issued its final awards on damages in August 2009, with the award on Ethiopia’s claims addressing the *jus ad bellum* damages.

Not surprisingly, in their pleadings concerning the Group No. 1 claims, Eritrea and Ethiopia had significantly different views as to what damages should flow from the *jus ad bellum* violation. Eritrea maintained that the “limited and careful phrasing of the Commission’s partial award” meant that reparation should be limited to satisfaction in the form of the liability finding already reached by the Commission, which could be repeated in a final damages award.⁸⁵ 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) has the international community imposed an extensive regime of compensation upon a party to an armed conflict and 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.⁸⁶

By contrast, Ethiopia regarded the *jus ad bellum* violation as having “resulted” in widespread loss, damage, or injury to Ethiopia, 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 the prior precedents of World War I, World War II, and Iraq’s invasion of Kuwait as supporting the proposition that a state that

⁸² *Id.*, para. 19 (emphasis added).

⁸³ Ethiopia’s Damages, Final Award, para. 4.

⁸⁴ *Id.*, para. 13.

⁸⁵ Eritrea-Ethiopia Claims Commission, Decision No. 7, Guidance Regarding *Jus Ad Bellum* Liability (Jul 2007) (Annex 9) [hereinafter “Decision No. 7”].

⁸⁶ *Id.*, para. 18.

initiates a war is responsible for extensive compensation, though admittedly, for most conflicts, there was no authoritative decision maker (such as the Commission) established to determine what that compensation should be.⁸⁷ Ethiopia identified twenty-three separate categories of damage that were compensable for the *jus ad bellum* violation, which were loss, damage, or injury suffered by:

1. internally displaced persons (IDPs) in Ethiopia;
2. civilian deaths on the war fronts in Ethiopia;
3. civilian injuries on the war fronts in Ethiopia;
4. civilian property damage in Ethiopia, including religious institutions, primarily from shelling;
5. deaths and injuries caused by landmines in Ethiopia;
6. property destruction and losses by businesses in Ethiopia;
7. harm to natural resources and the environment in Ethiopia;
8. strafing and bombing of the Mekele airport in 1998;
9. deaths of Ethiopian prisoners of war while in Eritrean camps;
10. costs of operating Ethiopian camps for Eritrean prisoners of war;
11. departures of Ethiopians from Eritrea;
12. losses of property at Eritrean ports by Ethiopian Government entities, businesses, non-governmental organizations, and persons;
13. loss of tax revenues in Ethiopia, including loss of customs revenue related to property lost at Eritrean ports;
14. damage suffered by Ethiopian Airlines;
15. damage associated with loss of tourism in Ethiopia;
16. declines in international development assistance for Ethiopia (loss of foreign loans, grants, and assistance);

⁸⁷ *Id.*, paras. 15-16.

17. loss of foreign and domestic investment in Ethiopia;
18. costs of reconstructing and rehabilitating areas in Ethiopia damaged by the war;
19. costs of assisting IDPs in Ethiopia;
20. costs of assisting persons expelled or displaced from Eritrea;
21. loss, damage, and injury suffered by Ethiopia's Road Authority;
22. loss of revenues in Ethiopia from imports and exports due to disruption of trade through Eritrean ports; and
23. losses due to harassment and intimidation of Ethiopian Embassy staff in Eritrea and visitors to the Embassy there.⁸⁸

Ethiopia did not advance an even more aggressive position—that Eritrea's violation of the *jus ad bellum* meant that Eritrea was responsible not just for losses attributable to its own conduct, but also all losses sustained by Eritrea attributable to *Ethiopia's* conduct. Arguably “but for” Eritrea's initiation of the war, there would have been no unlawful conduct by Ethiopia relating to the war, and hence no loss, damage, or injury to Eritrea or its nationals. Consequently, Eritrea would be entitled to no compensation from Ethiopia for Eritrea's claims. Had such a position been advanced, the Commission likely would have rejected it as a matter of legal policy. When a state unlawfully uses force against another state, that other state is nevertheless is obligated to follow the laws of war. Imposing upon the aggressor the costs for the other state's violations of the laws of war may encourage those violations, whereas imposing the costs upon the other state makes it less likely violations will occur. An alternative way of advancing the argument—that Eritrea's violation of the *jus ad bellum* meant that Eritrea was not coming before the Commission with “clean hands,” or was seeking to profit from its own wrongdoing, and therefore was not entitled to recover—was also unlikely to succeed with the Commission. Though there is some support among some scholars and jurists for the existence of a general international law doctrine on “clean hands,”⁸⁹ international tribunals simply have not used the doctrine to decide cases.

In the course of the April 2007 hearing on the Group No. 1 claims, the Commission considered the positions of Eritrea and Ethiopia, and decided that the way forward fell somewhere in between their two positions. At the informal meeting held immediately after the

⁸⁸ Ethiopia's Damages, Final Award, para. 273.

⁸⁹ For a discussion, see Stephen M. Schwebel, *Clean Hands in the Court*, in THE WORLD BANK, INTERNATIONAL FINANCIAL INSTITUTIONS, AND THE DEVELOPMENT OF INTERNATIONAL LAW 74-78 (1999).

hearing, the Commission said that it “does not regard its *jus ad bellum* finding as a finding that Eritrea initiated an aggressive war for which it bears the extensive financial responsibility claimed by Ethiopia. At the same time, it does not accept Eritrea’s argument that there is no financial responsibility.”⁹⁰

Further, in Decision No. 7, issued three months later, the Commission indicated some of the core standards by which it intended to proceed. First, the Commission articulated the basic legal standard of causation that would guide it throughout the damages proceedings, including with respect to the *jus ad bellum*. For compensation to be awarded for loss, damage, or injury, it must have been “proximately caused” by the violation of international law. The Commission set forth this standard as follows:

In assessing whether this test is met, and whether the chain of causation is sufficiently close in a particular situation, the Commission will give weight to whether particular damage reasonably should have been foreseeable to an actor committing the international delict in question.⁹¹

The Commission’s use of a “reasonably foreseeable” standard in the context of armed conflict has some basis in international law, but also presents certain problems in the context of damages for violation of the *jus ad bellum*. It is not clear from whose vantage point foreseeability is to be tested and based on what information. The view from Asmara in May 1998 was certainly quite different from the view from The Hague years after the conflict had unfolded; arguably Asmara in 1998 only foresaw a brief conflict of a few weeks and, given its poorly informed and insular government, such a prediction may well have been reasonable. On the other hand, if the idea is to postulate what a “reasonable leader” of an aggressor state should have foreseen, it should be noted that leaders of states who commence wars invariably are not reasonable and do not have any particular skill in foreseeing the consequences of their action (if they did, many wars likely would not be started). Rather, war is notoriously unpredictable, with much depending on how a belligerent’s adversary reacts, how third states react, and the skill, training, competence, and luck of the militaries involved. As such, deciding which loss, damage, or injury was reasonably foreseeable and which was not seems a highly subjective undertaking for which there are few if any guidelines. Moreover, it is not clear why an aggressor’s responsibility should be limited to what was reasonably foreseeable. Having unleashed a war that in fact did cause extensive loss, damage, or injury, why should the aggressor only have to pay for the harm it reasonably foresaw; or to put it differently, why should the victim state have to bear the burden of harm that was not reasonably foreseen by the aggressor?

Second, the Commission cast doubt on the significance of the compensation mechanisms set up after World War I, World War II, and Iraq’s invasion of Kuwait for purposes of addressing compensation for Eritrea’s violation of the *jus ad bellum*. The Commission viewed

⁹⁰ Decision No. 7, para. 5.

⁹¹ *Id.*, para. 13.

the post-World War I reparations as “heavily shaped by motives of policy and revenge unrelated to the principles of law.”⁹² The Commission viewed the post-World War II reparations as “modest in relation to the resulting damages,” with “no internationally agreed program of reparations or compensation,” and with some measures (such as those of the Soviet Union) being “victor’s justice,” not a principled application of international law.⁹³ This manner of disposing of those precedents suggested that the Commission did not regard them as legally significant for any legal commission charged with deciding war-related claims (though the Commission ultimately did make use of the U.S.-German Mixed Claims Commission established after World War I).⁹⁴

The Commission was somewhat less certain as to the relevance of the work of the U.N. Compensation Commission (UNCC) on reparations owed by Iraq, but even there cast some doubt on whether it provided an appropriate legal precedent. The Commission noted that the Governing Council of the UNCC “is a political organ that has operated in an unusual political and factual setting. It does not follow judicial processes or necessarily apply international law in its decisions.”⁹⁵ Despite that conclusion, the Commission viewed it as necessary later in its decision to draw a distinction between the Iraq/Kuwait and Eritrea/Ethiopia situations, a distinction that concerned the posture of the Security Council.⁹⁶ For the former conflict, the Commission noted the Security Council condemned Iraq’s invasion, took extensive measures against Iraq to reverse the invasion, determined that Iraq was liable for the loss, damage, and injury caused by its invasion and occupation, and ultimately established the U.N. Compensation Commission to quantify those damages. By contrast, the Council did not assign responsibility to Eritrea for starting the war and instead spoke in equal terms to both parties about refraining from military action. This differential treatment, according to the Commission, was apparently relevant to the scope of damages to which Ethiopia was entitled:

The Security Council—a body given great powers and responsibilities by the Charter—made judgments regarding the invasion and complete occupation of Kuwait that it did not make in the case of Eritrea’s unlawful use of force against Eritrea. This Commission’s mandate and powers are far more modest than those of the Security Council.⁹⁷

The exact implications of the Commission’s finding in this regard are not entirely clear. On the one hand, the Commission did not regard the Council’s “even-handed” approach to the Eritrea-Ethiopia conflict as precluding the Commission’s initial factual and legal finding that

⁹² *Id.*, para. 22.

⁹³ *Id.*, para. 24.

⁹⁴ Ethiopia’s Damages, Final Award, paras. 286, 288.

⁹⁵ Decision No. 7, para. 11.

⁹⁶ *Id.*, paras. 29-32.

⁹⁷ *Id.*, para. 32.

Eritrea violated the *jus ad bellum*. In other words, the Council's silence on whether Eritrea initially invaded Ethiopia was not dispositive for the Commission in finding that an unlawful invasion occurred. This makes sense in that violations of the *jus ad bellum* do not occur only when the Council says so. The Council is a political organ focused on restoring peace by whatever means are possible. In addressing virtually all situations of armed conflict, it does not fix legal blame upon one or other belligerent; when it does fix blame, it virtually never creates a compensation scheme (the Iraq/Kuwait situation being the lone exception). Given that the Council's mandate is political and forward-looking in nature, it would be inappropriate to regard the lack of Council condemnation as dictating whether a violation of the *jus ad bellum* has occurred.

Yet, on the other hand, the Commission seems to have decided that the quantum of damages that flows from a violation of the *jus ad bellum* is somehow affected by the "judgments" made by the Council, particularly the Council's failure to condemn Eritrea and to impose sanctions or other measures on Eritrea. Why the Council's inaction is not relevant with respect to the threshold finding of whether the *jus ad bellum* has been violated, but is relevant with respect to the quantum of damages flowing from that violation, is not spelled out by the Commission. Nor is it clear why the Commission viewed the Council's *political* "judgments" as of a kind that essentially preempt the "more modest" mandate and powers of a *legal* commission, especially one established by the two parties to the conflict precisely to decide, as a matter of law, the quantum of damages owed for violations of international law.

The Commission seems to be implying that for extensive compensation to be awarded for a *jus ad bellum* violation, it should be expected that the Security Council will act. The absence of such action is a determination that either extensive damage did not occur or, if it did occur, that extensive compensation is not warranted as a matter of law and that such a "determination" must be accepted by an arbitral commission. If so, such an implication is unfortunate, in no small part because the Council on many occasions has failed to act in many situations involving an unlawful use of force for reasons unrelated to the underlying culpability of a particular state's conduct in using force and unrelated to the scale of damages caused by that conduct.

Once again, the explanation for the Commission's effort to downgrade the seriousness of Eritrea's invasion, as compared with that of Iraq, may have been its desire not to go down a path that would entail massive compensation by Eritrea to Ethiopia, akin to what Iraq has paid (and continues to pay) to those affected by its invasion. If so, again, the Commission's position may be animated less by legal reasoning and more by pragmatism and hence may not have an enduring effect on the views of future tribunals. Rather than ascribe to the Security Council's inaction an implied narrowing of the scope of compensation appropriate for Eritrea's invasion of Ethiopia, the Commission could have distinguished the Iraq/Kuwait precedent in other, perhaps more convincing ways. For example, the Commission might have said that there was no significant difference in the legal standards to be applied in the Iraq/Kuwait and the Eritrea/Ethiopia situations, but the actual damage caused by Iraq's full-scale invasion and purported annexation of Kuwait was simply far more extensive than that caused by Eritrea's

seizure of portions of the border with Ethiopia and hence would lead to lower levels of compensation.

In any event, both parties continued with their pleadings on *jus ad bellum* damages as a part of the proceedings on the Group No. 2 claims, taking into account the Commission's guidance. If the Commission was hoping that its guidance would significantly shift the Parties' respective positions, bringing them closer together in defining for the Commission the compensable damages, then the Commission was likely disappointed. In the second round, Ethiopia revisited whether all of its claims for *jus ad bellum* damages fell within the scope of the Commission's proximate-cause standard and concluded that only a handful did not. As such, Ethiopia withdrew claims in its categories for:

7. the portion of harm to natural resources and the environment relating to the migration or loss of wild animals;
10. costs for Ethiopia in operating camps for Eritrean prisoners of war;
13. loss of Ethiopian tax revenues, including loss of customs revenue related to property lost at Eritrean ports;
21. loss, damage and injury suffered by Ethiopia's Road Authority; and
22. loss of revenues from imports and exports due to disruption of trade through Eritrean ports.⁹⁸

Ethiopia continued to regard its other categories of *jus ad bellum* damages as falling within the scope of the standard set by the Commission. As such, the Commission correctly characterized Ethiopia's view as that

there should be liability for the full range of a delict's potentially foreseeable consequences, not just those that appear most likely. In Ethiopia's view, the potentially foreseeable consequences of Eritrea's May 1998 actions included that which occurred—a costly two-year war along a long frontier. Accordingly, Eritrea should pay compensation for multiple types of damages, on all three fronts for the war, for the entirety of the war, as well as for various kinds of public expenditures related to the war, extensive damage to civilians, and other types of damages.⁹⁹

Similarly, while Eritrea did not press its prior contention that no compensation should be paid, it remained firm that the scope of compensation should be strictly confined to the place and

⁹⁸ Ethiopia's Damages, Final Award, para. 274.

⁹⁹ *Id.*, para. 280.

time of the initial invasion, and even then contested various aspects of Ethiopia's evidence in that limited sphere.¹⁰⁰

2. Proximate Causation and *Jus ad Bellum* Damages

In its final award on damages for Ethiopia, the Commission resolved the matter, carving a path that provided compensation for Ethiopia, but one that was limited by various factors, including the need to establish proximate causation. The Commission reiterated its proximate-cause standard as applied to the *jus ad bellum* violation in the following terms:

The Commission must determine 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.¹⁰¹

In considering what types of injury can be said to be "proximately caused" from initiating a war, the Commission surveyed prior legal precedents, including decisions of the International Court of Justice, *ad hoc* arbitral tribunals, and some of the post-World War I claims processes.¹⁰² Interestingly, although in its Decision No. 7 the Commission downplayed the precedent of the UNCC (as not relying on international law¹⁰³ and as dealing with a very different situation given the condemnation of Iraq by the Security Council¹⁰⁴), in its award on damages the Commission found various aspects of the UNCC's practice as "persuasive," such as its practice of including damage resulting from actions by the forces of both parties to a conflict.¹⁰⁵ Based on all those precedents, the Commission found certain useful general standards (such as no compensation for harm to generalized economic interests or for the expenses of waging war), as well as certain more specific standards (such as the appropriate compensation for mines of an unknown origin).¹⁰⁶ At the same time, the Commission rejected certain standards, such as the view by a Samoan Claims Commission that damages should be limited to those that a reasonable person "would have foreseen as *likely* to ensue" from the wrongful conduct.¹⁰⁷

The Commission then indicated that both Eritrea and Ethiopia had misapplied the proximate-cause standard, especially the element of what was reasonably foreseeable to Eritrea when it initiated the invasion. The Commission concluded that reasonable foreseeability did not

¹⁰⁰ *Id.*, para. 281.

¹⁰¹ *Id.*, para. 284.

¹⁰² *Id.*, paras. 285-86.

¹⁰³ Decision No. 7, para. 11.

¹⁰⁴ *Id.*, paras. 29-32.

¹⁰⁵ Ethiopia's Damages, Final Award, para. 288.

¹⁰⁶ *Id.*, paras. 286, 288.

¹⁰⁷ *Id.*, para. 290, note 78.

limit the damages solely to the time and place of the initial invasion (hence, Eritrea was wrong).¹⁰⁸ 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 (hence, Ethiopia was wrong).¹⁰⁹ 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 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.¹¹⁰

The Commission then applied its test to the three fronts along the Eritrea-Ethiopia border. The Western Front, where the actual *jus ad bellum* violation occurred, presented the “clearest case” for reasonably foreseeable loss, damage, or injury.¹¹¹ Given that Eritrea’s objective was to seize territory in this area that was under peaceful Ethiopian administration, it was reasonably foreseeable that Eritrean forces would seize and control such territory, that Ethiopia would resist such a seizure, and that “these military operations would result in Ethiopian civilian casualties and damage to Ethiopian civilian property, both in the areas on the Western Front occupied by Eritrea’s forces, and on the Ethiopian side of the opposing armies’ lines.”¹¹² In other words, the damage might have occurred as a result of either of the belligerent’s conduct; whether the civilian’s home was flattened by Eritrean or Ethiopian artillery was immaterial. The temporal span for such injury was from the time of the initial invasion up until Eritrean forces were expelled back to Eritrea (principally in February 1999), except for certain types of injury that might arise thereafter, such as injury caused by land mines and for the care of displaced persons unable to return to their homes.¹¹³

On the Central Front, the Commission found that the emergence of “powerful new forces” there also should have been foreseeable to Eritrea, given “the imperatives of military

¹⁰⁸ *Id.*, para. 284.

¹⁰⁹ *Id.*, para. 290.

¹¹⁰ *Id.*, para. 290.

¹¹¹ *Id.*, para. 292.

¹¹² *Id.*, paras. 292-94.

¹¹³ *Id.*, para. 296.

strategy and geography.”¹¹⁴ The Commission noted that the principal road connecting the capitals of the two countries crosses the frontier in this area, and therefore “the rapid spread of conflict along the general line of the border eastward towards Zalambessa, and the serious fighting that ensued at Zalambessa and at other locations on the Central Front, was the proximate result of Eritrea’s breach of the *jus ad bellum*. It was or should have been readily foreseeable”¹¹⁵ Like in the Western Front, Eritrea was responsible for injury to Ethiopian civilians or civilian property, extending up until the time that Eritrean forces were expelled from Ethiopian territory (principally in June 2000), again with some exceptions for certain types of claims.¹¹⁶

On the Eastern Front, a similar result was reached, even though it was geographically distant from Eritrea’s initial invasion. Here was located the road connecting Ethiopia to the Eritrean port of Assab, a key outlet for Ethiopia to the sea, and, further south, the road and rail links connecting Ethiopia to ports in Djibouti. The Commission regarded it as “readily foreseeable to Eritrea’s leaders that the conflict” would spread to this area, once again given the “imperatives of military strategy and geography.”¹¹⁷ Even in the remote area of Dalul Wereda, it was reasonably foreseeable that the conflict would occur, given that this area of the border was the subject of the dispute at Bada-Adi Murug in the summer of 1997.¹¹⁸ Again, Eritrea was found responsible for injuries to Ethiopian civilians and civilian property through the period of the presence or operations there of Eritrean forces (extending in some instances to June 2000).¹¹⁹

The Commission then proceeded to address the quantum of damages owed with respect to each of Ethiopia’s claims. 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.¹²⁰ 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.”¹²¹

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

¹¹⁴ *Id.*, para. 298.

¹¹⁵ *Id.*, para. 299.

¹¹⁶ *Id.*, para. 300.

¹¹⁷ *Id.*, para. 303.

¹¹⁸ *Id.*, para. 305.

¹¹⁹ *Id.*, para. 304.

¹²⁰ *Id.*, para. 308.

¹²¹ *Id.*, para. 310.

jus in bello. The Commission regarded the latter as inherently more grave¹²² and expressed concern that failing to distinguish between the two might undercut incentives for an aggressor State to comply with the *jus in bello*.¹²³ This third factor seems poorly grounded; an individual who is killed by unlawful military targeting is just as injured as an individual who is killed from lawful military targeting by a state who has embarked on an unlawful war. Both losses are grave ones, not the least from the victim's standpoint, and both merit thorough sanctioning under international law. Further, aggressor states have a variety of incentives for complying with the *jus in bello* separate from the possibility of paying compensation, including maintaining troop discipline, avoiding war crimes prosecutions, minimizing bad publicity, retaining support from third states, and promoting humanitarian conduct by its opponent. As such, it seems highly unlikely that a state would decide not to comply with the *jus in bello* on an assumption that ultimately it will lose the war, will be labeled an aggressor state, and will be placed before a claims commission that will impose compensation for all the loss, damage, or injury that it has caused.

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, or Iraq's 1990 invasion and occupation of Kuwait."¹²⁴ As such, Ethiopia was apparently entitled to lesser amounts of compensation than the victim States of those other conflicts. This view by the Commission might be criticized as signaling that some forms of aggression are better than others, when from the vantage point of the victim on the ground they all look pretty bad. The family of a civilian who dies from a "modest" invasion presumably feels entitled to the same level of compensation as the family of the civilian who dies from a "full-scale" invasion. The norm violated (the *jus ad bellum*) is the same and the harm to the victim (death) is the same. Why the geopolitical quality of the invasion should dictate a level of compensation for harms occurring to the individuals is simply not clear. More importantly, the terrible consequences that ensue for the victim's family when such action occurs in a developing country can be far more devastating than the consequences for families in the more developed countries involved in the other conflicts referred to by the Commission as of greater seriousness.

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."¹²⁵ As previously noted, this factor appears to have been of great concern to the Commission, and it is possible that it drove many of the decisions reached by the Commission concerning not just the quantum of damages but the scope of the *jus ad bellum* violation itself. If so, it may call into question whether the Commission's views on compensation were driven by

¹²² *Id.*, para. 311.

¹²³ *Id.*, para. 316.

¹²⁴ *Id.*, para. 312.

¹²⁵ *Id.*, para. 313.

legal principles. Indeed, while the policy concern of the Commission is understandable, it might be seen as a decision *ex aequo et bono*,¹²⁶ a power of decision-making denied to the Commission when it was established.¹²⁷ The Commission sought to explain its position as consistent with international law, in part because of the obligations within the field of human rights for governments to provide for the welfare of their people.¹²⁸ The Commission, however, did not analyze whether those human rights obligations in fact precluded the payment by a state of large compensation to another state, did not analyze how such human rights obligations operate in a situation where a state is causing large-scale harm to a neighboring state (such that the welfare of the people of both states at issue), and did not analyze why such human rights, which are obligations upon governments, are in any sense binding upon an international tribunal. Further, the Commission did not adopt a procedure of offsetting the awards of compensation to the two Parties, which likely would have resulted in an obligation upon Eritrea to pay compensation at a much lower level than the award actually issued by the Commission against Eritrea. The Commission also sought to explain its unwillingness to impose too great a financial burden on Eritrea based upon past post-war practice (e.g., after World War I with respect to Germany), which gave weight to the “needs of the affected population in determining amounts sought as post-war reparations,”¹²⁹ even though such practice reflected political, not legal considerations.

3. Fixed-Amount Compensation for Widespread Injury to the Civilian Population Caused by Lawful Military Activities of Either Belligerent

For the first five categories of damages advanced by Ethiopia as being compensable for the *jus ad bellum* violation, Ethiopia requested that the Commission quantify the compensation through a method of tabulating fixed amounts for the approximate number of persons or properties likely affected by Eritrea’s violation of the *jus ad bellum* (and that were not already being compensated based in a violation of the *jus in bello*). The Commission agreed that approaching the matter through “fixed-amount compensation” made sense, but in many instances expressed doubt about Ethiopia’s estimation of the numbers of persons/property affected and the appropriate fixed amount to used for each injury.

Ultimately, the Commission’s basic analysis for each category consisted of (1) indicating whether any compensation was appropriate for the category of alleged harm, which entailed considering whether that harm was proximately caused by the violation of the *jus ad bellum*; (2) identifying the amount sought by Ethiopia; (3) analyzing the evidence and assumptions presented by Ethiopia in support of the amount sought; (4) assessing reactions by Eritrea; and (5)

¹²⁶ *Ex aequo et bono* is Latin for “according to the right and good,” and refers in this context to the power of the Commission to decide the case based on what the arbitrators regard as fair and equitable, rather than what is required by the law.

¹²⁷ December 2000 Algiers Agreement, art. 5(13).

¹²⁸ Ethiopia’s Damages, Final Award, paras. 19-21, 313.

¹²⁹ *Id.*, paras. 21, 314-15; *see* Decision No. 7, 6-7.

indicating in light of that analysis the aggregate amount of compensation awarded by the Commission. In doing so, the Commission typically did not itself provide exact figures for the total number of persons/property that it believed were harmed, nor state the fixed amount it believed appropriate for each category.

a. Losses Suffered by Persons Internally Displaced by the War

The Commission had found at the liability phase that, when civilians are internally displaced by the presence of military operations, that displacement alone was not a violation of the *jus in bello*. Nevertheless, such displacement of Ethiopians was “the direct and foreseeable result of Eritrea’s breach of the *jus ad bellum*,”¹³⁰ as was the likelihood that persons would be evacuated by the Ethiopian Government from conflict areas for their safety.¹³¹ The Commission highlighted the gravity of this harm as follows:

The displacement of many thousands of persons on account of Eritrea’s violation of the *jus ad bellum* was a most serious consequence of the conflict. Many displaced persons suffered the loss of shelter, animals and essential household and farming implements. Those losses produced destitution and dependency on the relief provided by their government and by international agencies. The food and health conditions in many relief camps were often inadequate to meet the basic needs of many families, particularly young children. The Commission believes it is peculiarly the office of the *jus ad bellum* to provide a basis for compensation in the case of IDPs whose displacement was proximately caused by a violation of the *jus ad bellum*.¹³²

Ethiopia asserted that approximately 350,000 Ethiopians were internally displaced and requested \$209,913,910 in material damages (approximately \$600 per person) and more than \$1.3 billion in moral damages in compensation for the displacement of these individuals.¹³³ The Commission indicated reasons why it thought the number of displaced persons was not so high, why the period of displacement for different groups in different areas was likely less than that argued by Ethiopia, and why an award of moral damages was inappropriate.¹³⁴ Ultimately, the Commission awarded Ethiopia \$45,000,000 for this claim.¹³⁵ Though less than the amount claimed by Ethiopia, this amount was still the largest amount awarded to Ethiopia for any category of damage (both those categories based on the *jus ad bellum* and those based on the *jus in bello*) in the Commission’s final award on damages at more than twice the amount awarded

¹³⁰ Ethiopia’s Damages, Final Award, para. 321.

¹³¹ *Id.*, para. 323.

¹³² *Id.*, para. 322.

¹³³ *Id.*, para. 324.

¹³⁴ *Id.*, paras. 325-31.

¹³⁵ *Id.*, para. 332.

for the next largest quantum of damages awarded for a single category (that for damage, destruction, and looting in Zalambessa).

b. Civilian Deaths and Injuries from Lawful Military Activities

Ethiopia sought \$205,167,028 in material damages for civilian deaths that were not proven as caused by *jus in bello* violations, including deaths on all three fronts from shelling, aerial bombardments, and gunfire. Ethiopia asserted that 39,881 civilians were killed, so the claim was for a fixed amount of more than \$5,000 per person. Ethiopia claimed a further \$102,583,514 for injuries to an equivalent number of civilians, reflecting a fixed amount of \$2,500 per person (one half the amount for death).¹³⁶

The Commission agreed that Eritrea was liable for “deaths and injuries caused by shelling and gunfire in the regions for which there is *jus ad bellum* liability.”¹³⁷ However, it regarded Ethiopia’s evidence in support of the claim as “modest,” with the evidence of deaths based principally on a World Bank estimate (derived from information provided by the Ethiopian government itself), plus various adjustments based on certain estimates and conjectures by Ethiopia.¹³⁸ The Commission noted that Ethiopia’s evidence of the number of injuries was simply an assumption that the number of injuries equaled the number of deaths.¹³⁹ Further, some of the deaths and injuries were apparently those of Ethiopian military personnel, for whom compensation was not available pursuant to the exclusion included in Article 5(1) of the December 2000 Peace Agreement.¹⁴⁰ At the same time, the Commission found that death and injuries caused by shelling and gunfire did occur; the Commission revisited the evidence presented during the liability phase in the context of the fighting along the fronts, where death from artillery in particular was clearly documented, but which suggested it was less pervasive than claimed by Ethiopia at the damages phase.¹⁴¹

Consequently, the Commission decided that “the available evidence identified deaths and injuries numbering at most in the hundreds, not the tens of thousands claimed here by Ethiopia,” and awarded \$8,500,000 for such civilian deaths and injuries related to Eritrea’s breach of the *jus ad bellum*.¹⁴²

c. Damage to Housing Principally from Artillery Shelling

¹³⁶ *Id.*, para. 333.

¹³⁷ *Id.*, para. 334.

¹³⁸ *Id.*, paras. 335-36.

¹³⁹ *Id.*, para. 337.

¹⁴⁰ *Id.*, para. 338.

¹⁴¹ *Id.*, paras. 339-48.

¹⁴² *Id.*, para. 349.

Ethiopia's claim for *jus ad bellum* damage to civilian property was advanced principally in the area of housing, for which it claimed \$77 million. Most of this damage arose from artillery shelling along the war fronts.¹⁴³ When considered in conjunction with Ethiopia's claims for civilian property damage from *jus in bello* violations, the Commission estimated that Ethiopia was contending that, in large areas of six *weredas*, some seventy-five percent of civilian property was damaged.¹⁴⁴ The Commission described Ethiopia's methodology as follows:

Ethiopia calculated the amount of its *jus ad bellum* housing claim utilizing the same numbers of houses and per capita amounts for alleged property damage in Tigray and Afar as were used in the corresponding *jus in bello* claim. These per capita amounts were multiplied by the populations of the kebeles and towns that Ethiopia stated in its Memorials during the liability phase were subjected to shelling. Thus, the *jus ad bellum* claim started with a universe of about 77,000 houses. The implication was that either 40% of these houses were destroyed by Eritrean shelling, or that a larger number suffered damage in amounts cumulatively equaling 40% of the 77,000 houses' total value.¹⁴⁵

As was the case as well for the *jus in bello* violations, the Commission doubted that damage from the shelling was so extensive.¹⁴⁶ Reviewing certain areas where damaged housing was replaced (such as a pilot project of the World Bank to repair four hundred damaged houses), the Commission further doubted that the cost of repairing the damaged properties was as high as claimed by Ethiopia.¹⁴⁷ In light of the evidence before it, the Commission awarded \$6,000,000 for such damage.

d. Damage to Public Buildings and Infrastructure

For public buildings and infrastructure (such as administration buildings, schools, clinics and water supply systems), Ethiopia sought compensation for destruction and looting without distinguishing between damage caused by the *jus in bello* and by the *jus ad bellum*. All told, Ethiopia sought compensation for \$13,963,982 on all three fronts.¹⁴⁸ The Commission regarded the evidence of such damage as occurring from *jus in bello* violations as problematic,¹⁴⁹ and Ethiopia did not fare much better in the context of the *jus ad bellum*.

¹⁴³ *Id.*, para. 350.

¹⁴⁴ *Id.*, para. 351.

¹⁴⁵ *Id.*, para. 352.

¹⁴⁶ *Id.*, para. 353.

¹⁴⁷ *Id.*, paras. 354-55.

¹⁴⁸ *Id.*, para. 357.

¹⁴⁹ *Id.*, para. 358-59.

Ethiopia produced an itemized list of government buildings and infrastructure, along with values of alleged damages, and for each provided supporting evidence in the form of orders, invoices, and construction contracts.¹⁵⁰ In addition, Ethiopia provided declarations from Ethiopian Government administrators attesting that the evidence related to damage caused during the war.¹⁵¹

Nevertheless, the Commission was not impressed, finding that the evidence did not provide a reliable basis for determining which repairs related to war damage and which were simply ongoing development projects.¹⁵² Some evidence plausibly established that a particular infrastructure project was damaged as result of the war, but much other evidence did not.¹⁵³ Moreover, evidence from the liability phase, including damage assessment reports for regional and local administrators, indicated that the damage was less severe than Ethiopia was claiming.¹⁵⁴ Ultimately, the Commission awarded \$3,500,000 for this claim.

e. Damage to Religious Institutions

Ethiopia fared somewhat better in the context of damage to religious institutions, seeking \$9,238,669 without distinguishing between whether the damage arose from *jus in bello* or *jus ad bellum* violations.¹⁵⁵ Ethiopia's evidence consisted of reports, letters, and other information from government and religious officials about the damage that occurred.¹⁵⁶ The Commission awarded \$2,500,000 for damages resulting from violation of the *jus ad bellum* (additional to the \$4,500,000 in compensation for damages resulting from violation of the *jus in bello*, as discussed in Chapter V.¹⁵⁷

f. Damage for the Destruction of a City from Shelling

Ethiopia sought compensation for the especially severe damage sustained by the Ethiopian border city of Zalambessa; the Commission found that by the end of the war, of the 1,400 buildings in the city, "scarcely a single building remained intact."¹⁵⁸ As discussed further in Chapter V, the Commission regarded much of the damage as due to Eritrea's destruction and

¹⁵⁰ *Id.*, para. 360.

¹⁵¹ *Id.*, para. 361.

¹⁵² *Id.*, paras. 365-69.

¹⁵³ *Id.*, para. 370.

¹⁵⁴ *Id.*, paras. 373-378.

¹⁵⁵ *Id.*, para. 380.

¹⁵⁶ *Id.*, paras. 382-85.

¹⁵⁷ *Id.*, paras. 381, 386.

¹⁵⁸ Ethiopia Central Front, Partial Award, para. 71.

looting inflicted during its two-year occupation of the town and thus concluded that it occurred as a violation of the *jus in bello*. However, some portion of the destruction was attributable to lawful military activities by both sides as they fought over control of the town.

The Commission found Eritrea liable under the *jus in bello* for causing seventy-five percent of the city's destruction¹⁵⁹ and for that damage awarded Ethiopia \$16,812,094. In the context of the *jus ad bellum*, the Commission found Eritrea liable for the remaining twenty-five percent of the city's destruction, and for that awarded Ethiopia \$5,605,000.¹⁶⁰

g. Deaths and Injuries Caused by Lawful Use of Landmines

In the context of the *jus in bello*, the Commission rejected both sides' claims that landmines were deployed in an indiscriminate and unlawful manner.¹⁶¹ Ethiopia, however, argued that such landmines caused loss, damage, or injury that was compensable due to Eritrea's violation of the *jus ad bellum*. The Commission agreed, finding that "[c]ivilian deaths and injuries from landmines are a direct and readily foreseeable consequence of the use of these weapons," and therefore "justify compensation, if they resulted from mines that were laid in the areas and during the periods for which Eritrea bears *jus ad bellum* liability."¹⁶² The Commission further concluded that compensation was due even if the loss, damage, or injury occurred after Eritrean forces were forced out of Ethiopia and was due whether the landmine was laid by Ethiopia or Eritrea.¹⁶³

The evidence before the Commission as to the number of casualties principally consisted of statistics developed by the Tigray Regional Office of the Rehabilitation and Development Organization, an Ethiopian non-governmental organization that provided assistance to victims of landmine explosions, which showed 124 deaths and 340 physical injuries from landmines.¹⁶⁴ Ethiopia sought \$1,635,622 for these deaths and injuries; the Commission awarded Ethiopia \$1,500,000.¹⁶⁵

h. Death of Prisoners of War Not Related to Mistreatment

Ethiopia argued that, separate from receiving compensation for violations of the *jus in bello* in Eritrea's treatment of Ethiopian prisoners of war, the Commission should also award

¹⁵⁹ *Id.*, para. 73.

¹⁶⁰ Ethiopia's Damages, Final Award, para. 387.

¹⁶¹ For further discussion, see Chapter V.

¹⁶² *Id.*, para. 391.

¹⁶³ *Id.*, para. 391.

¹⁶⁴ *Id.*, para. 388.

¹⁶⁵ *Id.*, paras. 389, 393.

compensation for fifty-one Ethiopian prisoners war who allegedly died in Eritrean camps, on a theory that their capture and detention in harsh conditions inevitably and foreseeably resulted in earlier-than-normal deaths. Ethiopia sought compensation based on fixed-sum damages using projections of lost lifetime earnings for those prisoners of war,¹⁶⁶ but was not able to prove that the detention in the camps actually caused the early deaths of the individuals. The Commission concluded that

there is not a sufficiently clear and direct causal connection between the deaths of some POWs while in Eritrean custody and the events of May 1998 for which Eritrea has been found liable under the *jus ad bellum*. It is true that ‘but for’ the war that began at Badme, Eritrea would not have taken POWs, but a clearer and more substantial degree of causal connection is required to establish liability for the deaths of a disputed number of disparate individuals based on Eritrea’s *jus ad bellum* violation.¹⁶⁷

i. Losses from the Return of Nationals from the Enemy State

During the course of the war, Ethiopia maintained that 80,000 Ethiopian nationals living in Eritrea returned to Ethiopia “because of the harsh conditions caused by the war.”¹⁶⁸ Ethiopia calculated fixed-sum amounts that assumed that each individual lost all income for four years following his or her departure and assumed that, thereafter, each individual’s lifetime earnings were much lower in Ethiopia because *per capita* income in Ethiopia was lower than in Eritrea. Ethiopia adjusted the total amount downward to avoid any double-counting with compensation awarded for *jus in bello* violations to these same individuals, but also added a fixed amount (\$3,740) for each person for “moral injury on account of ‘brutality, several hardship, pain and emotional shock’” caused by the departure.¹⁶⁹

The Commission expressed strong doubts about the assumptions and evidence underlying Ethiopia’s computation of damages for this category but found, in any event, that insufficient proximate causation existed:

While the circumstances of Ethiopians in Eritrea during the war varied by location and time, the great majority of those who left Eritrea did so in the unsettled and difficult period following Ethiopia’s successful May 2000 invasion of Eritrea and the end of hostilities, two years after the attack on Badme. The principal factor in shaping this situation was the defeat of Eritrean forces by Ethiopia’s army. It strains the chain of causality too much to contend that Eritrea should have foreseen in May 1998 that it would suffer this severe military defeat, the occupation of large portions of its territory,

¹⁶⁶ *Id.*, para. 429.

¹⁶⁷ *Id.*, para. 431.

¹⁶⁸ *Id.*, para. 432.

¹⁶⁹ *Id.*

and the ensuing social and economic turmoil. Further, these claims fell well outside the areas for which the Commission has determined Eritrea to be liable on account of the *jus ad bellum* violation.¹⁷⁰

j. Loss of Tourism

Ethiopia claimed some \$104,000,000 for alleged lost revenue from tourism due to the war. The amount was calculated based on estimates of how many tourists would have traveled to Ethiopia but for the war (based on pre-war numbers adjusted for annual growth), an additional number of tourists who would have visited in the years immediately following the war, and an assumption that tourists would have spent in Ethiopia an average of \$500 each.¹⁷¹ The Commission left unaddressed whether such damages could be proximately caused by the *jus ad bellum* violation. Instead, in rejecting the claim, the Commission found that the “evidence supporting the claimed amount essentially rested on assumptions and hypotheses that were uncorroborated and, indeed, were contradicted by Ethiopia’s other evidence.”¹⁷²

4. Actual-Amount Compensation for More Discrete Loss

Separate from the approach of quantifying *jus ad bellum* damages by use of fixed-sum amounts, Ethiopia sought to quantify actual damages for many of the categories that it presented to the Commission for *jus ad bellum* compensation. Here, too, the Commission accepted in principle the possibility of recovery for most of these categories based on a violation of the *jus ad bellum*, but in many instances found the evidence presented by Ethiopia to be insufficient to sustain some or all of the claim.

a. Business, Government, and Non-Governmental Organization Losses Along the War Fronts

Ethiopia argued that many businesses, government agencies, and non-governmental organizations suffered extensive damage during the war along the war fronts. Business losses included the interruption of business activity due to artillery shelling and the need to evacuate personnel, the destruction of inventory, or the rendering of certain debts as uncollectible. Losses to governmental or non-governmental organizations included the looting of cash reserves and vehicles and the destruction of facilities. While the Commission was willing to provide *jus ad bellum* compensation for some of these losses, most losses were either regarded as non-compensable because they were too remote from Eritrea’s delict, too speculative, or unsupported by the evidence. Indeed, virtually all of the business losses were deemed non-compensable

¹⁷⁰ *Id.*, para. 435.

¹⁷¹ *Id.*, para. 458.

¹⁷² *Id.*, para. 461.

(including all alleged lost profits¹⁷³), with compensation only provided for the destruction of business facilities.

i. Loss Must Not be Too Remote

As to the issue of remoteness, the Commission distinguished direct and specific economic loss, which could be compensated, from more generalized and remote economic loss, which could not. Those latter losses included

production delays, interruptions of foreign consultants' services, and other types of damages resulting from the general disruption of the civilian economy in wartime. . . . Both Parties agreed that claims for generalized social or economic dislocation in wartime should not be compensable, and cited with approval decisions of the U.S.-German Mixed Claims Commission to this effect. No system of legal liability can address all of the economic consequences of war. Costs and delays happen; business is injured; plans and expectations are disrupted. International law does not impose liability for such generalized economic and social consequences of the war.¹⁷⁴

The central issue for the Commission with respect to such claims was that, while the war may have generally caused such loss, the loss was not proximately caused by Eritrea's violation of the *jus ad bellum*. For example, a claim by a building materials company for delays and additional costs in constructing a cement factory in Mekele, allegedly due to Eritrea's bombings there, was not compensated because such costs were not "proximately caused by Eritrea's *jus ad bellum* violation."¹⁷⁵ In particular, an element of that claim was the intervening decision by foreign contractors to evacuate their employees from a risky environment, which caused delays to, but did not actually prevent completion of, the factory during the war.¹⁷⁶

ii. Loss Must Not Be Too Speculative

As to the issue of speculativeness, the Commission was reluctant to compensate losses that were too uncertain or conjectural, such as a claim for alleged lost profits from the inability to use a minerals analysis laboratory based in Mekele,¹⁷⁷ or a claim for lost future profits for a health clinic that was just beginning operations when its founders left to seek safety from the

¹⁷³ Although the Commission did not award lost profits to any businesses on account of the *jus ad bellum* violation, it did award lost profits to a business for one claim on the basis of a *jus in bello* violation, as discussed in Chapter V.

¹⁷⁴ *Id.*, para. 395.

¹⁷⁵ *Id.*, para. 405.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*, para. 407.

war.¹⁷⁸ A claim for loans made by the Tigray Youth Association to trainees that were not repaid because the trainees went to the war front, as well as for the costs of training new leadership and for lost contributions, were deemed “too attenuated to allow for compensation.”¹⁷⁹

iii. Loss Must Be Supported by Clear and Detailed Evidence

Other economic losses were not compensable due to lack of clear and detailed evidence. For instance, alleged harm in the form of a six-month suspension of operations by a pharmaceutical plant, due to artillery attacks, was not compensated because the evidence was solely a claims form by the plant operators providing summary information and no supporting documents.¹⁸⁰ Similarly, a textile factory that allegedly lost contracts for export sales, again without documentation and detailed explanation, was not compensated.¹⁸¹ No compensation was awarded to a savings and credit institution that allegedly was unable to collect on about one-half of its unsecured short-term loans to low-income farmers and others in the Tigray region, in part because the claim was speculative and remote, in part because it was duplicative of other claims, and in part because the evidence was too limited.¹⁸²

iv. Compensation Awarded for Businesses, Government and Non-Governmental Organizations

If the issues of remoteness, speculativeness, and evidence could be overcome, then the Commission was willing to award *jus ad bellum* compensation, but, as it turned out, virtually all such compensation was for losses suffered by governmental and non-governmental organizations.

With respect to businesses, the Commission awarded some compensation for the destruction of five private businesses in Sheraro caused by Eritrean artillery attacks (hence, the compensation was for destruction of facilities, not for lost profits or other business losses). Separate from the business facilities, those attacks were found to have destroyed several government buildings, schools, a housing project, other public facilities, and private residences. To support the claim, Ethiopia provided a declaration from the head of the Sheraro Municipality Administration, who provided a construction contract for the rebuilding of the destroyed businesses, as well as the other damaged property. Although Ethiopia sought \$1,451,880, the Commission only awarded \$625,000.¹⁸³

¹⁷⁸ *Id.*, paras. 408-09.

¹⁷⁹ *Id.*, para. 418.

¹⁸⁰ *Id.*, paras. 396-97.

¹⁸¹ *Id.*, paras. 398-400.

¹⁸² *Id.*, paras. 401-02.

¹⁸³ *Id.*, para. 420.

With respect to governmental claims, the Commission awarded *jus ad bellum* compensation for losses incurred along both the Central and Western Fronts, both from destruction from air raids and shelling and from the looting of property. For the Central Front, the Commission awarded \$250,000 for the destruction of certain facilities of the Tigray Regional Disaster Prevention and Preparedness Bureau (DPPB) from the Eritrean air raid on Adigrat on June 1, 1998.¹⁸⁴ The Commission found that such destruction was “sufficiently connected in time and causal sequence with Eritrea’s *jus ad bellum* violation, and that destruction of this nature was a foreseeable result of that violation.”¹⁸⁵ Further, “Ethiopia provided persuasive evidence of the destruction, including a video of the aftermath of the June 11 attack clearly showing a large burning warehouse, burning sacks of grain, and a burning heavy truck inside the warehouse.”¹⁸⁶ Elsewhere on the Central Front, the Commission awarded \$162,000 for the looting of property, the destruction of a DPPB warehouse, and other losses; among other things, the Commission noted that the losses were supported by “detailed inventories of items looted” or were “reasonably supported by inventories and contract documents.”¹⁸⁷

On the Western Front, the Commission awarded \$75,000 for the looting of cash that had been collected by Ethiopian authorities as tax revenue in Badme, for the looting of police vehicles in Badme, and for the destruction of law enforcement offices in Badme and Rama.¹⁸⁸ For losses allegedly incurred during an eight-hour raid by Eritrean forces in December 1998 on the town of Adi Goshu, the Commission found:

The evidence reflected that Eritrean forces destroyed and looted the seven-room kebele administration building, took cash from the administrator and some twenty others, and looted or destroyed large quantities of grain and livestock. Based on the declaration of the representative of the head of the Kafta Humera Wereda and other supporting documentation in the liability and damages phases, the Commission awards Ethiopia compensation of US\$150,000.¹⁸⁹

Damage to civic and non-governmental organizations was also compensable. The Commission awarded \$125,000 for the looting of a bulldozer, motorcycle, and other equipment owned by the Relief Society of Tigray.¹⁹⁰

¹⁸⁴ *Id.*, para. 412.

¹⁸⁵ *Id.*, para. 410.

¹⁸⁶ *Id.*, para. 411.

¹⁸⁷ *Id.*, para. 416.

¹⁸⁸ *Id.*, para. 417.

¹⁸⁹ *Id.*, para. 419.

¹⁹⁰ *Id.*, para. 418.

b. Harm to Natural Resources and the Environment

Ethiopia sought \$1,028,862,444 for environmental damage in the Tigray region from the effects of Eritrea's initiation of the war. The vast majority of the claim (more than ninety percent) related to an alleged loss of gum arabic and resin plants, with lesser amounts relating to loss of trees, seedlings, and damages to terraces.¹⁹¹ The Commission did not indicate any problem with seeking such damages based on a violation of the *jus ad bellum*, but did find significant problems with Ethiopia's evidence in support of the damages.

The principal evidence in support of the claim was a "claims form" prepared by the Tigray Regional Agricultural and Natural Resources Development Bureau, which the Commission noted "did not identify the location of the lost plants, or the circumstances of their destruction."¹⁹² Eritrea strongly challenged this claim, arguing that many of the plants were actually in Eritrea, that Ethiopia's "evidence" was largely conclusory, and that the calculations in the evidence involved double-counting and a wide range of other errors.¹⁹³ The Commission agreed with Eritrea and declined to award any compensation for this claim.¹⁹⁴

c. Collateral Civilian Damage Caused by Lawful Aerial Bombardment

As discussed in greater depth in Chapter VII, Eritrea engaged in an aerial bombardment on June 5, 1998, of a joint civilian-military airport located at Mekele in Ethiopia, which the Commission found to be a lawful military target. The harm to military persons and military aircraft at the airport could not be recovered because such losses were excluded by Article 5(1) of the December 2000 Peace Agreement. The civilian casualties and property damage caused by this attack could not be recovered based on a violation of the *jus in bello* because the attack was a lawful military attack that happened to cause some collateral civilian injury.

Ethiopia, however, sought to recover for such harm to civilians and civilian property based on Eritrea's violation of the *jus ad bellum* in the amount of \$102,467.¹⁹⁵ Ethiopia estimated that the lifetime earnings of the eighteen civilians who died, discounted by fifty percent, would be \$19,998 and that the cost of medically treating a further eighteen civilians who were wounded would be \$2,555. Further, Ethiopia maintained that the cost of repairing the damage to a Fokker-50 civilian aircraft was \$79,914.¹⁹⁶

¹⁹¹ *Id.*, paras. 421-22.

¹⁹² *Id.*, paras. 423.

¹⁹³ *Id.*, para. 424.

¹⁹⁴ *Id.*, para. 425.

¹⁹⁵ *Id.*, para. 426.

¹⁹⁶ *Id.*, para. 427.

Although the attack on Mekele was not a part of Eritrea's initial invasion, or of the various movements of troops along the other parts of the border between the two countries, the Commission agreed that "this attack was sufficiently linked to Eritrea's initial *jus ad bellum* violation to warrant compensation. An attack such as this is a foreseeable consequence of that violation."¹⁹⁷ However, the Commission viewed the use of discounted future earnings as a poor method for calculating damages and chose to instead award Ethiopia a total of \$65,000 in compensation for these damages.¹⁹⁸

d. Loss of Property at Ports Not Related to Unlawful Seizure

Ethiopia contended that some \$117 million of property owned by Ethiopian Government agencies, businesses, non-governmental organizations, and individuals was stranded and lost at Eritrean ports after the outbreak of the war. In support of this claim, Ethiopia provided a list prepared by its Maritime Transit Services Enterprise.¹⁹⁹ The Commission rejected the claim on several grounds.

First, it found there was no proof of a "taking of property" under international law, though the Commission did not explain why that was relevant with respect to alleged damages resulting from a violation of the *jus ad bellum*.²⁰⁰ Second, the Commission found that some undetermined amount of the property did not belong to Ethiopia or its nationals because title had not yet transferred; as such, compensation for that property was outside the scope of the Commission's jurisdiction.²⁰¹

Yet, third, the most important ground appears to have been a belief by the Commission that *Ethiopia's own actions* were to blame for the stranding of the property. The Commission indicated that Eritrea was willing to transfer the property that it still held, and the proceeds of perishable commodities or other property sold or used by the Eritrean Government, but that Ethiopia had rejected the offer. While such an offer might have suggested some level of unjust enrichment of Eritrea, the Commission appears to have felt that the failure by Ethiopia to accept (or at least respond to) Eritrea's offer demonstrated a failure by Ethiopia to mitigate the damages, for which Eritrea should not be responsible.²⁰² Moreover, the Commission found that "much Ethiopian cargo continued to move through Assab to and from Ethiopia after the hostilities began."²⁰³ Only somewhat later was the remaining property stranded, which the Commission

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*, para. 436.

²⁰⁰ *Id.*, para. 444.

²⁰¹ *Id.*, para. 445.

²⁰² *Id.*, para. 444.

²⁰³ *Id.*, para. 445.

apparently viewed as “significantly caused” by Ethiopia’s seizure of Eritrean-owned trucks from the ports as they crossed into Ethiopia for use in transporting Ethiopian cargo to and from ports in Djibouti.²⁰⁴

e. Economic Loss Incurred by the Airline Industry

Ethiopia sought to recover \$10,951,465 for lost profits to Ethiopian Airlines (EAL) in no longer being able to operate flight service from Ethiopia to Eritrea (an amount equal to one year of lost service, calculated based on operating revenue and expenses from prior years). Further, Ethiopia sought \$1,311,421 for similar losses from being unable to operate flight services within northern Ethiopia near the war zones. Additional amounts were sought for lost airline bank accounts at the Bank of Eritrea (\$1,703,020), costs associated with moving the airline fleet temporarily to Kenya for safety (\$314,914), and for Eritrea’s failure to pay air tickets provided to six Eritrean government agencies and certain air transport freight charges (\$182,909).²⁰⁵

As noted above with respect to business losses along the war fronts, the Commission was not favorably inclined to award *jus ad bellum* compensation for lost business profits. For this claim, however, the Commission was willing to compensate for lost profits from the suspension of flights between the Ethiopian and Eritrean capitals, for reasons closely linked to whether the outbreak of war made it virtually impossible to continue business operations:

Airline service between the two capitals was not a typical commercial endeavor but was closely linked to the Parties’ overall political and economic relationship. Ethiopian Airlines is Ethiopia’s State-owned national carrier, and is for many a symbol of the State of Ethiopia. Its aircraft were valuable property, vulnerable both to the risks of seizure by Eritrea and to damage in the course of hostilities. Its insurers would be sensitive to these risks, and might suspend coverage or raise premiums to unsustainable levels. Moreover, EAL’s operations depended upon a steady flow of passengers and cargo, both vulnerable to interruption during hostilities on account of government actions or individual decisions by passengers or shippers concerned about safety.

. . . Given these special circumstances, the Commission concludes that documented lost profits from the termination of the Addis Ababa–Asmara service were the proximate result of Eritrea’s *jus ad bellum* breach. Clearly it was, or should have been, foreseeable to Eritrea’s leaders that a likely result of Eritrea’s action at Badme would be the interruption of commercial air service between the two capitals, with attendant economic injury to EAL.²⁰⁶

²⁰⁴ *Id.*

²⁰⁵ *Id.*, paras. 446-47.

²⁰⁶ *Id.*, paras. 449-50.

The Commission accepted the use of a one-year period for measuring the lost profits, noting that the two countries' air services agreement was terminable upon one-year notice. Relying on evidence in the form of a declaration from EAL's general counsel regarding computations by EAL's finance department, but expressing some concern that the computations were not sufficiently substantiated, the Commission awarded \$4,000,000 for these lost profits.²⁰⁷

The Commission also awarded to Ethiopia the full amount of the EAL bank accounts in Eritrea that were never returned. Key to this finding was Eritrea's failure to rebut Ethiopia's evidence and the Commission's view that, while a belligerent may freeze an enemy belligerent's assets during the armed conflict, it must protect and then return those assets after the conflict is over.²⁰⁸

By contrast, all other aspects of the claim failed. The claim for lost profits for suspension of flight service within Ethiopia was rejected for lack of proof and as being "too causally remote from Eritrea's actions at Badme to be compensable."²⁰⁹ An aspect of this "remoteness" appears to be that the suspension occurred in large part during Ethiopia's first major counter-attack in 1999 (Operation Sunset), which the Commission viewed as an intervening action that broke the chain of proximate causation by Eritrea's *jus ad bellum* violation.²¹⁰ Similarly, the Commission declined to award compensation for the temporary transfer of aircraft to Kenya because this too occurred during the period of Operation Sunset and was therefore not a "proximate consequence" of Eritrea's violation.²¹¹ The claim for unpaid passenger tickets and freight charges failed because the Commission found that the claim "involved a commercial dispute involving prewar relationships, and is outside the Commission's jurisdiction."²¹²

f. Loss of Foreign Aid

Ethiopia sought approximately \$1.6 billion for foreign aid that was allegedly frozen, suspended, or terminated due to the outbreak of the war. Ethiopia argued that such grants and loans by international organizations and bilateral donors were lost, or at least suspended, due to Eritrea's violation of the *jus ad bellum*.²¹³ The Commission rejected the claim in part for lack of evidence, noting that Ethiopia had "provided little information regarding specific loans, grants or programs allegedly affected, or regarding post-war developments."²¹⁴ A key problem, however,

²⁰⁷ *Id.*, para. 451.

²⁰⁸ *Id.*, paras. 454-55.

²⁰⁹ *Id.*, para. 453.

²¹⁰ *Id.*, paras. 452-53.

²¹¹ *Id.*, para. 456.

²¹² *Id.*, para. 457.

²¹³ *Id.*, para. 462.

²¹⁴ *Id.*, para. 463.

was in establishing causation, given that the decision not to provide such aid ultimately was made by third parties:

The record was not sufficient to establish either the amount of the alleged loss, or a sufficient causal connection between that loss and Eritrea's violation of the *jus ad bellum*. In this connection, any reduction of development assistance to Ethiopia resulted from decisions taken by international financial institutions and foreign governments for their own reasons. Particularly where the immediate cause of the alleged injury was decisions made by third parties, much more compelling evidence would be required to show that the loss was attributable to Eritrea's *jus ad bellum* violation.²¹⁵

g. Loss of Investment in the Local Economy

Ethiopia also sought more than \$2 billion for lost foreign and domestic investment in the Ethiopian economy.²¹⁶ The Commission expressed skepticism about the theory for such a claim because any investment in the Ethiopian economy would have been in the private sector and might or might not have produced benefits for the local economy.²¹⁷ While Ethiopia invited the Commission to award compensation based on its own assessment of the harm experienced by Ethiopia from the loss of such investment, the Commission declined to do so for reasons similar to that relating to foreign aid:

As with the decisions by foreign assistance agencies addressed above, decisions whether or not to invest were made by a myriad of private investors inside and outside Ethiopia. Each decision reflected particular facts and considerations unique to the investor. The evidence simply did not show that their behavior, individually or in the aggregate, primarily resulted from Eritrea's actions in May 1998.²¹⁸

h. Losses Incurred from Governmental Assistance to Displaced Persons

Ethiopia asked for approximately \$100 million for expenses incurred by its Disaster Prevention and Preparedness Commission (DPPC) and the Relief Society of Tigray (REST) in assisting internally displaced persons (IDPs) in Ethiopia during the war.²¹⁹ The Commission had no difficulty finding that such a loss was proximately caused by Eritrea's violation.

Caring for internally displaced persons is an important responsibility of a State. Displaced people must have sustenance and support. It is readily foreseeable that in

²¹⁵ *Id.*, para. 465.

²¹⁶ *Id.*, para. 466.

²¹⁷ *Id.*, para. 468.

²¹⁸ *Id.*, para. 469.

²¹⁹ *Id.*, para. 470.

circumstances causing large-scale internal displacement, relief agencies will incur expenses to provide such help. The Commission concludes that Ethiopia is entitled to damages reflecting demonstrated expenses reasonably incurred by Ethiopia, or by Ethiopian public or private entities, to assist and support IDPs displaced on account of Eritrea's *jus ad bellum* violation.²²⁰

However, the Commission was not receptive to awarding compensation for such assistance to Ethiopians who returned to Ethiopia from Eritrea during the war. "As Eritrea is not legally responsible for the return of these Ethiopians to Ethiopia on account of its *jus ad bellum* violation, it likewise is not responsible for amounts expended by Ethiopia for their support and resettlement."²²¹

Ethiopia presented as evidence to support its DPPC claim a report prepared by the DPPC in October 2001 regarding the costs of its relief activities. The Commission noted that the report was not sworn to, corroborated, or detailed, but nevertheless accorded it weight "because it was not prepared for litigation and, taken in the context of the circumstances and the entire record, the amounts do not appear unreasonable."²²² Even so, various discounts were made to exclude the costs of Ethiopians returning from Eritrea, costs for support to Ethiopian military forces and veterans (which were not within the scope of the Commission's jurisdiction), costs covered in other parts of Ethiopia's *jus ad bellum* claim, and costs incurred by foreign non-governmental organizations in providing assistance.²²³ As such, the Commission awarded \$6 million for the DPPC claim.²²⁴ Similar reasoning with respect to the evidence and discounting applied to the REST claim, for which the Commission awarded \$1.5 million.²²⁵

F. Conclusion

The Commission's *jus ad bellum* findings, both with respect to the merits and with respect to damages, are of considerable importance for future tribunals faced with such a claim. The Commission considered and addressed several important and complicated issues concerning the law on the resort to force and self-defense, and the scope of harm that flows from such action. Rarely have such claims been litigated and rarer still have decisions been issued on these matters, especially regarding the scope of permissible compensation. There are various aspects of the Commission's findings that can be questioned, if not criticized, but given the difficult circumstances under which the Commission operated, with both limited resources and time, the

²²⁰ *Id.*, para. 471.

²²¹ *Id.*, para. 472; for further discussion, see Chapter IV(E)(3)(f).

²²² *Id.*, para. 474.

²²³ *Id.*, paras. 473-74.

²²⁴ *Id.*, para. 475.

²²⁵ *Id.*, paras. 476-78.

Commission performed extremely well. The most limiting feature of the 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.