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**Lettre datée du 20 décembre 2005, adressée au Président
du Conseil de sécurité par le Chargé d'affaires par intérim
de la Mission permanente de l'Éthiopie auprès
de l'Organisation des Nations Unies**

J'ai l'honneur de transmettre ci-joint un communiqué de presse publié par le Ministère des affaires étrangères de la République fédérale démocratique d'Éthiopie (voir annexe) et la sentence de la Commission des réclamations entre l'Érythrée et l'Éthiopie), en date du 19 décembre 2005, concernant la demande d'indemnisation de l'Éthiopie fondée sur le *jus ad bellum*, qui tient l'Érythrée pour responsable de la guerre de 1998-2000 contre l'Éthiopie et la dénonce comme étant l'agresseur.

Je vous serais obligé de bien vouloir faire distribuer le texte de la présente lettre et de son annexe à tous les membres du Conseil de sécurité et de le faire publier en tant que document du Conseil.

Le Chargé d'affaires par intérim
(Signé) Ambassadeur Terunch Zenna



**Annexe à la lettre datée du 20 décembre 2005, adressée
au Président du Conseil de sécurité par le Chargé d'affaires
par intérim de la Mission permanente de l'Éthiopie
auprès de l'Organisation des Nations Unies**

**Un tribunal international détermine que l'Érythrée
est responsable de la guerre de 1998-2000 contre l'Éthiopie
et la dénonce comme étant l'agresseur**

Dans sa sentence (voir pièce jointe) rendue publique hier, le 19 décembre 2005, la Commission des réclamations entre l'Érythrée et l'Éthiopie a décidé que l'Érythrée était responsable du déclenchement de la guerre de deux ans avec l'Éthiopie. La Commission a également considéré que l'Érythrée était responsable d'avoir intentionnellement tué, maltraité et enlevé des civils éthiopiens et d'avoir causé des pillages et des destructions généralisés de biens civils pendant les attaques et l'occupation par l'Érythrée du territoire éthiopien dans les régions frontalières. Même si la Commission n'a pas décidé en faveur de l'Éthiopie dans tous les cas, cette sentence revêt une importance capitale car elle dénonce l'Érythrée comme étant l'agresseur et la nature belliqueuse du régime qui a entraîné l'impasse actuelle dans le processus de paix.

En déterminant que l'Érythrée était responsable du déclenchement de la crise entre les deux pays en 1998, la Commission a déclaré que l'Érythrée avait violé le droit international lorsqu'elle a attaqué l'Éthiopie sans provocation et a occupé Badme et d'autres zones sans défense de l'Éthiopie en mai 1998. Au paragraphe 16 de la sentence, la Commission a déterminé d'une manière décisive quelle partie avait déclenché la guerre et était donc responsable de l'effusion de sang entre les deux pays, de la manière suivante :

... La Commission considère que l'Érythrée a violé le paragraphe 4 de l'Article 2 de la Charte des Nations Unies en ayant recours à la force armée pour attaquer et occuper Badme, qui se trouvait alors sous l'administration pacifique de l'Éthiopie, ainsi que d'autres territoires situés dans les weredas éthiopiens de Tahtay Adiabo et de Laelay Adiabo, lors d'une attaque qui a commencé le 12 mai 1998, et qu'elle est tenue d'indemniser l'Éthiopie pour les dommages causés par cette violation du droit international.

La Commission a décrit d'une manière très précise le moment où l'incursion illégale de l'Érythrée a commencé et la composition des troupes érythréennes qui avaient lancé cette attaque non provoquée. La Commission décrit de la manière suivante comment a commencé l'attaque initiale et non provoquée de l'Érythrée contre l'Éthiopie :

Les éléments de preuve ont montré qu'à environ 5 h 30 le 12 mai 1998, des forces armées érythréennes, comprenant au moins deux brigades de l'armée régulière et appuyées par des chars et de l'artillerie, ont attaqué la ville de Badme et plusieurs autres zones frontalières situées dans le wereda éthiopien de Tahtay Adiabo, ainsi qu'au moins deux localités dans le wereda voisin de Laelay Adiabo. Le même jour et les jours suivants, les forces armées érythréennes ont traversé la plaine sans relief de Badme jusqu'à des hauteurs situées à l'est.

Au moment de l'attaque, convaincue que les deux peuples frères ne constituaient pas une menace mutuelle, l'Éthiopie n'avait pas déployé de troupes dans cette zone. La Commission confirme ce fait en déclarant au paragraphe 14 de sa sentence que « les nombreux éléments de preuve indiquaient que les défenseurs éthiopiens comprenaient à peine des miliciens et quelques policiers, qui avaient dû rapidement battre en retraite devant les forces d'invasion érythréennes ».

La Commission a rejeté catégoriquement tous les arguments invoqués par l'Érythrée pour justifier son acte illégal du 12 mai 1998. « Étant donné l'absence d'une attaque armée contre l'Érythrée », la Commission déclare au même paragraphe que « l'attaque qui a commencé le 12 mai ne peut pas être justifiée comme un cas de légitime défense en vertu de la Charte des Nations Unies ».

Il convient de rappeler que le Gouvernement érythréen a toujours prétendu, comme il l'a également fait devant la Commission des réclamations, que l'Éthiopie, par l'intermédiaire de son Parlement, avait déclaré la guerre à l'Érythrée le 13 mai 1998. L'Érythrée l'a fait en interprétant délibérément d'une manière différente la résolution adoptée par le Parlement éthiopien. La Commission n'a pas été dupe de cette tentative de l'Érythrée pour essayer de justifier son agression. Elle déclare au paragraphe 17 de la sentence que :

Le 13 mai 1998, le Conseil des ministres et le Parlement éthiopien ont adopté une résolution condamnant l'invasion du 12 mai et exigeant le retrait inconditionnel et immédiat des forces érythréennes du territoire éthiopien. Cette résolution ne constituait pas, comme l'a affirmé l'Érythrée, une déclaration de guerre.

La Commission indique aussi clairement au paragraphe 15 de la sentence qu'il n'y avait aucune justification pour que l'Érythrée attaque l'Éthiopie en prétendant que l'Éthiopie avait violé l'intégrité territoriale de l'Érythrée. La Commission donne l'explication suivante :

Les zones envahies initialement par les forces érythréennes le 12 mai se trouvaient toutes soit en territoire éthiopien incontesté soit dans le territoire qui était administré pacifiquement par l'Éthiopie et qui devait se trouver du côté éthiopien de la ligne sur laquelle les forces armées éthiopiennes avaient été obligées de se retirer en 2000 en vertu de l'Accord de cessez-le-feu conclu le 18 juin 2000.

Dans sa sentence, la Commission réitère que l'ampleur des dommages pour lesquels l'Érythrée est responsable sera déterminée lors de la phase de l'instance relative aux dommages.

L'Éthiopie n'a jamais eu de doutes que cela serait la conclusion de toute tierce partie ayant l'occasion d'examiner les faits qui ont provoqué la crise entre l'Éthiopie et l'Érythrée, avec un certain degré d'objectivité et de respect pour les faits. Cela était également la décision qui avait été prise par l'OUA par l'intermédiaire d'un comité d'ambassadeurs qu'elle avait créé à l'époque. Le Gouvernement érythréen a essayé d'induire en erreur son propre peuple et la communauté internationale au sujet de l'origine de la crise entre les deux pays en se servant de la décision prise par la Commission du tracé de la frontière pour créer de la confusion. Cela n'est plus possible. Aucune tentative faite par les dirigeants érythréens pour dissimuler la vérité ne pourrait plus réussir. L'Éthiopie et l'Érythrée sont dans la situation où elles se trouvent aujourd'hui à cause d'un fait irréfutable

qui vient d'être exposé clairement et sans ambiguïté par la Commission des réclamations. Ce fait n'est rien d'autre que l'agression fatidique, tragique et non provoquée de l'Érythrée contre l'Éthiopie pacifique. Cette décision a une extrême importance pour l'état actuel du processus de paix entre l'Éthiopie et l'Érythrée. Cette dernière décision de la Commission des réclamations montre sans aucun doute possible que l'Érythrée n'a absolument aucune raison de revendiquer une supériorité morale dans ce conflit. C'est elle qui était l'agresseur. Comme l'a indiqué la Commission des réclamations au paragraphe 16 de sa sentence, l'Érythrée a violé le paragraphe 4 de l'Article 2 de la Charte des Nations Unies, qui stipule que :

Les membres de l'Organisation s'abstiennent, dans leurs relations internationales, de recourir à la menace ou à l'emploi de la force, soit contre l'intégrité territoriale ou l'indépendance politique de tout État, soit de toute autre manière incompatible avec les buts des Nations Unies.

Il convient de noter ici qu'en rejetant la position juridique de l'Érythrée selon laquelle la menace ou l'emploi de la force est justifié en droit international pour occuper un territoire administré pacifiquement par un autre État simplement sur la base d'une revendication territoriale, la Commission a déclaré que :

La pratique des États et les analyses de spécialistes éminents du droit public montrent que la légitime défense ne peut pas être invoquée pour régler des différends territoriaux. À cet égard, la Commission note que les différends frontaliers entre États sont si fréquents que toute exception à l'interdiction de la menace ou de l'emploi de la force dans le cas d'un territoire qui serait occupé illégalement créerait une brèche importante et dangereuse dans une règle fondamentale du droit international.

Quelle que soit la perspective utilisée, il n'y a aucune justification pour l'agression non provoquée menée par l'Érythrée contre l'Éthiopie entre 1998 et 2000. C'est ce qui a été déterminé par la Commission des réclamations dans sa sentence du 19 décembre 2005.

L'Érythrée a commis de toute évidence une agression sans aucune provocation de la part de l'Éthiopie. Cela est la conclusion de la Commission des réclamations qui non seulement dissipe les doutes que certaines personnes auraient pu avoir au sujet de l'origine de cette crise, mais met également en évidence la nature des difficultés auxquelles le processus de paix entre les deux pays doit encore faire face. Il n'y avait aucune justification pour l'agression érythréenne en mai 1998. De même, il n'y a aucune justification pour ce que l'Érythrée fait actuellement afin d'aggraver les tensions sur la frontière commune et de faire obstacle à la solution de la crise et à la normalisation des relations.

Enclosure

PARTIAL AWARD

Jus Ad Bellum
Ethiopia's Claims 1-8

between

The Federal Democratic Republic of Ethiopia

and

The State of Eritrea

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

**PARTIAL AWARD – *Jus ad Bellum* – Ethiopia's Claims 1–8
between the Claimant,
The Federal Democratic Republic of Ethiopia, represented by:**

Government of Ethiopia

Ambassador Fisseha Yimer, Permanent Representative of the Federal Democratic Republic of Ethiopia to the United Nations, Geneva, Co-Agent
Mr. Habtom Abraha, Consul General, Ethiopian Mission in The Netherlands
Mr. Ibrahim Idris, Director, Legal Affairs General Directorate, Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia, Addis Ababa
Mr. Reta Alemu, First Secretary, Coordinator, Claims Team, Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia, Addis Ababa
Mr. Yared Getachew, Esq., Legal Advisor; Member of the State Bar of New Jersey

Counsel and Consultants

Mr. B. Donovan Picard, Hunton & Williams LLP, Washington, D.C.; Member of the Bar of the District of Columbia; Member of the Bar of the Supreme Court of the United States
Professor Sean D. Murphy, George Washington University School of Law, Washington, D.C.; Member of the State Bar of Maryland
Mr. Edward B. Rowe, Hunton & Williams LLP, Washington, D.C.; Member of the Bar of the District of Columbia; Member of the State Bar of Colorado
Ms. Virginia C. Dailey, Hunton & Williams LLP, Washington, D.C.; Member of the Bar of the District of Columbia; Member of the State Bar of Florida
Mr. Thomas R. Snider, Hunton & Williams LLP, Washington, D.C.; Member of the Bar of the District of Columbia; Member of the State Bar of Massachusetts

**and the Respondent,
The State of Eritrea, represented by:**

Government of Eritrea

His Excellency, Mohammed Suleiman Ahmed, Ambassador of the State of Eritrea to The Netherlands
Professor Lea Brilmayer, Co-Agent for the Government of Eritrea, Legal Advisor to the Office of the President of Eritrea; Howard M. Holtzmann Professor of International Law, Yale Law School
Ms. Lorraine Charlton, Deputy Legal Advisor to the Office of the President of Eritrea

Counsel and Advocate

Professor James R. Crawford, SC, FBA, Whewell Professor of International Law, University of Cambridge; Member of the Australian and English Bars; Member of the Institute of International Law

Counsel and Consultants

Ms. Michelle Costa
Ms. Julie Frey
Ms. Diane Haar, Esq.
Ms. Amanda Costikyan Jones
Mr. Kevin T. Reed
Mr. Abrham Tesfay Haile, Esq.
Ms. Lori Danielle Tully, Esq.
Ms. Cristina Villarino Villa, Esq.

PARTIAL AWARD – *JUS AD BELLUM*
ETHIOPIA’S CLAIMS 1–8

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ETHIOPIA'S CLAIMS 1-8

I. INTRODUCTION

1. This Claim (included as a component of all of Ethiopia's Claims 1-8) has been brought to the Commission by the Claimant, the Federal Democratic Republic of Ethiopia ("Ethiopia"), pursuant to Article 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of December 12, 2000 ("the Agreement"). The Claimant asks the Commission to find the Respondent, the State of Eritrea ("Eritrea"), liable for loss, damage and injury suffered by the Claimant, including loss, damage and injury suffered by the Claimant's nationals, as a result of the alleged use of force against the Claimant in violation of the rules of international law regulating the resort to force, the *jus ad bellum*, in May and June 1998.¹ The Claimant requests monetary compensation.

2. The Respondent asserts that it fully complied with international law in its resort to military operations.

II. JURISDICTION

3. Eritrea asserted that the Commission has no jurisdiction over this issue, because the Agreement, in Article 3, assigns the responsibility to address it to another body. The Commission finds that argument unpersuasive. Article 3 provides for the creation of an "independent and impartial body" to be appointed by the Secretary-General of the Organization of African Unity in consultation with the Secretary-General of the United Nations, and defines its task in the following terms:

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.

The Commission understands that the independent body authorized by Article 3 has never been constituted.

4. The terms "origins of the conflict" and "misunderstanding between the parties regarding their common border" are not the same as the legal issue posed by Ethiopia for adjudication in this Claim, that is, whether Eritrea's actions in May and June 1998 involved the unlawful resort to force against Ethiopia resulting in liability in accordance with applicable rules of international law. Determination of the origins of the conflict and the nature of any misunderstandings about the border, had they been made by the impartial body

¹ Both Parties utilized the terminology of *jus ad bellum* to describe the law governing the initial resort to force between them. At the hearing of this Claim in April 2005, Ethiopia confirmed that it meant by this the use of force contrary to the Charter of the United Nations, June 26, 1945, 59 Stat. p. 1031, 3 Bevans p. 1157 [hereinafter UN Charter].

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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. The factual inquiries called for by Article 3 were largely different from the factual determinations this Commission must make in assessing Ethiopia's claim under Article 5. Moreover, it seems clear that Article 3 was carefully drafted to direct the impartial body to inquire into matters of fact, not to make any determinations of law. This Commission is the only body assigned by the Agreement with the duty of deciding claims of liability for violations of international law.

5. Upon first reading, the last sentence of Article 5 of the Agreement might well be thought to exclude the Commission's jurisdiction over rules of international law regulating the resort to force. That sentence provides 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" (emphasis added). However, at an early stage of the proceedings, the Parties agreed upon an interpretation of that sentence limiting it to claims solely for the costs of the enumerated activities, and the Commission agreed to respect that interpretation. That agreed interpretation was recorded in point 5 of the Commission's letter to the Parties of July 24, 2001.² Consequently, the Commission has jurisdiction pursuant to Article 5 over Ethiopia's *jus ad bellum* Claim.

III. THE MERITS

6. Ethiopia claimed that Eritrea carried out a series of unlawful armed attacks against it, beginning on May 12, 1998, in violation of the *jus ad bellum*, and made this an element of all eight of the Claims it submitted to the Commission.³ The Commission, in ordering filing schedules, decided to hear that Claim along with Ethiopia's Claims concerning alleged violations of applicable international law, including the *jus in bello*, in the Western and Eastern Fronts (Ethiopia's Claims 1 and 3). Consequently, this Claim was heard in the Commission's April 11–15, 2005 hearings on liability.

7. The Commission informed the Parties on August 29, 2001 that it intended to conduct proceedings in Government-to-Government claims in two stages, first concerning liability, and second, if liability is found, concerning damages. Ethiopia filed its Statement of Claim on December 12, 2001, Eritrea's Statement of Defense was filed on December 16, 2002,

² Point 5 of the Commission's July 24, 2001 letter to the Parties states:

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.

³ See, e.g., Partial Award, Central Front, Ethiopia's Claim 2 Between the the Federal Democratic Republic of Ethiopia and the State of Eritrea (April 28, 2004), para. 4 [hereinafter Partial Award in Ethiopia's Central Front Claims].

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Ethiopia's Memorial on November 1, 2004, Eritrea's Counter-Memorial on January 17, 2005, and Ethiopia's Reply on March 10, 2005.

8. In essence, Ethiopia contended that Eritrea planned and carried out these attacks against Ethiopia in violation of its obligations under international law, including notably the requirement of Article 2, paragraph 4, of the Charter of the United Nations ("UN Charter") that all Members refrain from the threat or use of force against the territorial integrity or political independence of any State. Ethiopia alleged that, between May 12 and June 11, 1998, Eritrea launched a "full scale" invasion of Ethiopia at many points along their mutual border from Badme in the west to Bure in the east.

9. In addition to its jurisdictional objections, dealt with above, Eritrea denied Ethiopia's allegations on the merits. In its written pleadings, Eritrea made the following three main defensive assertions: (a) that Ethiopia was unlawfully occupying Eritrean territory in the area around Badme, which was the area of much of the initial hostilities in May 1998, citing the decision of the Eritrea-Ethiopia Boundary Commission of April 13, 2002;⁴ (b) that Ethiopian armed militia near Badme carried out forcible incursions into Eritrea in early May 1998 and fired on Eritrean forces on May 6 and 7, killing eight Eritrean soldiers and setting off fighting between small units in the area during the next several days; and (c) that it was Ethiopia that declared war on Eritrea on May 13, 1998. On the last day of the hearing, Eritrea argued that its actions in taking Badme and adjacent areas on May 12, 1998 were lawful measures of self-defense, consistent with Article 51 of the UN Charter, taken in response to the fighting near Badme that began on May 6 and 7, 1998. While Eritrea asserted that these incidents occurred within Eritrean territory, Ethiopia asserted that they occurred within Ethiopian territory.

10. The Commission cannot accept the legal position that seems to underlie the first of these Eritrean contentions – that recourse to force by Eritrea would have been lawful because some of the territory concerned was territory to which Eritrea had a valid claim. It is true that the boundary between Eritrea and Ethiopia in the area of Badme was never marked in the years when Eritrea was an Italian colony, during Eritrea's subsequent incorporation into Ethiopia, or after Eritrean independence in 1993, and it is clear that the Parties had differing conceptions of the boundary's location. However, the practice of States and the writings of eminent publicists show that self-defense cannot be invoked to settle territorial disputes.⁵ In

⁴ Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Eritrea-Ethiopia Boundary Commission, April 13, 2002, *reprinted in* 41 I.L.M. p. 1057 (2002).

⁵ See, e.g., Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (the "Friendly Relations Declaration"), UN General Assembly Resolution 2625 (XXV) of Oct. 24, 1970, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, *reprinted in* 9 I.L.M. p. 1292 (1970) ("[E]very State has the duty to refrain from the threat or use of force . . . as a means of solving international disputes, including territorial disputes"); GAETANO ARANCIO-RUIZ, *THE UNITED NATIONS DECLARATION ON FRIENDLY RELATIONS AND THE SYSTEM OF THE SOURCES OF INTERNATIONAL LAW* pp. 104–105 (Sijthoff & Noordhoff 1979); ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VOLKERRECHT* p. 905 (Duncker und Humblot 1984); Michel Virally, *Article 2:*

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that connection, the Commission notes 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.

11. The Commission turns next to Eritrea's second line of argument. In general, recourse to the use of armed force by one State against another is unlawful unless it is used in self-defense or occurs with the sanction of the Security Council pursuant to Chapter VII of the UN Charter.⁶ As the text of Article 51 of the Charter makes clear, the predicate for a valid claim of self-defense under the Charter is that the party resorting to force has been subjected to an armed attack. Localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter. In that connection, the Commission notes that Eritrea did not report its use of armed force against Ethiopia on May 12, 1998 to the Security Council as measures taken in self-defense, as it would be obligated to do by Article 51 of the Charter in case of self-defense against armed attack.

12. With respect to the events in the vicinity of Badme that occurred during the period from May 6–12, 1998, the Commission takes note of the sharply different accounts offered by the Parties as to the precise location of the incidents of May 6 and 7 and of the numbers and types of forces involved. It need not resolve these differences, because it is clear from the evidence that these incidents involved geographically limited clashes between small Eritrean and Ethiopian patrols along a remote, unmarked, and disputed border. 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.

13. The Parties agreed that a joint body met in Addis Ababa on May 8, 1998 to discuss border problems.⁷ Ethiopia asserted, and Eritrea did not dispute, that the head of the Eritrean delegation to that meeting was its Minister of Defense and that, following the meeting on May 8, its delegation left Addis Ababa during the night. Ethiopia asserted that it had expected the meeting to continue on May 9 and that it was surprised by the departure of the Eritrean delegation. Eritrea asserted in response that its delegation left because the meeting had concluded. Ethiopia also asserted that the meeting had been cordial and that agreement had

Paragraphe 4, in LA CHARTE DES NATIONS UNIES pp. 119–125 (Economica, 2d ed. 1991); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* p. 116 (Nijhoff 1991); PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* pp. 314–315 (Routledge, 7th rev. ed. 1997).

⁶ See, e.g., UN Charter, *supra* note 1, arts. 2(4), 24, 39–42; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* pp. 699–700 (Oxford University Press, 6th ed. 2003); ANTONIO CASSESE, *INTERNATIONAL LAW* pp. 296–298, 305–307 (Oxford University Press 2001); Albrecht Randelzhofer, *Article 2(4)*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* pp. 111–118 (Bruno Simma ed., Oxford University Press 1994).

⁷ The Parties disagreed regarding the nature of this body. Ethiopia contended that the Parties established a formal commission to address questions relating to the boundary. Eritrea characterized it in less formal terms. In any case, the Parties were engaged in a process of consultations regarding questions related to the boundary before hostilities began.

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been reached that both sides should avoid border crossings by armed personnel and that the two sides would meet again in two months in Asmara to seek agreement on border issues. Eritrea did not respond in the present proceedings to those assertions.⁸

14. The evidence showed that, at about 5:30 a.m. on May 12, 1998, Eritrean armed forces, comprised of at least two brigades of regular soldiers, supported by tanks and artillery, attacked the town of Badme and several other border areas in Ethiopia's Tahtay Adiabo Wereda, as well as at least two places in its neighboring Laelay Adiabo Wereda. On that day and in the days immediately following, Eritrean armed forces then pushed across the flat Badme plain to higher ground in the east. Although the evidence regarding the nature of Ethiopian armed forces in the area conflicted, the weight of the evidence indicated that the Ethiopian defenders were composed merely of militia and some police, who were quickly forced to retreat by the invading Eritrean forces. Given the absence of an armed attack against Eritrea, the attack that began on May 12 cannot be justified as lawful self-defense under the UN Charter.

15. The areas initially invaded by Eritrean forces on that day 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 Cease-Fire Agreement of June 18, 2000. In its Partial Award in Ethiopia's Central Front Claims, the Commission held that the best available evidence of the areas effectively administered by Ethiopia in early May 1998 is that line to which they were obligated to withdraw in 2000.⁹ In the same Partial Award, the Commission explained why it must hold Eritrea liable for violations of international humanitarian law committed by it within such territory and why such holdings concerning conduct during the war have no effect on the international boundary as subsequently determined by the Eritrea-Ethiopia Boundary Commission.¹⁰ The same principle governs application of the *jus ad bellum*.

16. 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, 1998, and is liable to compensate Ethiopia, for the damages caused by that violation of international law.¹¹

⁸ The evidence included references to other high-level contacts and conversations between the Parties in the days prior to May 12, 1998, as well as suggestions of military preparations on both sides of the boundary during this period. However, these matters were not clarified during the proceedings, and the Commission is constrained to act on the basis of the record available to it.

⁹ Partial Award in Ethiopia's Central Front Claims, *supra* note 3, para. 31.

¹⁰ *Id.* at paras. 27–31.

¹¹ In addition to the UN Charter, Ethiopia contended that Eritrea's actions also violated the Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. p. 39 [hereinafter OAU Charter], as well as several bilateral agreements and customary international law. While the OAU Charter articulates important principles,

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17. This leaves Eritrea's third line of argument, based on Ethiopia's alleged declaration of war. On May 13, 1998, the Ethiopian Council of Ministers and Parliament passed a resolution that condemned the May 12 invasion and demanded the unconditional and immediate withdrawal of Eritrean forces from Ethiopian territory. This resolution was not, as Eritrea has asserted, a declaration of war. In international law, the essence of a declaration of war is an explicit affirmation of the existence of a state of war between belligerents.¹² Nevertheless, the resolution made clear that Ethiopia would not accept Eritrea's advances as a *fait accompli* and was determined to act in self-defense until the Eritrean forces withdrew or were compelled to leave the areas they had occupied. Ethiopia so notified the United Nations Security Council, pursuant to Article 51 of the UN Charter. Moreover, the Commission notes that the Parties subsequently maintained diplomatic relations and some economic relations, both of which would appear inconsistent with a formal declaration of war.

18. Ethiopia also contended that the unlawful armed attack by Eritrea that began on May 12 included all of Eritrea's subsequent attacks in May and June 1998 into Ethiopian territory along other parts of the border between the two States, as it considered those attacks to be a continuous second phase of a "30-day offensive" by Eritrea. It alleged that those attacks occurred across the Mareb River and at Zalambessa on the Central Front and at Adi Murug and Bure on the Eastern Front. In essence, Ethiopia contended that Eritrea carried out a program of pre-planned and coordinated armed attacks in multiple locations in violation of international law. This contention, however, has not been proved.

19. The evidence indicated that Eritrea's armed forces were more fully mobilized than those of Ethiopia and thus had the initiative in the first several months of the war, but that does not prove that Eritrea's actions, other than those in the areas of what became known as the Western Front addressed in this Partial Award, were predetermined. Based on the evidence before it, the Commission cannot resolve whether the Eritrean military operations from mid-May to mid-June 1998 in what became the Central and Eastern Fronts were pre-planned attacks, as Ethiopia contends, or were determined by 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. What is clear is 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.

20. In view of these holdings establishing Eritrea's liability for the unlawful armed attack on the Western Front that began on May 12, 1998, the Commission will request further briefing in the damages phase concerning the scope of the damages for which Eritrea is liable

because of the fundamental role of the UN Charter in relation to the issues presented, this Partial Award does not consider these additional claims in detail.

¹² See Hague Convention (III) Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. p. 2259, 1 Bevans p. 619.

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by reason of that attack, in addition to those damages following from the Commission's other Partial Awards.

IV. AWARD

In view of the foregoing, the Commission determines as follows:

A. Jurisdiction

1. The Commission has jurisdiction over the Claimant's *jus ad bellum* Claim.

B. Findings on Liability for Violation of International Law

1. The Respondent violated Article 2, paragraph 4, of the Charter of the United Nations 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.

2. The Claimant's contention that subsequent attacks by the Respondent along other parts of their common border were pre-planned and coordinated unlawful uses of force fails for lack of proof.

3. The scope of damages for which the Respondent is liable because of its violation of the *jus ad bellum* will be determined in the damages phase of these proceedings.

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

H. Houtte

President Hans van Houtte

George H. Aldrich

George H. Aldrich

John R. Crook

John R. Crook

James C.N. Paul

James C.N. Paul

Lucy Reed

Lucy Reed