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# The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?

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## Abstract

*The recent decision by the Eritrea/Ethiopia Claims Commission on the ius ad bellum claims of Ethiopia – that Eritrea had violated the law on the use of force in starting the 1998–2000 war between the two states – is a troubling one. It raises questions about the proper role of arbitral tribunals in such cases. There were many factors which suggested that the Commission should have abstained from giving judgment. There was no unequivocal agreement between the parties that the Commission's jurisdiction extended beyond claims for violations of humanitarian and other international law during the conflict to an examination of responsibility for the start of the war. Moreover, the award is extremely brief, and consequently it deals with controversial issues of the law of self-defence, such as the meaning of armed attack and the duty to report to the Security Council, in a rather limited way. The award also raises important questions about the relationship of an arbitral tribunal to other bodies. In this case, the award of the Claims Commission undermined the Eritrea/Ethiopia Boundary Commission's 2002 Delimitation Decision, already under challenge by Ethiopia, at a time of increasing tension along the border.*

## 1 Introduction

On 19 December 2005 the Eritrea/Ethiopia Claims Commission decided on Ethiopia's claims that Eritrea had violated the rules of international law on the use of force in its Partial Award on the *ius ad bellum* claims of Ethiopia.<sup>1</sup> This award is extremely brief, but it raises extremely serious issues. In seven short pages the Commission found that Eritrea had violated Article 2(4) of the United Nations Charter '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

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<sup>1</sup> Eritrea/Ethiopia, Partial Award, *Ius Ad Bellum* Ethiopia's Claims 1–8, 19 December 2005 (hereafter *Ius ad bellum* case), available at <http://www.pca-cpa.org>, 2006 ILM 430.

territory'. The Commission's Partial Award raises many questions, not only about its view of the substance of international law on the use of force, but also about the proper role of an arbitral tribunal, about arbitral respect and restraint and the proper relation between the Claims Commission and the Eritrea/Ethiopia Boundary Commission which had made its award in 2002.<sup>2</sup> Is it possible or desirable for an arbitral commission to deal with such an important issue – the use of force – so briefly and in the absence of clear consent by the parties? It may be that the Claims Commission's decision on the merits was a sustainable one. It may be that Eritrea was in fact responsible for violations of Article 2(4) in 1998. But, without going into the merits of the claims in any depth, I will show that the Commission's approach gives grounds for serious disquiet.

## 2 Background

In May 1998 fighting broke out between Ethiopia and Eritrea around the town of Badme.<sup>3</sup> Both sides claimed this area as their own. There is a fundamental disagreement between the two states as to the origins and the characterization of the conflict. On 14 May 1998 Ethiopia wrote to the Security Council, saying that Eritrea had carried out an unprovoked violation of Ethiopian sovereignty on 12 May 1998. Eritrean troops had attacked Ethiopian forces and occupied areas of Ethiopian territory over which Eritrea had claims.<sup>4</sup> On the next day Eritrea replied rejecting these allegations. Although there were continuing border disputes between the two countries, they had been instigated by prior Ethiopian incursions into Eritrea.<sup>5</sup> Ethiopia had claimed areas of Eritrea and the clashes had arisen from the presence of Ethiopian troops on Eritrean territory. Eritrea's position was that the international boundary was clear and non-controversial and that a Joint Committee had been formed by both governments to resolve the dispute and delineate the boundary line.<sup>6</sup> But on 6 May Ethiopia had mounted an unprovoked attack, which had triggered a cycle of clashes around Badme.

Ethiopia denied that the borders were fully delineated and demarcated and maintained that the areas 'invaded' by Eritrea had never been part of it but had always

<sup>2</sup> Eritrea-Ethiopia Boundary Commission: *Decision regarding Delimitation of the Border between Eritrea and Ethiopia* (hereafter *Delimitation Decision*) 2002 ILM 1057, UN Document S/2002/423, 15 April 2002.

<sup>3</sup> Ethiopia (current population about 67 million) had long been an independent state apart from the period of its annexation by Italy (1935–1941). Eritrea (current population about 4.5 million) was formally proclaimed an Italian colony in 1890. In 1941 the UK expelled Italian forces from Ethiopia and Eritrea. Ethiopia returned to independence, but Eritrea remained under British administration until 1952 when it was federated to Ethiopia, following General Assembly Resolution 390A(V). Ethiopia incorporated Eritrea as a province and in 1962 formally annexed it. Armed Eritrean resistance forces fought and finally secured independence in 1993; Eritrea was admitted as a member of the UN in the same year.

<sup>4</sup> UN Doc. S/1998/396, 14 May 1998.

<sup>5</sup> UN Doc. S/1998/399, 15 May 1998.

<sup>6</sup> The Claims Commission recorded that the Eritrean delegation had left a meeting of this body on 8 May 1998. Although the Commission did not expressly draw any inference from this, the Commission could be understood as implying that Eritrea was planning to initiate its attack (*Ius ad bellum* case, at para. 13).

been administered by Ethiopia. Eritrea denied any incursion into Ethiopian territory and accused Ethiopia of incorporating large areas of Eritrea into its territory on a 1997 map. It asserted that already in July 1997 Ethiopian troops had occupied areas of Eritrea and had dismantled the Eritrean administration and installed an Ethiopian administration in those areas. Later, the Ethiopian authorities had evicted Eritrean farmers in the Badme area. The two states continued to accuse each other of aggression throughout 1998.<sup>7</sup> These differences about the location and the starting date of the conflict were central to the Claims Commission's decision.

The Organization of African Unity (OAU) and the Security Council both intervened in an attempt to bring the conflict to an end. The Security Council's initial response was to pass Resolution 1177 (1998), expressing grave concern at the conflict and stressing that the use of armed force was not acceptable as a means of addressing territorial disputes or changing circumstances on the ground. It condemned the use of force and demanded that both parties immediately cease hostilities and refrain from further use of force. It called on the parties to cooperate with the OAU. As is typical of the Security Council's resolutions, it did not assign blame or hold either of the two states responsible for the outbreak of the conflict; there is no express reference to a violation of Article 2(4) or to the right of self-defence under Article 51.

The OAU was somewhat less even-handed. The OAU Ministerial Committee on the Eritrea/Ethiopia conflict held that the disputed Badme area was under Ethiopian administration prior to 6 May 1988, and the OAU demanded that Eritrea withdraw from this area.<sup>8</sup> Eritrea argued that Ethiopia's insistence on finding out which authority was administering Badme before 6 May 1998 was designed to gloss over Ethiopia's use of force in July 1997 to occupy areas of Eritrean territory around Bada in eastern Eritrea; a few days later Ethiopian authorities had evicted Eritrean farmers from villages in the Badme area, saying that it had been demarcated as Ethiopian territory.<sup>9</sup> The administration was not valid if established illegally, and the priority was to establish where Badme and other areas were situated within the recognized international boundaries as established by colonial treaties. In contrast Ethiopia gave evidence of its occupation of the disputed area prior to 1997, following Eritrea's independence in 1993.<sup>10</sup>

The OAU recommended that an observer mission be deployed to Badme, that forces in and around Badme be redeployed to positions held before 6 May 1998, that the civilian administration in place before 6 May return, and that an investigation be held into the 6 May events. The boundary should be demilitarized and demarcated by the UN cartographic section. These recommendations were incorporated into a

<sup>7</sup> UNYB (1998), at 146–147.

<sup>8</sup> UN Doc. S/1998/1223, 28 Dec. 1998, Annex at para 21.

<sup>9</sup> UNYB (1998) 146, at 148.

<sup>10</sup> The Boundary Commission in its Delimitation Decision (at para. 5.91–5.95) had rejected Ethiopia's claim that its administration of the disputed area overrode the colonial treaties, 2002 ILM 1057; UN Doc. S/2002/423, 15 April 2002. See also *Observations*, (at paras 9, 13, 17) in the Progress Report of the Secretary-General on Ethiopia and Eritrea, Addendum, UN Doc. S/2003/257/Add.1, 31 March 2003; 2003 ILM 1010.

*Framework Agreement* on 17 December 1998.<sup>11</sup> Ethiopia said that it accepted these proposals, but Eritrea did not.<sup>12</sup> It was unwilling to withdraw from Badme as this could be construed as a concession that it was in Ethiopian territory. Eritrea was not willing to see the re-establishment of Ethiopian administration in disputed areas. The OAU accused Eritrea of undermining its peace effort.

But Eritrea's concerns later turned out to be justified in the light of the Claims Commission's Partial Award on the *ius ad bellum* claims. Its reluctance was based on its insistence that the boundary was based on the colonial treaties, and that any Ethiopian occupation or administration of Badme was contrary to these treaties. Its reservations concerned the singular focus on Badme and the incidents of 6–12 May 1998 to the exclusion of preceding incidents of Ethiopian aggression and occupation. Eritrea did however welcome the 'positive elements in the OAU's talking points', the recognition that the dispute did not start in May 1998 but went back to at least July 1997 and that redeployment would not prejudice the final status of that area.<sup>13</sup>

In 1999 the limited conflict escalated to a full-scale war. Ethiopia and Eritrea again accused each other of aggression.<sup>14</sup> The Security Council condemned the use of force by both sides and demanded an immediate end to hostilities. In Resolution 1226 (1999) it expressed grave concern over the risk of armed conflict.<sup>15</sup> It now called on Eritrea to accept the *Framework Agreement*, thus to some extent abandoning its neutral stance. Next, Resolution 1227 (1999) condemned the recourse to force by Ethiopia and Eritrea, demanded an immediate end to the hostilities, stressed that the OAU *Framework Agreement* remained a viable and sound basis for a peaceful resolution of the conflict, and urged all states to end all sales of arms and munitions to both parties.<sup>16</sup>

Eritrea finally accepted the *Framework Agreement* on 27 February 1999 after suffering major military reverses. It also accepted the subsequent OAU proposal for Technical Arrangements to implement the *Framework Agreement*. However, Ethiopia now refused to proceed; it demanded the return of all its territories and that Eritrea declare its recognition of Ethiopia's sovereignty over contested territories.<sup>17</sup> The *Framework Agreement* was never signed.

Fighting escalated again in May 2000; each side accused the other of reigniting the conflict. Ethiopian troops made major advances and captured not only Badme but substantial areas of Eritrean territory.<sup>18</sup> The Security Council now imposed an arms embargo on both states under Chapter VII.<sup>19</sup> The debate leading up to the adoption of this resolution was not public, but there are indications that some states at this time held Ethiopia responsible for the continuation of the conflict. Ethiopia said in a letter

<sup>11</sup> UN Doc. S/1998/1223, 28 Dec. 1998.

<sup>12</sup> UNYB (1998), at 146.

<sup>13</sup> UN Doc. S/1998/1223, 28 Dec. 1998, Annex at page 25; UNYB (1998) 149.

<sup>14</sup> UNYB (1999), at 130–138.

<sup>15</sup> 29 Jan. 1999 (passed unanimously).

<sup>16</sup> 10 Feb. 1999 (passed unanimously).

<sup>17</sup> UNYB (1999) 130, at 135–137.

<sup>18</sup> UNYB (2000), at 167.

<sup>19</sup> SC Res. 1298, 17 May 2000 (passed unanimously).

to the President of the Security Council that 'the expected Security Council resolution imposing an arms embargo on Ethiopia was adopted by the Council yesterday on 17 May. Though ostensibly aimed also at the aggressor country, Eritrea, the intent and objective of the initiators of the resolution is obviously Ethiopia. The USA and the UK who had wanted an even harsher punishment to be meted out on Ethiopia, did not succeed.'<sup>20</sup> Ethiopia complained that the Security Council had not deemed the situation to be a threat to regional peace and security when the aggression by Eritrea was committed, but now that Eritrea 'might not be able to manage to succeed to continue refusing to reverse this aggression', the Security Council found the situation serious enough to fall under Chapter VII. Ethiopia condemned the resolution as unjust and unfair.<sup>21</sup>

A ceasefire Agreement was finally reached in June 2000.<sup>22</sup> The 'senseless war' had lasted two years and involved the deaths of 70,000 soldiers and the displacement of over a million people. Drought and famine had worsened the situation; government spending had been massively diverted to military ends. A UN peace-keeping mission (UNMEE) was now established to monitor the ceasefire and to assist in the demarcation process.<sup>23</sup> It was deployed in a 25 kilometre buffer zone, the Temporary Security Zone (TSZ), which was situated totally within Eritrean territory.

A *Comprehensive Peace Agreement* was signed by Ethiopia and Eritrea on 12 December 2000 (the *Algiers Agreement*).<sup>24</sup> This provided for the establishment of three dispute settlement bodies. Article 3 provided for the establishment of an independent body under OAU auspices to carry out an investigation 'to determine the origins of the conflict'; in fact this body was never established. Article 4 created a neutral Boundary Commission to delimit and demarcate the boundary based on pertinent colonial treaties and applicable international law.<sup>25</sup> Article 5 set up a neutral Claims Commission to arbitrate claims for loss, damage or injury by one government against the other and by nationals of one party against the government of the other. The President of the Commission was Hans Van Houtte; Ethiopia appointed George Aldrich and James Paul; Eritrea appointed Lucy Reed and John Crook.

This Claims Commission has delivered many awards, on treatment of prisoners and civilians, aerial bombardment, interference with pensions, and so on. The Partial Award on Ethiopia's *ius ad bellum* claims marks a dramatic and controversial step beyond such questions of responsibility for violations of international humanitarian law and other rules of international law committed during the conflict into a totally

<sup>20</sup> UN Doc. S/2000/448, 18 May 2000.

<sup>21</sup> UNYB (2000), at 170.

<sup>22</sup> *Ibid.*, at 173.

<sup>23</sup> SC Res. 1312, passed unanimously; UN Doc. S/2003/257, 6 March 2003, Progress Report of the Secretary-General on Ethiopia and Eritrea, containing the Seventh Report of the Eritrea-Ethiopia Boundary Commission.

<sup>24</sup> UN Doc. S/2000/1183, 13 Dec. 2000.

<sup>25</sup> The arbitrators were Elihu Lauterpacht, Arthur Watts, Michael Reisman, Stephen Schwebel and Bola Adesumbo Ajibola.

different area of international law. It is open to serious criticisms: that the Claims Commission exceeded its jurisdiction, that it showed no respect for the Delimitation Decision of the Boundary Commission, that its decision on the law on the use of force was inadequate, and that there was insufficient discussion of the proper approach to the evidence.

### 3 The Decision on Jurisdiction

The first and most important criticism that may be made of the Partial Award on the *ius ad bellum* claims is that the Claims Commission lacked jurisdiction to go into the difficult issue of responsibility for the start of the war and that it should not have decided the case. The tribunal was set up under the *Algiers Agreement* (2000), following the earlier OAU *Framework Agreement*. Article 5(1) of the *Algiers Agreement* dealt with the jurisdiction of the Claims Commission. This provides:

Consistent with the Framework Agreement, in which the parties commit themselves to addressing the negative socio-economic impact of the crisis on the civilian population, including the impact on those persons who have been deported, a neutral Claims Commission shall be established. The mandate of the Commission is therefore to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law. The 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.

Thus it seems clear that the Claims Commission's powers were designed to cover claims for violations of international humanitarian law or other violations of international law committed during the conflict. There is no suggestion in Article 5 that its jurisdiction would extend to an examination of responsibility for the start of the war.

However, in the case under consideration Ethiopia claimed that Eritrea was responsible for the loss, damage and injury suffered by the Claimant and its nationals as a result of the use of force in violations of the rules of international law regulating the resort to force, the *ius ad bellum*, in May and June 1998. The claimant requested monetary compensation. In this case Ethiopia claimed that Eritrea was guilty of starting the 1998–2000 war between the two states, and was responsible not only for its initial limited use of force near Badme, but also for launching a full-scale invasion of Ethiopia at many points along the border. It also apparently argued that Eritrea was therefore responsible, not merely for the damage caused by the relatively limited use of force in 1998, but for the whole economic loss suffered by Ethiopia because of the war. In Claim 7 for *Economic Loss throughout Ethiopia* it contended that because Eritrea had initiated the 1998–2000 conflict it was liable for loss, damage and injury

suffered by Ethiopia as a result of the use of force.<sup>26</sup> Ethiopia's general contention was that Eritrea was legally required to provide compensation for wartime injury to Ethiopia's economy resulting from Eritrea's violation of the *ius ad bellum*. These claims included loss to Ethiopia's national airline from loss of revenue resulting from the disruption of flights, bad debt losses and so on. Ethiopia also alleged other forms of large-scale economic damage stemming from the conflict: loss of, or harm to, international import and export tax, tourism, development assistance, interruption or suspension of road rehabilitation projects, loss of significant tax revenues, decline of foreign and domestic investment, and reconstruction and rehabilitation expenses.

The Claims Commission itself acknowledged in the *ius ad bellum* case that 'upon first reading, the last sentence of Article 5 might well be thought to exclude the Commission's jurisdiction over rules of international law regulating the use of force'.<sup>27</sup> This sentence says: 'The 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.' But the Commission nevertheless decided that Article 5 of the Agreement should be interpreted to allow *ius ad bellum* claims. This was because 'at an early stage of the proceedings, the Parties agreed upon an interpretation of that sentence limiting it to claims *solely* for costs of the enumerated activities' and the Commission agreed to respect that 2001 interpretation.<sup>28</sup> This passage in the Award is rather obscure, the agreement quoted is not unequivocal and the conclusion drawn is not logically necessary. The sentence quoted *excludes* certain claims, but it certainly does not seem to indicate that the parties envisaged that the Commission would have jurisdiction to decide *ius ad bellum* claims. It does not follow from the 2001 agreement between the parties – that the Commission had no jurisdiction over claims for costs of the enumerated activities – that the phrase 'other violations of international law' should therefore be interpreted to include claims for responsibility for starting the war. The Commission nevertheless concluded without further

<sup>26</sup> In its Partial Award on Claim 7 the Claims Commission noted that it had determined in the *Ius ad bellum* case that 'the scope of damages for which the Respondent is liable because of its violation of the *ius ad bellum* will be determined in the damages phase of these proceedings'. Para. 19 of the *Ius ad bellum* case had provided that the Commission would request further briefing in the damages phase concerning the scope of damages for which Eritrea was liable by reason of that attack in addition to those damages following from the Commission's other Partial Awards. Therefore the Commission in the Economic Loss claim found that Ethiopia's claims for economic damages allegedly suffered as the legal consequence of Eritrea's violation of the *ius ad bellum* in May 1998 were not admissible at this stage, available at <http://www.pca-cpa.org>.

<sup>27</sup> *Ius ad bellum* case, at para 5.

<sup>28</sup> This was recorded in the Claims Commission's Letter to the parties of 24 July 2001. The Commission quotes the relevant agreement in a footnote: '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 intending 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.'

explanation that ‘consequently’ it had jurisdiction over Ethiopia’s *ius ad bellum* claims.<sup>29</sup>

More important, Article 3 of the *Algiers Agreement* assigned the investigation of the outbreak of the conflict to another body. This provided:

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 investigation will be carried out by an independent impartial body appointed by the Secretary General of the OAU, in consultation with the Secretary General of the United Nations and the two parties.

Eritrea argued that this meant that the Claims Commission had no jurisdiction to entertain Ethiopia’s *ius ad bellum* claims because this issue had been assigned to another body. How did the Claims Commission get round this argument about the limits on its jurisdiction? It dealt with jurisdiction in three short paragraphs. First, the Commission asserted that the independent body had never been constituted under Article 3; it seemed to conclude from this that therefore it could decide the issue. Again this seems an unjustified and illogical conclusion.

Moreover, the Commission said that the terms ‘origins of the conflict’ and ‘misunderstanding between the parties regarding their common border’ were not the same as the legal issues posed by Ethiopia: they would certainly not have answered the question of the *legality* of Eritrea’s use of force; the *factual* inquiries called for by Article 3 were largely different from those used in assessing Ethiopia’s claims under Article 5. Article 3 was carefully drafted to direct the impartial body to inquire into matters of fact, not to make any determinations of law. The Claims Commission was the only body assigned by the Agreement with the duty of deciding claims of liability for violations of international law. Again it does not follow from the fact that the Article 3 body was assigned to decide issues of fact rather than of law that therefore the Claims Commission should have jurisdiction to decide on responsibility for violations of *ius ad bellum*. It is true that the terms of Article 3 are cautious and that they do not provide for the determination of responsibility for starting the war; they do not expressly allow the independent body to assign legal responsibility. But it does not follow that the Claims Commission should assert jurisdiction over this issue.

As Eritrea argued, it is also open to question how far the Claims Commission would be able to attribute legal liability for starting the conflict without a prior factual inquiry by the independent body under Article 3. Decision Number 1 on *The Commission’s Mandate/Temporal Scope of Jurisdiction* seemed to offer some confirmation of this.<sup>30</sup> This said:

<sup>29</sup> Eritrea’s own claims for ‘other violations of international law’ – that is for violation of international law other than international humanitarian law – also made it more difficult for it to base its jurisdictional arguments on Article 5 alone: Final Award *Pensions, Eritrea Claims* 15, 19, 23; Partial Award *Eritrea Diplomatic Claims*, Claim 20, available at <http://www.pca-cpa.org>.

<sup>30</sup> August 2001, available at <http://www.pca-cpa.org>.

Moreover, the Commission's mandate under Article 5 must be construed so as to be in harmony with the overall institutional structure established by the Agreement. In this regard, the Parties gave two other institutions clear and expansive mandates regarding events that occurred before the outbreak of the armed conflict. It is difficult to see how this Commission could inquire into and pass judgment regarding events prior to 6 May 1998 without running afoul of the mandates of these other bodies.

However, there is in the Partial Award on the *ius ad bellum* claims little sign of any respect for the division of functions.

Moreover, it seems inconceivable that, if the parties had wanted the Claims Commission they set up under Article 5 to make a decision on the sensitive and important question of *ius ad bellum* and responsibility for starting the war, they would have appointed the arbitrators they did. I hope it is not invidious to point out that the main area of expertise of a majority of the arbitrators is in private international law and international commercial arbitration, rather than in the field of *ius ad bellum*.

Nevertheless, the Claims Commission took a wide view of its jurisdiction; it was thus faced with the sensitive issues raised by Ethiopia's claims. It showed no apprehension or hesitation in embarking on this difficult task, a task that the Security Council had avoided. In undertaking this task the Claims Commission showed little awareness of relevant decisions of the International Court of Justice or of doctrinal debates. Most seriously, it showed little respect for the award of the Boundary Commission.

#### 4 The Eritrea-Ethiopia Boundary Commission

The Boundary Commission had issued its Decision on Delimitation on 13 April 2002; it delimited the three zones – west, central and east – of the boundary along the lines of the three applicable colonial treaties.<sup>31</sup> The result brought some success for Ethiopia and some for Eritrea. Of greatest relevance here, the Boundary Commission found that a large part of the contested western border sector belonged to Eritrea; this part of its award has proved extremely controversial. Both the parties initially accepted the Decision on Delimitation as final and binding.<sup>32</sup> The Boundary Commission's mandate required it to proceed next to the demarcation of the border on the ground, but problems soon emerged. The UN Secretary-General's reports give the story of the aftermath of the binding award.<sup>33</sup>

The first sign of trouble was that Ethiopia did not allow preparatory work for the demarcation to be undertaken within the territory under its control.<sup>34</sup> It indicated its doubts about the Decision when on 13 May 2002 it filed a *Request for Interpretation, Correction and Consultation*, which amounted to a substantive challenge to the

<sup>31</sup> 2002 ILM 1057; UN Doc. S/2002/423, 15 April 2002.

<sup>32</sup> UN Doc. S/2002/744 at para. 3, 10 July 2002. Report of the Secretary-General on Ethiopia and Eritrea, containing the Fifth Report of the Eritrea-Ethiopia Boundary Commission.

<sup>33</sup> See, most recently, UN Doc. S/2006/1, 3 Jan. 2006, Report of the Secretary-General on Ethiopia and Eritrea; UN Doc. S/2006/140, 6 March 2006, Report of the Secretary-General on Ethiopia and Eritrea.

<sup>34</sup> Fifth Report of the Eritrea-Ethiopia Boundary Commission, *supra* note 32, at para 4.

Commission's Decision. The Commission found this request inadmissible.<sup>35</sup> Ethiopian resistance continued, and the Boundary Commission expressed its concern.<sup>36</sup> Under the terms of the arbitration agreement the Commission was to complete a map on which the border would be marked. The parties were to comment on the Commission's map; these comments were meant to be of a technical nature. This map showed Badme on the Eritrean side of the border in the western sector. The original *Delimitation Decision* of 2002 had set out the map coordinates, but had not expressly dealt with Badme, the site of the outbreak of fighting in 1998.<sup>37</sup> Ethiopia now submitted 141 pages of Comments, going far beyond comments on the map; it was attempting to reopen the substance of the Delimitation Decision, notwithstanding its professed acceptance of that decision. It said,

Ethiopia has understood that this line would be subject to refinement during the demarcation process when the effective administration of the Parties could be determined in the field. It was on this basis that the Government accepted the April decision and it is on this basis only that the Government continues to do so.<sup>38</sup>

In March 2003 the Boundary Commission offered the parties certain *Observations* on its approach to the demarcation phase of its work. It now expressly indicated that Badme was in Eritrean territory and repeated its rejection of Ethiopian claims that the boundary established by the 1902 colonial treaty had been overridden by other factors, including *effectivités* (administrative acts) on the ground in the western sector.<sup>39</sup> The Commission confirmed that no developments after 1935 had altered the boundary under the 1902 treaty.<sup>40</sup> Ethiopia had not shown sufficient governmental activity to give it title to the Badme area. In response Ethiopia adopted a more openly hostile position; in a letter of 19 September 2003 to the UN Secretary-General it said that the Boundary Commission decision on Badme and also on parts of the Central Sector was 'totally illegal, unjust and irresponsible'.<sup>41</sup>

The demarcation process could not proceed. According to the Boundary Commission's Report of February 2005, Ethiopia was not prepared to allow demarcation to continue in the manner laid down in the demarcation directions and in accordance with the timeline set by the Commission. It now insisted on prior dialogue, but had

<sup>35</sup> Sixth Report of the Eritrea-Ethiopia Boundary Commission at para. 3, contained in UN Doc. S/2002/977, 30 August 2002, Report of the Secretary-General on Ethiopia and Eritrea.

<sup>36</sup> Preamble of the Eighth Report of the Eritrea-Ethiopia Boundary Commission, contained in UN Doc. S/2003/257, 6 March 2003, Report of the Secretary-General on Ethiopia and Eritrea.

<sup>37</sup> Delimitation Decision, 2002 ILM 1057; UN Doc. S/2002/423, 15 April 2002.

<sup>38</sup> Eighth Report of the Eritrea-Ethiopia Boundary Commission, at para. 5, contained in UN Doc. S/2003/257, 6 March 2003, Report of the Secretary-General on Ethiopia and Eritrea.

<sup>39</sup> *Observations*, in the Progress Report of the Secretary-General on Ethiopia and Eritrea, Addendum, S/2003/257/Add.1, 31 March 2003; 2003 ILM 1010.

<sup>40</sup> See also Delimitation Decision at para. 5.92–5.95, 2002 ILM 1057; UN Doc. S/2002/423, 15 April 2002.

<sup>41</sup> Eleventh Report of the Eritrea-Ethiopia Boundary Commission, Appendix 1, contained in UN Doc. S/2003/1186, 19 Dec. 2003, Progress Report of the Secretary-General on Ethiopia and Eritrea. Ethiopia repeated its attack on the Boundary Commission's decision in a letter of 16 October 2003 to the UN Secretary-General, available at [http://www.un.int/ethiopia/eth03\\_pgs/fs\\_mst\\_pr03.htm](http://www.un.int/ethiopia/eth03_pgs/fs_mst_pr03.htm).

rejected the opportunity for such dialogue within the framework of the demarcation process. In the assessment of the Commission this was the latest in a series of obstructive actions taken since the summer of 2002, which belied the frequently professed acceptance by Ethiopia of the delimitation decision. Eritrea was not prepared to accept the proposal made by Ethiopia for the completion of demarcation in the Eastern Sector unless there was at the same time a clear assurance from Ethiopia that the rest of the boundary would also be demarcated.<sup>42</sup> The Boundary Commission accordingly suspended its work in March 2005.

The Security Council has repeatedly called for cooperation by Ethiopia.<sup>43</sup> In Resolution 1531 of 12 March 2004 it expressly indicated concern about Ethiopia's rejection of significant parts of the Boundary Commission's decision, and its current lack of cooperation with the Boundary Commission. Subsequently, it urged Ethiopia to show the political will to reaffirm unequivocally its acceptance of the Boundary Commission's decision, and take the necessary steps to enable the Commission to demarcate the border without delay.<sup>44</sup> And in Resolutions 1586 (2005) and 1622 (2005) it called on Ethiopia to start the implementation of demarcation without preconditions.

In response to Ethiopia's failure to accept the demarcation of the boundary, Eritrea limited its cooperation with UNMEE. It also refused to cooperate with the UN Secretary-General's Special Envoy, appointed as from January 2004 to help 'overcome the impasse', as it claimed that this appointment undermined the Boundary Commission's decisions and clouded a clear issue, i.e., Ethiopia's refusal to implement demarcation.<sup>45</sup> In October 2005 it banned helicopter flights by UNMEE over Eritrea; this seriously impeded all operations of the mission.<sup>46</sup> In December 2005 it asked US, Canadian and European peacekeepers to withdraw from UNMEE.<sup>47</sup> In response to Eritrea's behaviour, the Security Council began to use somewhat stronger language than it had in response to Ethiopia's refusal to implement the binding award by the Boundary Commission.

In Resolution 1640 (2005) it deeply deplored Eritrea's continued imposition of restrictions on the freedom of movement of UNMEE and demanded that it reverse its October 2005 decision to ban UNMEE helicopter flights. It also called on both parties to show maximum restraint and to refrain from any threat or use of force against each other and demanded that both parties return to the 16 December 2004 levels of deployment. However, it also demanded that Ethiopia accept the final and binding decision of the Boundary Commission. This resolution was not passed under Chapter VII,

<sup>42</sup> Sixteenth Report of the Eritrea-Ethiopia Boundary Commission at paragraph 6, contained in UN Doc. S/2005/142, 7 March 2005, Report of the Secretary-General. See also, UN Doc. S/2003/1186, 19 Dec. 2003, containing the Eleventh Report of the Eritrea-Ethiopia Boundary Commission.

<sup>43</sup> Resolutions 1430 (2002), 1466 (2003), 1507 (2003), 1531 (2004).

<sup>44</sup> Res. 1560 (2004).

<sup>45</sup> UN Doc. S/2004/116, 13 Feb. 2004.

<sup>46</sup> Report of the Secretary-General on Ethiopia and Eritrea, UN Doc. S/2006/1 at para. 2, 3 Jan. 2006.

<sup>47</sup> *Ibid.*, at paras 8–9. On past attempts by the host state to have a say in the composition of a peacekeeping force, see Gray, 'Host State Consent and UN Peacekeeping in Yugoslavia', *Duke Journal of Comparative and International Law* (1996) 241.

but it did say that the continuation of the situation would constitute a threat to international peace and security. The Security Council threatened sanctions, but only in the event of non-compliance with its demands on redeployment of troops and the reversal of Eritrea's ban on helicopters; it did not threaten sanctions with regard to the implementation of the decision of the Boundary Commission. Eritrea's (unwise and counter-productive) behaviour has allowed the Security Council to be distracted from the main issue, the acceptance of the binding decision of the Boundary Commission and the demarcation of boundary.

Thus, it is clear that at the time of the Claims Commission's *ius ad bellum* case in 2005, the *Delimitation Decision* of the Boundary Commission was under threat. Moreover there had been a steady increase in Ethiopian troops on the boundary since December 2004; seven divisions had been moved to near the Temporary Security Zone (TSZ).<sup>48</sup> The Security Council expressed concern in the preamble to Resolution 1586 (2005) at the recent high concentration of Ethiopian troops in the areas adjacent to the TSZ, and called on both parties to refrain from any increase of troops in those areas.<sup>49</sup>

## 5 The Claims Commission and Its Attitude to the Boundary Commission

However, the Claims Commission in the *ius ad bellum* case paid very little respect to the *Delimitation Decision* of the Boundary Commission. Very surprisingly it made only two brief references to its award, and one of those references was to dismiss the significance of this boundary, and to give greater weight to the line to which forces were obligated to withdraw in 2000 under the June ceasefire Agreement.<sup>50</sup>

If the Claims Commission had given respect to the *Delimitation Decision* of the Boundary Commission, it could have said that it was now clear, following the Boundary Commission's Decision, that the disputed territory of the town of Badme belonged to Eritrea. Therefore, Ethiopia's prior acts of administration were illegal. Ethiopia accordingly had no right to maintain police, militia or troops in Eritrea or to use force to perpetuate its illegal occupation or to seize further Eritrean territory, and Eritrea could not be held liable for forcible actions against Ethiopian forces on its own territory. Ethiopia's claim that Eritrea had initiated the conflict by its actions in Badme could be dismissed.

Instead, the Claims Commission chose to give greater significance to the line of withdrawal established after the conflict by the June 2000 ceasefire Agreement, the

<sup>48</sup> Report of the Secretary-General on Ethiopia and Eritrea, UN Doc. S/2005/142, 7 March 2005. On the question of civilian settlement in the disputed area after the boundary decision, see Eritrea-Ethiopia Boundary Commission, Order made pursuant to Article 20 and Article 27(1) of the Commission's Rules of Procedure, 17 July 2002, <http://www.pca-cpa.org>.

<sup>49</sup> Ethiopia withdrew its troops a year later. However, the UN Secretary-General reported that there were still problems at the start of 2006, Progress Report of the Secretary-General, UN Doc. S/2006/1 at paras 2–4.

<sup>50</sup> *Ius ad bellum* case, at para. 15.

line to which Eritrean forces were obliged to withdraw. This approach showed that Eritrea's reluctance to agree to this ceasefire line had been well justified. Its fears that this line would be given legal significance were realized. Even though the ceasefire line was said by the OAU to be 'without prejudice to final boundary', it nevertheless proved crucial in the *ius ad bellum* claims. Thus the Claims Commission gave decisive importance to a line which had not been drawn at the time of the conflict and which was later found not to be the international boundary.

In reply to Ethiopia's *ius ad bellum* claims, Eritrea had argued (citing the decision of the Boundary Commission) 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. The Claims Commission said that it could not accept the legal position underlying this argument – 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 was true that the boundary was never marked and that the parties had different conceptions of the boundary's location. However, the practice of states and the writings of eminent publicists showed that

self-defence cannot be invoked to settle territorial disputes. In that connection, the Commission notes that border disputes are so common that any exception to the prohibition of the threat of use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law.<sup>51</sup>

However, this superficially plausible reasoning is unconvincing. The Commission briefly invoked the General Assembly's *Declaration on Friendly Relations* and the writings of eminent publicists in support of its position that 'self-defence cannot be invoked to settle territorial disputes', but it did not enter into any further discussion of this difficult area of the law. It is true that the use of force in self-defence does not give title to territory, and in that sense 'self-defence cannot be invoked to settle territorial disputes'. Thus the UN does not accept Israel's legal title to the West Bank and Gaza, even if it was acting in self-defence in 1967. But Eritrea was not arguing that its use of force gave title to the disputed territory. Its position was that it had title on the basis of colonial treaties and that it was using force to defend its territory against Ethiopian occupation/attack.

The Claims Commission's view was in fact based on a selective reading of the Declaration, for this says not only that '[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', but also that

[e]very State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State. . . Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect.

Eritrea was required by the Claims Commission to respect a line which was not an international boundary, nor even a ceasefire line at the time of the use of force, but

<sup>51</sup> *Ius ad bellum* case, at para. 10 (emphasis added).

was merely based on the presence of Ethiopia's (illegal) administration in what turned out to be Eritrean territory.<sup>52</sup> Ethiopia's acts of administration had not been enough to give Ethiopia title to Badme but did, according to the Commission, give it the right to use force. The Commission focused on Ethiopian allegations about the use of force on 12 May and did not adequately consider whether it was in fact Ethiopia which was illegally using force to occupy Eritrea's territory.

In justification of its choice of the relevant boundary in the *ius ad bellum* case, the Claims Commission referred to the approach it had taken earlier in its Partial Award on Ethiopia's *Central Front* claims on humanitarian law. There it had held that 'the responsibility of a State for all acts contrary to international humanitarian law committed by members of its armed forces is clear wherever those acts take place'.<sup>53</sup> Under customary international humanitarian law, damage unlawfully caused by one party to an international armed conflict to persons or property within territory that was *peacefully administered* by the other party to that conflict prior to the outbreak of the conflict is damage for which the party causing the damage should be responsible and such responsibility is not affected by where the boundary between them may subsequently be determined to be. The alternative could deny vulnerable persons in disputed areas the important protections provided by international humanitarian law.

In the *Central Front* case the Claims Commission explained its decision not to treat the international boundary line decided by the Boundary Commission as governing the applicability of humanitarian law; it said that the Boundary Commission was concerned to determine the boundary as of the independence of Eritrea in 1993, and not the *de facto* line between effective administrations in 1998. Thus the Boundary Commission was not purporting to reach any conclusions as to the areas effectively administered by either party in May 1998, when the armed conflict between them began. The best available evidence of the areas effectively administered by Ethiopia in early May 1998 was that line to which they were obligated to withdraw in June 2000. The Commission explained that it must hold Eritrea liable for violations of international humanitarian law committed within such territory.<sup>54</sup> This seems in line with the philosophy behind humanitarian law. But it does not follow, as the Commission asserted in the *ius ad bellum* case, that the same principle governs the application of *ius ad bellum*.<sup>55</sup> Entirely different considerations apply in the two types of cases.

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. The Claims Commission may be criticized because it has not

<sup>52</sup> The situation is thus different from Argentina's invasion of the Falklands (1982) and Iraq's invasion of Kuwait (1990) where the use of force was condemned by the UN Security Council because it violated an international boundary, even if that boundary was contested. A comparison might be made between Ethiopia's occupation of Eritrean territory and South Africa's illegal occupation of Namibia: South Africa's claim to use force in self-defence against frontline states was rejected by many on the basis that it had no title to the Namibian territory it was defending.

<sup>53</sup> Partial Award *Central Front* Ethiopia's Claim 2, at para. 29, 2004 ILM 1275.

<sup>54</sup> *Ibid.*, at paras 24–31.

<sup>55</sup> *Ius ad bellum* case, at para. 15.

given any value to consistency between international tribunals, a question of increasing importance in a time of proliferation. It could, and should, have avoided this undesirable result by refusing jurisdiction.

## **6 Land and Maritime Boundary between *Cameroon v. Nigeria***

Moreover, the approach of the Claims Commission in this case is inconsistent with the far more cautious approach taken by the International Court of Justice in the *Cameroon v. Nigeria* case.<sup>56</sup> In that case the International Court of Justice was faced with a similar situation to that before the Claims Commission; *Cameroon v. Nigeria* was primarily a boundary case in which the central argument was whether colonial treaties had determined the boundary or whether subsequent administrative acts were decisive. Both sides also accused each other of the illegal use of force. Each claimed possession of the disputed territory and therefore accused the other of aggression for any use of force in, or military occupation of, that territory. Cameroon argued that Nigeria had deliberately set out on a policy of invasion and annexation; it had illegally used force to override Cameroon's title to territory. In particular, it illegally occupied the Bakassi Peninsula. Nigeria argued that there was a legitimate difference between the two states as to the location of the boundary. Therefore its use of force, if it had taken place in Cameroon's territory, was not an unlawful use of force but the result of reasonable mistake or honest belief. It had been in peaceful occupation of the Lake Chad region and of the Bakassi peninsula; it had used force only to resolve internal problems and in response to encroachment by Cameroon in self-defence. If it turned out that Cameroon was the lawful sovereign then Nigeria's use of force was reasonable mistake or honest belief. Thus Nigeria's arguments were much less radical than those of Ethiopia, which claimed that, even though the territory fought over in 1998 had turned out to belong to Eritrea, Ethiopia had nevertheless been entitled to use force in defence of that territory.

Cameroon's claims to the disputed land territory were largely accepted by the International Court of Justice, but its arguments on state responsibility for unlawful use of force were not successful. The International Court of Justice did not pronounce on the controversial issue as to whether Nigeria had illegally used force to invade and or occupy disputed areas; it avoided a decision on state responsibility and focused on title to territory. The Court was clearly anxious to avoid a decision on the use of force at the merits stage. The decision on the land boundary meant that Nigerian armed forces and administration were in place in areas determined by the Court to be Cameroonian territory (and also elsewhere Cameroonian forces were in areas determined to be Nigerian territory). The Court held that Nigeria was therefore under an obligation expeditiously and without condition to withdraw its forces. However, it did not order Nigeria to make guarantees of non-repetition; this would have involved a

<sup>56</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Reports (2002) 303.

finding of responsibility. The Court said that it could not envisage that the parties would not now respect the territorial sovereignty of the other party when the Court had determined the boundary in definitive and mandatory terms. The Court did not seek to ascertain whether Nigeria's responsibility had been engaged as a result of the occupation.<sup>57</sup>

The Claims Commission in the *ius ad bellum* case did not refer to this case or to the cautious approach of the International Court of Justice, let alone enter into any discussion of the proper role of arbitration tribunals in this area of the use of force.

## 7 Who Started the War?

On the controversial subject of the substance of international law on the use of force, the Claims Commission's reasoning again gives rise to concern. A crucial question in this case was: When did the conflict start? Was 12 May 1998 the start of the conflict and therefore of the whole war? As we have seen, there was a fundamental disagreement between the parties on this issue, with Ethiopia focusing on 12 May 1998 as the starting date, and Eritrea on events of July–August 1997 and earlier events in 1998. This was also the focus of Article 3 of the Algiers Agreement. However, in its *Decision Number 1: The Commission's Mandate/Temporal Scope of Jurisdiction*, the Commission said that the phrase 'related to the conflict' in Article 5 of the *Algiers Agreement* meant 'the armed conflict that began in May 1998'. Therefore Article 5(1) of the Algiers Agreement excluded claims arising before May 1998. Arguably, this choice of starting date prejudged the question of responsibility, or at least was unfavourable to Eritrea. It is open to question as to how far it was possible for the Commission to come to the *ius ad bellum* claims with an open mind after making this Decision.

The Claims Commission also pronounced on responsibility for various uses of force during the war in its earlier awards; it did so in passing and as if this had been universally accepted. Surely it would not have done so if it had thought that this could be an issue that could come before it for decision in another case? Thus in its two Partial Awards on *Central Front* claims decided in April 2004 the Commission included a statement of events.<sup>58</sup> According to these, the conflict in the Central Zone began in May 1998 when 'in mid-May Eritrean forces attacked at a number of points'.<sup>59</sup>

Ethiopia and Eritrea disagreed over the facts and over the legal characterization of a series of clashes. The total award of the Claims Commission in this case was only six pages, with one further page for the dispositif. 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

<sup>57</sup> Judge ad hoc Mbaye in his Separate Opinion was critical of the Court's approach. The Court had determined that Nigerian *effectivités* in the territory of Cameroon were *contra legem*, that is, illegal acts. Judge Mbaye said that the Court should have held that Nigeria had acted illegally. The Court seemed anxious to avoid finding responsibility; it did not even stress the duty to settle territorial disputes peacefully.

<sup>58</sup> Partial Award *Central Front* Eritrean claims 2, 4, 6, 7, 8, 22 (28 April 2004), at para. 30 (2004 ILM 1249); Partial Award *Central Front* Ethiopian claim 2 (28 April 2004), at para. 24–26 (2004 ILM 1275).

<sup>59</sup> The Claims Commission in Partial Award *Central Front*, Ethiopia's Claim 2 (at para. 26) went on to describe the Ethiopian offensive of May 2000 when it penetrated deep into Eritrean territory.

cursory way. Many extremely controversial legal issues were inevitably glossed over. And the Claims Commission decided on only one small part of the conflict, on what it saw as the initial attack. Ethiopia had asked it to decide that Eritrea was responsible for the initial attack beginning on 12 May and also for carrying out a programme of pre-planned and coordinated armed attacks in multiple locations in violation of international law. The Commission rejected the second part of the claim for lack of evidence, but it did say: 'What is clear is that, once the armed attack in the Badme area occurred and Ethiopia decided to act in self-defence, a war resulted that proved impossible to restrict to the areas where that initial attack was made.'<sup>60</sup> Further questions on state responsibility for unlawful use of force also arose out of the protracted conflict. Even if Ethiopia's initial claim to be acting in self-defence were justified, how long could this justification for its use of force continue? The Claims Commission in two earlier cases had said that in May 2000 Ethiopia launched a general offensive on the Central Front that drove all Eritrean forces out of areas previously administered by Ethiopia and took Ethiopian forces deep into Eritrea. Ethiopian forces remained in Eritrean territory until late February 2001.<sup>61</sup> These events give rise to questions as to whether there is any continuing right of self-defence once a state has recovered what it claims as its territory. Both Ethiopia and Eritrea invoked self-defence repeatedly throughout the conflict, not just once at the start of the conflict, thus indicating that they were concerned to justify successive operations.<sup>62</sup>

Because Eritrea was contesting the Claims Commission's jurisdiction to decide the *ius ad bellum* claims, it may be that it chose not to counter-claim on these issues in order to maintain its opposition to the Commission's jurisdiction.<sup>63</sup> Was it suitable for an arbitration tribunal to decide this type of question of responsibility for violation of Article 2(4)? And to decide on responsibility for one part of a longer conflict? The Claims Commission showed no hesitation in asserting its jurisdiction to decide an issue on which the Security Council had made no decision. The provision for another body to investigate the origins of the conflict under Article 3 of the *Algiers Agreement*, even if it did not mean that the Claims Commission had no jurisdiction over *ius ad bellum* claims, might nevertheless have indicated caution in the interpretation of the constituent instrument.

### ***A The Claims Commission's Approach to the Evidence***

The Claims Commission gave no explanation of its approach to the evidence in this case. The International Court of Justice has faced difficulties with regard to evidence

<sup>60</sup> *Ius ad bellum* case, at para. 19.

<sup>61</sup> Partial Award *Central Front*, Ethiopia's Claim 2, at para. 26.

<sup>62</sup> *UNYB* (1998), at 145; *UNYB* (1999), at 130; *UNYB* (2000), at 167. In both these regards this is similar to the 1980–1988 Iran and Iraq War; see Gray, 'The British Position with Regard to the Gulf Conflict', 37 *ICLQ* (1988) 420; 40 *ICLQ* (1991) 464.

<sup>63</sup> This contrasts with the approach taken by the USA in *Oil Platforms (Iran v. USA)*, ICJ Reports (2003), at 161, and by Nigeria in *Cameroon v Nigeria*: these states first challenged the jurisdiction of the International Court of Justice to decide issues concerning the use of force, but also themselves made counterclaims involving such claims, see Gray, 'The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after *Nicaragua*', 14 *EJIL* (2003) 867, at 877.

in use of force cases, and has been criticized for its failure adequately to address this question or that of the burden of proof. But it developed a consistent and cautious approach in *Nicaragua v. USA*<sup>64</sup> and *Armed Activities on the Territory of the Congo (DRC v. Uganda)*.<sup>65</sup> In comparison, the Claims Commission in the *ius ad bellum* claims completely ignored this issue.

This contrasts strikingly with its earlier awards where there was some, albeit limited, discussion of this issue: ‘Incompatible views of the relevant facts may perhaps be considered not surprising in the light of the confusion and uncertainty characteristic of military operations and the polarizing effects of warfare.’<sup>66</sup> The Claims Commission noted the obvious difficulties it faced when each party presents large numbers of sworn declarations by witnesses asserting facts that disagree completely with the facts asserted in large numbers of sworn declarations by witnesses of the other party. ‘Particularly in light of the gravity of some of the claims advanced, the Commission will require clear and convincing evidence in support of its findings.’<sup>67</sup> This brief comment may not seem particularly illuminating, but there is no mention at all of this subject in the Partial Award on *ius ad bellum* claims, when the Commission might have been expected to address the special problems raised by the use of force or at least to refer to the International Court of Justice’s jurisprudence on this difficult question. This lack of any express discussion of the evidence supporting its findings may be seen in the Commission’s Award below.<sup>68</sup>

## B *The Law of Self-defence*

The Commission’s treatment of the law on self-defence was somewhat disappointing, whatever one’s view of its position on the merits. At a relatively late stage in the case – on the last day of the hearing – Eritrea had invoked self-defence against an armed attack as a justification for its use of force.<sup>69</sup> The Commission treated this as a simple question and its ruling was extremely brief. It is true that the type of self-defence invoked in this conflict between Ethiopia and Eritrea is in theory the most straightforward form of self-defence, that invoked by one state in response to a cross-border attack by regular forces of another state. However, the establishment of the facts in such a situation is often far from straightforward. In this particular case, neither the Security Council nor the OAU attributed responsibility; they did not decide which state was the aggressor and which the victim. And even in this relatively simple type of cross-border use of force, doctrinal questions arise. The tribunal did not go into these. It said simply:

<sup>64</sup> *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986) 14, at paras 59–74.

<sup>65</sup> ICJ Reports (2005), at paras 57–61.

<sup>66</sup> Partial Award, Ethiopia’s *Central Front* claim 2 at paras 5–7, 21; *Western Front* Eritrea claims at para. 5; *Western and Eastern Front*, Ethiopia claims 1, 3 at para. 6.

<sup>67</sup> For example, Partial Award, Ethiopia’s *Central Front* claim 2 at para. 7.

<sup>68</sup> The Claims Commission did not give any evidence of this caution in its *ius ad bellum* award: see *infra* at 720–721.

<sup>69</sup> *Ius ad bellum* case, at para. 9.

As the text of Article 51 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 the purpose of the Charter. Eritrea did not report its use of 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.<sup>70</sup>

Every sentence of this section of the Award is open to question. And every sentence needs further elaboration. First, is it true that there must be an armed attack for a right to self-defence to arise? I have argued that this interpretation of Article 51 is the better position, but even those who support this position accept that it is far from uncontroversial.<sup>71</sup> There is an ongoing debate about the legality of anticipatory or pre-emptive self-defence. It may be that the Commission meant that the parties had argued on the basis that there had been an armed attack and had not actually invoked anticipatory self-defence. If so, the Commission should have made that clear, as the International Court of Justice had done in the *Nicaragua* case as well as in *Armed Activities in the Territory of the Congo (DRC v. Uganda)*, decided on the same day as the *ius ad bellum* claims.<sup>72</sup> It should have made clear whether it was making a categorical statement about the scope of self-defence or just pronouncing on the arguments of the parties.

Second, what is an armed attack? The Commission should also have discussed this question in greater depth; it is not satisfactory merely to say that localized border encounters do not constitute an armed attack. Eritrea had argued in its Statement of Defense that Ethiopia's own arguments admitted the presence of armed Ethiopians on the Eritrean side of the internationally recognized boundary line during the time in question. 'The entry of armed forces of one state into another state's territory, without permission, constitutes an armed attack even if shots are not fired and is therefore prohibited under international law.'<sup>73</sup> The presence of Ethiopian militia in Badme without the permission of the Eritrean government was thus an illegal armed attack. The Commission's adoption of the ceasefire line rather than the international boundary as decisive for determination of legality of use of force meant that it did not consider this argument. The Commission did not pay attention to the question of occupation of territory, it did not consider whether what it described as Ethiopia's 'peaceful administration' could in itself constitute a continuing armed attack or even aggression.<sup>74</sup>

<sup>70</sup> *Ibid.*, at para. 11.

<sup>71</sup> C. Gray, *International Law and the Use of Force* (2nd ed., 2004) at Ch. 4.

<sup>72</sup> *DRC v. Uganda*, ICJ Reports (2005), at para. 143. 'The Court recalls that Uganda has insisted in this case that operation "Safe Haven" was not a use of force against an anticipated attack. As was the case also in *Nicaragua*, "reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised" (ICJ Reports 1986, 103 para 194.) The Court there found that "accordingly it expresses no view on that issue." So it is in the present case.'

<sup>73</sup> Eritrea, Statement of Defense, 15 Dec. 2002, at para. 14.

<sup>74</sup> Cf. the decision of the ICJ in *DRC v. Uganda*, ICJ Reports (2005), at paras 172–173.

Eritrea had argued that Ethiopia's actions in 1997 were part of continuing aggression by Ethiopia against Eritrea. After the Second World War, Eritrea, which had been colonized by Italy in 1890, was not given its independence. Rather it was federated with Ethiopia. Ethiopia subsequently annexed Eritrea in 1962. Even after Eritrea finally gained independence in 1993 Eritrea accused Ethiopia of making claims to sovereignty over large parts of its territory and of using force and threats to pursue these claims. Eritrea also argued that Ethiopia had declared war on 13 May 1998.<sup>75</sup> The Claims Commission rejected this claim, but recorded that Ethiopia had demanded the unconditional and immediate withdrawal of Eritrean forces from 'Ethiopian' territory. Eritrea could therefore also have claimed that, given the history, Ethiopia violated the right of self-determination of Eritrea in continuing to occupy its territory in the Badme area and in demanding the withdrawal of Eritrean forces from what turned out to be its own territory.

Third, the Claims Commission said that Eritrea had failed to report any action in self-defence in May 1998 to the Security Council, as required by Article 51 of the UN Charter. The implication of the Commission's statement is that failure to report meant that Eritrea was not acting in self-defence, or at least was evidence that it did not believe that it was so acting. In contrast, the Court recorded that Ethiopia had notified the Security Council of its use of force under Article 51.<sup>76</sup> However, this question of the duty to report and the consequences of a failure to report called for further discussion. In response to Ethiopia's letter of 14 May, Eritrea had written a letter to the Security Council challenging Ethiopia's version of events in May 1998.<sup>77</sup> And on 3 June 1998 Eritrea wrote that it had in its communications to the Security Council

consistently refrained from publicizing these aggressive attacks in the past even while the Ethiopian government was boasting about the losses it had inflicted on the Eritrean army. The Government of Eritrea condemns Ethiopia's repetitive acts of aggression. And while affirming its legitimate right of self-defence, it again reiterates its firm conviction that the current crisis can only be resolved by peaceful and legal means.<sup>78</sup>

Thus it argued that it had earlier played down the significance of Ethiopia's attacks in the hopes of pursuing peaceful settlement.

This needs further discussion as the matter is one which has given rise to some controversy. The International Court of Justice in *Nicaragua* had held that 'the absence of a report may be one of the factors indicating whether the state in question was itself convinced that it was acting in self-defence'.<sup>79</sup> Thus the failure of the USA to report its use of force against Nicaragua as self-defence under Article 51 was evidence that it had not been acting in collective self-defence. Judge Schwebel in his Dissenting Opinion was critical of this approach.<sup>80</sup> Greig has argued persuasively that failure to report

<sup>75</sup> *Ius ad bellum* case, at para. 17.

<sup>76</sup> *Ibid.*

<sup>77</sup> UNYB (1998), at 145, UN Doc. S/1998/399, 15 May 1998.

<sup>78</sup> UN Doc. S/1998/459, 3 June 1998.

<sup>79</sup> *Nicaragua* case, at para. 235.

<sup>80</sup> *Ibid.*, at 347, paras 7, 221–230.

does not in itself demonstrate conclusively that a state is not acting in self-defence; it is a procedural requirement rather than a mandatory element of self-defence.<sup>81</sup> State practice since the decision in the *Nicaragua* case shows that states have been scrupulous in their reporting.<sup>82</sup> Thus the matter is controversial, but the Commission did not discuss it. It is interesting that in *DRC v Uganda* the International Court of Justice also did not take the opportunity to discuss the significance of a failure to report or even to reaffirm the position taken in the *Nicaragua* case. It said simply, 'the Court would first observe that in August and early September 1998 Uganda did not report to the Security Council events that it had regarded as requiring it to act in self-defence.'<sup>83</sup>

The Commission's Award continued: the parties had offered sharply different accounts as to the precise location of the incidents of 6 and 7 May 1998 and of the numbers and types of forces involved. However, the Commission said that it need not resolve these differences, because it was *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 was satisfied that these relatively minor incidents were not of a magnitude to constitute an armed attack by either state within the meaning of Article 51 of the UN Charter.

Again this is not an entirely adequate treatment of the controversial question of armed attack. The significance of 'minor incidents' may depend on the particular context. *Nicaragua* drew the distinction between armed attack and frontier incidents not of sufficient gravity to constitute an armed attack.<sup>84</sup> This distinction has been subjected to much criticism, but this criticism may not be entirely justified. The Court's comments on armed attack should be seen in their context of the Court's discussion of collective self-defence. It could be argued that the Court took a strict approach to the question of what constitutes an armed attack because it is important to limit third-party intervention in conflicts between two states and thus to set a relatively high threshold for armed attack in this context of collective self-defence.<sup>85</sup> The *Oil Platforms* case also held that an attack must be of a certain gravity to qualify as an armed attack giving the right of self-defence. The issue in this case was whether attacks on US vessels during the 1980–1988 Iran-Iraq war were serious enough to qualify as armed attacks justifying forcible response by the US against Iranian oil platforms; thus the context was one of US third-state intervention during the conflict between Iran and Iraq. Again there is a policy argument for a relatively high threshold for such intervention.<sup>86</sup>

However, it could be argued that different policy considerations apply in the current case. As mentioned above, since the context in the *ius ad bellum* claims is one of a contested boundary (and perhaps even one of occupation) then the use of force by

<sup>81</sup> Greig, 'Self-defence and the Security Council: What Does Article 51 Require?', 40 *ICLQ* (1991) 366.

<sup>82</sup> Gray, *supra* note 71, at 101–104.

<sup>83</sup> *DRC v. Uganda*, at para. 145.

<sup>84</sup> *Nicaragua* case, at para. 191.

<sup>85</sup> Gray, *supra* note 71, at 145–151.

<sup>86</sup> *Oil Platforms*, ICJ Reports (2003) 161, at paragraphs 51, 62.

Ethiopia should not be dismissed as mere frontier incidents. Border incidents in the context of a serious territorial dispute may be regarded as more significant. Nor did the Commission discuss the accumulation of events theory of armed attack, the theory that a series of minor incidents, each insufficient in itself to amount to an armed attack, might nevertheless taken cumulatively qualify. The International Court of Justice has given some support to this theory in recent cases.<sup>87</sup>

Generally the Claims Commission's approach to the evidence in the *ius ad bellum* case seems rather unreflective and the language of its reasoning seems prejudicial: 'The evidence showed that' on 12 May 1998 Eritrean armed forces *attacked* the town of Badme and several other border areas. (Even though the town of Badme was subsequently found by the Boundary Commission to belong to Eritrea.)

Although the evidence regarding the nature of Ethiopian troops 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-defence under the UN Charter. 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 would later 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.

Consequently the Commission held that Eritrea violated Article 2(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 and was liable to compensate Ethiopia for the damages caused by that violation of international law.

## 8 Conclusion

This Award has many troubling aspects. Despite strong countervailing technical and policy considerations, the Claims Commission asserted jurisdiction to hear Ethiopia's *ius ad bellum* claims. In so doing it did not consider the lack of express or unequivocal consent to its jurisdiction over this subject matter as an obstacle to its jurisdiction, or even as an indication that it should exercise caution in such an important case on the use of force. Judge Oda's arguments for a strict doctrine of dispute – that a bilateral treaty should not be interpreted as giving jurisdiction to the International Court of Justice over disputes (especially those involving the use of force) in the absence of clear consent – did not persuade the Court, the principal judicial organ of the UN, that it had no role in cases concerning the use of force.<sup>88</sup> However, Judge Oda's arguments for unequivocal consent to submit a particular dispute to a tribunal are more compelling

<sup>87</sup> *Oil Platforms*, ICJ Reports (2003) 161, at para. 64; *DRC v. Uganda*, ICJ Reports (2005), at para. 146.

<sup>88</sup> See, e.g., his Separate Opinion in *Oil Platforms (Preliminary Objections)* ICJ Reports (1996) 803. If it had followed Judge Oda's approach, the Court would have had no jurisdiction in the *Bosnia Genocide* case, *DRC v. Uganda*, and *Legality of Use of Force*, and it would not have decided the *Nicaragua* case or the *Oil Platforms* case. That is, it would have avoided most of the cases on the use of force. For a fuller discussion of Judge Oda's approach, see Gray in 34 *Thesaurus Acroasium* (2005, forthcoming).

in regard to a Claims Commission set up by two states. The Claims Commission stretched the terms of the *Algiers Agreement* in order to assert jurisdiction over claims concerning the use of force.

Having asserted jurisdiction, the Claims Commission unfortunately did not treat the *ius ad bellum* claims with the rigour or in the depth that the subject matter required.<sup>89</sup> It did not adequately address issues of evidence or explain its approach to the contested facts. In fact it seemed generally to take Ethiopia's version of events at face value, leaving itself open to the accusation, in the absence of adequate explanation, that this was indeed a partial award.<sup>90</sup> And having undertaken this difficult task, it did not give a satisfactory decision on the substantive law on the use of force. It nevertheless found itself able to rule expressly that there had been a violation of Article 2(4) of the UN Charter by Eritrea. The Claims Commission's lack of caution in this regard may be contrasted to the approach of the International Court of Justice in *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, decided on the same day as the *ius ad bellum* case. It is striking that the Court deliberately avoided any express ruling on Article 2(4) in that case; in the operative part of the judgment it said only that Uganda had 'violated the principle of the non-use of force in international relations and the principle of non-intervention.' It expressly referred to Article 2(4) only in the reasoning.<sup>91</sup> This caution was not explained by the Court, but may have been based on an awareness not only of the great symbolic importance of a reference to Article 2(4), a rule of *ius cogens*, but also of sensitive issues concerning the relations between itself and the Security Council, the body with the primary responsibility for the maintenance of international peace and security.

But the Claims Commission showed no such restraint in this case.<sup>92</sup> Most seriously, this award undermines the Boundary Commission's Delimitation Decision, already under challenge by Ethiopia, at a time of increasing tension along the border. At the start of 2006 no real progress had been made with the demarcation of the boundary.<sup>93</sup> The issue of principle relied on by the Claims Commission – that states should not use force to settle boundary disputes – did not dictate the choice of boundary. And the choice of boundary was crucial to the Claims Commission's disposition of this case.

<sup>89</sup> As was mentioned above, the majority of the commissioners were appointed for their expertise in other areas of international law.

<sup>90</sup> The Pleadings in this case are not public. It may perhaps be suggested that Ethiopia's Pleadings on the use of force in its Memorial proved more persuasive to the Commission, and that Ethiopia's arguments were not adequately addressed in the Eritrean Counter-Memorial and Statement of Defense.

<sup>91</sup> *DRC v. Uganda*, ICJ Reports (2005). Judges Elaraby and Simma were critical of this low-key approach in their Separate Opinions. The Court was also cautious in its choice of language in the *Oil Platforms* case, ICJ Reports (2003)161.

<sup>92</sup> Though it is noteworthy that it, like the International Court of Justice in *DRC v. Uganda*, avoided any discussion of aggression or finding that there had been acts of aggression.

<sup>93</sup> Report of the Secretary-General on Ethiopia and Eritrea, S/2006/140, 6 March 2006, containing the twentieth report of the Eritrea-Ethiopia Boundary Commission.