Совет Безопасности

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Письмо Временного Поверенного в делах Постоянного представительства Эфиопии при Организации Объединенных Наций от 20 декабря 2005 года на имя Председателя Совета Безопасности

Имею честь настоящим препроводить пресс-релиз Министерства иностранных дел Федеративной Демократической Республики Эфиопия (см. приложение) и решение Комиссии по претензиям Эритреи и Эфиопии от 19 декабря 2005 года, касающееся претензии Эфиопии относительно jus ad bellum, в котором признается, что Эритрея несет ответственность за развязывание войны 1998–2000 годов против Эфиопии и, следовательно, является агрессором.

Буду признателен Вам за ознакомление с настоящим письмом и приложением к нему всех членов Совета Безопасности и распространение его в качестве документа Совета Безопасности.

(*Подпись*) Посол Терунех **Зенна**
Временный Поверенный в делах

Приложение к письму Временного Поверенного в делах Постоянного представительства Эфиопии при Организации Объединенных Наций от 20 декабря 2005 года на имя Председателя Совета Безопасности

Международный трибунал признал, что Эритрея несет ответственность за развязывание войны 1998–2000 годов против Эфиопии и является агрессором

В опубликованном вчера, 19 декабря 2005 года, решении (см. добавление) Комиссия по претензиям Эритреи и Эфиопии указала, что Эритрея несет ответственность за развязывание двухлетней войны с Эфиопией. Комиссия также указала, что Эритрея несет ответственность за умышленные убийства, избиения и похищения эфиопских граждан и широкомасштабное разграбление и уничтожение имущества граждан во время эритрейских нападений и оккупации территории Эфиопии в приграничных районах. Даже если в этом решении Комиссия не оправдала Эфиопию по всем пунктам, оно имеет основополагающее значение, поскольку в нем признается, что Эритрея является агрессором, и указывается на воинствующий характер режима, который завел в нынешний тупик мирный процесс.

Признав, что Эритрея несет ответственность за кризис в отношениях между двумя странами в 1998 году, Комиссия заявила, что Эритрея нарушила международное право, когда она без каких-либо причин напала на Эфиопию и оккупировала Бадме и другие незащищенные районы Эфиопии в мае 1998 года. В пункте 16 решения Комиссия вынесла следующее категоричное определение в отношении стороны, которая развязала войну и, следовательно, несет ответственность за кровопролитие между двумя странами:

> **...Комиссия считает, что Эритрея нарушила пункт 4 статьи 2 Устава Организации Объединенных Наций, прибегнув к вооруженной силе для совершения нападения и оккупации Бадме, находившегося тогда под мирным управлением Эфиопии, а также другой территории в Тахтай Адиабо и Лаелай Адиабо в Эфиопии, в ходе наступления, начавшегося 12 мая 1998 года, и обязана компенсировать Эфиопии ущерб, причиненный в результате этого нарушения международного права.**

Комиссия весьма конкретно высказалась в отношении того, когда началось незаконное вторжение Эритреи, и относительно состава эритрейских войск, которые осуществили это неспровоцированное нападение. Комиссия заявила следующее относительно того, когда началось первое эритрейское неспровоцированное нападение на Эфиопию.

> **Доказательства свидетельствуют о том, что примерно в 05 ч. 30 м. 12 мая 1998 года эритрейские вооруженные силы в составе по меньшей мере двух регулярных бригад при поддержке танков и артиллерии напали на город Бадме и несколько других приграничных районов в Тахтай Адиабо в Эфиопии, а также по меньшей мере в двух местах в соседнем районе Лаелай Адиабо. В этот и последующие дни эритрейские вооруженные силы продвинулись через равнину Бадме в более высокогорные районы в восточной части.**

На момент нападения у Эфиопии, убежденной в том, что два братских народа не представляют угрозы друг другу, не было войсковых подразделений в этом районе. Комиссия подтвердила это, заявив в пункте 14 своего решения, что «доказательства указывают на то, что эфиопские защитники состояли из простых ополченцев и некоторого числа полицейских, которые были вынуждены быстро отступить под натиском эритрейских войск».

Комиссия категорически отклонила все аргументы, выдвинутые Эритреей в оправдание своего незаконного акта 12 мая 1998 года. В этом же пункте Комиссия заявила, что ввиду отсутствия факта вооруженного нападения на Эритрею наступление, начавшееся 12 мая, не может быть оправдано как законная самооборона согласно Уставу Организации Объединенных Наций.

Следует напомнить, что правительство Эритреи всегда утверждало, в том числе и в Комиссии по претензиям, что Эфиопия через свой парламент объявила войну Эритрее 13 мая 1998 года. В подтверждение этого Эритрея ссылалась на резолюцию, принятую парламентом Эфиопии, сознательно искажая ее содержание. Комиссию не ввели в заблуждение попытки Эритреи оправдать свою агрессию. В пункте 17 этого же решения Комиссия заявила следующее:

> **«13 мая 1998 года Совет министров и парламент Эфиопии приняли резолюцию с осуждением нападения 12 мая и требованием безусловного и немедленного вывода эритрейских сил с территории Эфиопии. Эта резолюция не была, как это утверждает Эритрея, объявлением войны».**

Комиссия в пункте 15 решения также четко указала на отсутствие у Эритреи каких-либо поводов для нападения на Эфиопию на том основании, что Эфиопия нарушила территориальную неприкосновенность Эритреи. Комиссия заявила следующее:

> **«Районы, первоначально захваченные эритрейскими силами в тот день, были районами либо в пределах бесспорно эфиопской территории, либо в пределах территории, которая находилась под мирным управлением Эфиопии и позднее оказалась на эфиопской стороне от линии, к которой должны были быть отведены вооруженные силы Эфиопии в 2000 году в соответствии с соглашением о прекращении огня от 18 июня 2000 года».**

В своем заявлении Комиссия подтвердила, что размер ущерба, который должна возместить Эритрея, будет установлен на этапе определения убытков.

Эфиопия никогда не испытывала сомнений в том, что к такому выводу пришла бы любая третья сторона, которая имела бы возможность с достаточной объективностью и беспристрастностью изучить факты, послужившие причиной возникновения кризиса в отношениях между Эфиопией и Эритреей. Именно такое решение вынесла и ОАЕ в Комитете послов, учрежденном ею в то время. Раньше правительство Эритреи пыталось ввести в заблуждение свой народ и международное сообщество относительно истоков кризиса между двумя странами, используя для этого решение Пограничной комиссии. Теперь это невозможно. Ни одна попытка эритрейского руководства скрыть истину не увенчается успехом. Эфиопия и Эритрея сегодня находятся в таком состоянии в силу одного неопровержимого факта, который теперь со всей определенностью установлен Комиссией по претензиям. Этот факт заключается в том, что

Эритрея допустила фатальную и трагическую ошибку, совершив неспровоцированную агрессию против мирной Эфиопии. Принятое решение имеет чрезвычайно важное значение для нынешнего состояния мирного процесса в отношениях между Эфиопией и Эритреей. Это последнее решение Комиссии по претензиям, безусловно, указывает на то, что у Эритреи нет абсолютно никаких оснований претендовать на высокие моральные принципы в нынешнем конфликте. Она была агрессором. Как указала Комиссия в пункте 16 своего решения, Эритрея нарушила пункт 4 статьи 2 Устава Организации Объединенных Наций, в котором говорится следующее:

> **«Все Члены Организации Объединенных Наций воздерживаются в их международных отношениях от угрозы силой или ее применения как против территориальной неприкосновенности или политической независимости любого государства, так и каким-либо другим образом, не совместимым с Целями Объединенных Наций».**

Здесь необходимо отметить, что, категорически отвергнув правовую аргументацию Эритреи, согласно которой угроза силой или ее применение оправданы по международному праву для захвата территории, находящейся под мирным управлением другого государства, лишь в силу претензии на эту территорию, Комиссия заявила, что:

> **«Практика государств и труды видных специалистов по международному праву свидетельствуют о том, что на самооборону нельзя ссылаться для урегулирования территориальных споров. В этой связи Комиссия отмечает, что пограничные споры между государствами возникают настолько часто, что любое изъятие из запрета угрозы силой или ее применения в отношении территории, которая, как утверждается, незаконно оккупирована, создаст большой и опасный пробел в основополагающей норме международного права».**

С какой бы стороны ни рассматривать этот аргумент, нет никаких оправданий для неспровоцированной агрессии, которую Эритрея совершила против Эфиопии в период 1998–2000 годов. Именно на это указала Комиссия по претензиям в своем решении от 19 декабря 2005 года.

Эритрея совершила явную агрессию, никоим образом не спровоцированную Эфиопией. Это определение Комиссии по претензиям не только рассеивает все сомнения, которые могли возникнуть в умах людей в отношении истоков кризиса, но и проливает полезный свет на характер проблемы, с которой продолжают сталкиваться обе страны в рамках мирного процесса. Агрессия Эритреи в мае 1998 года не имеет никаких оправданий. Равно как не имеет никаких оправданий то, что сейчас делается Эритреей для эскалации напряженности в районе общей границы и создания препятствий на пути урегулирования кризиса и нормализации отношений.

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

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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

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Ms. Julie Frey
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Mr. Kevin T. Reed
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Ms. Cristina Villarino Villa, Esq.

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

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PARTIAL AWARD – *JUS AD BELLUM*
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. 1153 [hereinafter UN Charter].

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,

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[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].

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 ARANGIO-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 VÖLKERRECHT p. 905 (Duncker und Humblot 1984); Michel Virally, *Article 2:*

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

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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.

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]

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[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,

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

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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.

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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PARTIAL AWARD – JUS AD BELLUM
ETHIOPIA'S CLAIMS 1–8

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

President Hans van Houtte

George H. Aldrich

John R. Crook

James C.N. Paul

Lucy Reed