ERITREA-ETHIOPIA CLAIMS COMMISSION

DECISION NUMBER 7:

Guidance Regarding *Jus ad Bellum* Liability

I. INTRODUCTION

1. The purpose of this Decision is to provide guidance for the Parties' pleadings and arguments in the final round of hearings of these proceedings, regarding the extent of Eritrea's liability to pay damages for its breach of the *jus ad bellum*, the law regulating resort to armed force, as identified in the Commission's December 2005 partial award *Jus ad bellum* (Ethiopia's Claims 1–8) of December 19, 2005.

2. As the Parties are aware, the Commission held four rounds of hearings on the merits of both Parties' claims between November 2002 and April 2005, and issued numerous partial and final awards following those hearings. These resolved the merits of all of the Parties' claims, except for Ethiopia's claims relating to Eritrea's violation of the *jus ad bellum*.

3. The issue of the extent of Eritrea's responsibility in this regard pervades Ethiopia's damages claims. Many rest, in whole or part, upon Ethiopia's contention that Eritrea bears liability because of the violation of the *jus ad bellum*. These claims included several types of injury that the Commission earlier found did not involve violations of the law regulating armed conflict, the *jus in bello*. Among these are losses resulting from shelling or incurred by internally displaced persons, deaths and injuries attributable to landmines, and other damage associated with both Parties' military operations.

4. The Commission held its first round of hearings in the damages phase of these proceedings in April 2007. Both Parties were invited at that hearing to address the legal extent of compensable damage resulting from its *jus ad bellum* partial award. At the hearing, Ethiopia contended that Eritrea bore very extensive liability on account of this violation. Eritrea contended that, because the manner in which Ethiopia presented its claim did not conform to the Commission's procedural instructions prior to the hearing, the claim should be dismissed in its entirety.

5. The Commission does not accept either view. In an informal meeting with the Parties following the April hearing, the Commission informed them as follows:

> The Commission does not regard its *jus ad bellum* finding as a finding that Eritrea initiated an aggressive war for which it bears the extensive financial responsibility claimed by Ethiopia. At the same time, it does not accept Eritrea's argument that there is no financial responsibility. At the next stage, the Commission directs the Parties to address the specific extent of damage that is reasonably foreseeable/proximately caused by the specific finding of

liability made by the Commission. The Commission does not expect the Parties to simply repeat the arguments they have made at the current stage.

6. The purpose of this Decision is to provide the Parties with further guidance regarding these matters.

II. LEGAL CAUSATION

7. The Commission regards the standard of legal causation to be relevant to the matters at issue. Compensation can only be awarded in respect of damages having a sufficient causal connection with conduct violating international law. As the Parties noted, numerous terms have been used to describe this connection, including such terms as reasonable, direct, proximate, foreseeable or certain (or conversely, unreasonable, remote, attenuated, or speculative). As both Parties acknowledged, these varying terminologies often provide limited assistance in analyzing specific situations.[1] Both Parties also referred to a point noted by the International Law Commission in its Commentary to its State Responsibility Articles – that "the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation."[2] The degree of connection may vary depending upon the nature of the claim and other circumstances. In this regard, some writers see causation being more readily found in cases involving particularly serious violations of law.[3]

8. Ethiopia acknowledged the potential limitations of any verbal formulation. However, at the hearing, it maintained that the varying formulae were best distilled in Whiteman's treatise on *Damages in International Law* – "that damages allowed on account of the commission or omission of an act giving rise to responsibility generally are those which it is *reasonable* to allow."[4] While acknowledging its debt to Whiteman's treatise, the Commission is not persuaded that her formulation is the best way forward. The notions of "reasonableness" or "reasonable connection" rest upon a subjective concept – "reasonableness" – likely to be heavily shaped by the decision-maker's culture and life experience. This concept has a significant role in some national legal systems, but not in others. Given this, it cannot be seen as a general principle of law. Moreover, given the varying approaches to causation adopted by differing international tribunals, the concept has not attained the status of a customary rule of international law, and Ethiopia did not contend that it was.

9. For its part, Eritrea argued that the connection was better described in the more familiar lexicon of "proximate cause," although it acknowledged that this term was not a perfect expression of the required relationship. Again, this formulation is not a general principle of law or a rule of customary international law, and Eritrea did not contend otherwise. Indeed, both Parties viewed the link between delict and

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[1] *See* MARJORIE M. WHITEMAN, III DAMAGES IN INTERNATIONAL LAW pp. 1766–1767 (1943).
[2] International Law Commission, *Articles on State Responsibility, Commentary to Art. 31, para. 10, reprinted in* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY. INTRODUCTION, TEXT AND COMMENTARIES pp. 204–205 (2002).
[3] Arthur W. Rovine & Grant Hanessian, *Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission, in* THE UNITED NATIONS COMPENSATION COMMISSION [Thirteenth Sokol Colloquium] pp. 235–236 (Richard Lillich, ed. 1995) [hereinafter Lillich].
[4] WHITEMAN, *supra* note 1, at p. 1767 (emphasis in original).

compensable injury as an area in which judgment was required, and where the Commission necessarily exercised a measure of discretion.

10. Yet another approach is the concept of "direct" or "indirect" damages. In the historic *Alabama* arbitration, the arbitrators' decision to exclude "indirect" claims (for losses resulting from the transfer of U.S. ships to the British flag, increased insurance rates, and the prolongation of the war) was crucial in avoiding possible frustration of the process.[5] The Treaty of Versailles also required Germany to provide compensation for damage "directly in consequence of hostilities or of any operations of war."[6] However, many tribunals and commentators have criticized this approach, finding that it lacks analytical power. The umpire in the *War-Risk Insurance Premium Claims* case described the distinction as "frequently illusory and fanciful," and urged that it "should have no place in international law."[7]

11. Notwithstanding these concerns, when the Security Council established the mandate of the United Nations Compensation Commission (UNCC) in Resolution 687, it specified that the UNCC's jurisdiction was limited to "direct" injury.[8] Much of the subsequent work of the UNCC's Governing Council and of its Panels of Commissioners has involved line-drawing to determine what injury is deemed "direct" for purposes of Resolution 687.[9] The UNCC's work is of interest, but its relevance to the present question is uncertain. In addition to the criticisms noted above, the fundamental "line-drawing" decisions regarding the extent of direct injury for the UNCC's purposes have been made by the UNCC Governing Council in light of reports of the UNCC's Panels of Commissioners. The Governing Council is a political organ that has operated in an unusual political and factual setting. It does not follow judicial processes or necessarily apply international law in its decisions.[10] Thus, while the UNCC offers significant precedents in many areas, its decisions regarding the scope of "direct" injury must be assessed with care and in light of their context.

12. Another substantial line of cases finds the proper test of the connection between delict and compensable damage to be whether the damage was foreseeable (or sometimes, "reasonably foreseeable") to the perpetrator of the delict. These have included awards of the Samoan Claims Commission,[11] the U.S.-Venezuelan Mixed

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[5] 1 JOHN BASSETT MOORE, INTERNATIONAL ARBITRATION p. 646 (1898); WHITEMAN, *supra* note 1, at p. 1773.

[6] Treaty of Versailles, June 28, 1919, 225 Parry's Consol. T.S. 189, 11 Martens Nouveau Recueil (Ser. 3) p. 323, Part VIII, sec. 1, Annex I, para. 9.

[7] 7 R.I.A.A. p. 62, quoted in Norbert Wühler, *Causation and Directness of Loss as Elements of Compensability Before the United Nations Compensation Commission*, *in* Lillich, *supra* note 3, at p. 231. *See* Report by Special Rapporteur of the International Law Commission (Arangio Ruiz), 44 U.N. GAOR Supp. No. 10 at 6, U.N. Doc. A/CN 4/425 (1989).

[8] *See* Wühler, *supra* note 7, at pp. 207, 231.

[9] Wühler, *supra* note 7, at pp. 207–209.

[10] MICHAEL J. MATHESON, COUNCIL UNBOUND p. 174 (2006); Rovine & Hanessian, *supra* note 3, at p. 238.

[11] Joint Report No. 2 of 12 August 1904, of the American and British Commissioners, *in* WHITEMAN, *supra* note 1, at pp. 1778–1781.

Claims Commission,[12] the Portugo-German Arbitral Tribunal case,[13] and the Lighthouses arbitration between France and Greece.[14]

13. Given this ambiguous terrain, the Commission concludes that the necessary connection is best characterized through the commonly used nomenclature of "proximate cause." In assessing whether this test is met, and whether the chain of causation is sufficiently close in a particular situation, the Commission will give weight to whether particular damage reasonably should have been foreseeable to an actor committing the international delict in question. The element of forseeability, although not without its own difficulties, provides some discipline and predictability in assessing proximity. Accordingly, it will be given considerable weight in assessing whether particular damages are compensable.

14. The Commission notes that, in many situations, the choice of verbal formula to describe the necessary degree of connection will result in no difference in outcomes. In this regard, both Parties agreed that a significant range of possible damages related to war lie beyond the pale of State responsibility. Both cited with approval the decisions of the American-German Mixed Claims Commission established in 1922, which excluded significant types of claims, such as increased living costs and transportation costs, as being too remote from particular conduct by Germany. In this regard, the American-German Commission mirrored other war claims tribunals that excluded broad categories of claims, such as those for generalized economic damages, increased insurance rates, and similar matters.

III. ETHIOPIA'S *JUS AD BELLUM* CLAIMS

15. As noted, Ethiopia claimed for extensive damages said to result from Eritrea's breach of the *jus ad bellum*. In Ethiopia's view, these all bore a reasonable connection to conduct the Commission found to be unlawful, so that Eritrea should bear their full costs. Ethiopia maintained that the legal consequences of the Commission's *jus ad bellum* partial award are not limited to the times and places specifically mentioned in that partial award. Instead, Ethiopia contended that the *jus ad bellum* violation identified by the Commission "inescapably resulted in this wider condition [of wide scale hostilities] and, to the extent that there is loss, damage or injury associated with it, then that is compensable."[15] In this connection, Ethiopia referred to reparations programs following the First and Second World Wars, both of which involved reparations for the totality of the conflict, not just the initial attacks at their outset.

16. Ethiopia placed particular emphasis upon the actions of the UN Security Council in its Resolutions 674 and 687, regarding Iraq's invasion and occupation of Kuwait. As noted above, in Resolution 687, the Security Council stated that under international law, Iraq "is liable for any direct loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations as a result of the

[12] Roberts Case (U.S. v. Venez.), RALSTON'S REPORT p. 142.
[13] Naulilaa Case, 2 R.I.A.A. p. 1013. ("The uprising … thus constitutes an injury which the author of the initial act … should have foreseen as a necessary consequence of its military operations.")
[14] 12 R.I.A.A. p. 217 (1956).
[15] Transcript of the Eritrea-Ethiopia Claims Commission Hearings of April 2007, Peace Palace, The Hague, at p. 39 (Professor Murphy).

invasion and illegal occupation of Kuwait by Iraq." Counsel for Ethiopia described in some detail how the UNCC had defined the scope of Iraq's liability pursuant to Resolution 687 in ways that, in Ethiopia's view, substantially paralleled its *jus ad bellum* damages claims.

17. Eritrea acknowledged that Eritrea has an obligation to provide reparation for the specific violation of law identified by the Commission. However, it contended that Ethiopia's damages claims far exceeded the scope of liability following from the Commission's partial award. Eritrea stressed what it understood to be the limited and careful phrasing of the Commission's partial award. It further contended that Ethiopia's sweeping claims did not respond to the Commission's call, in the dispositif of the partial award, for a considered assessment of the scope of its liability, and provided no basis for a ruling by the Commission. Eritrea maintained that in these circumstances, Ethiopia's monetary claims for the *jus ad bellum* violation should be rejected. Ethiopia's relief should be limited to satisfaction, in the form of a declaration by the Commission that Eritrea had violated international law, which could be repeated in a future damages award.

18. Eritrea contended that uses of force in contravention of Article 2(4) of the Charter of the United Nations occur with considerable frequency, and the application of the law of State responsibility to them requires a more nuanced approach than contended by Ethiopia. In Eritrea's view, there have been only three cases in which the international community has sanctioned the imposition of broad liability on one side to a conflict – the First and Second World Wars, and Iraq's invasion and occupation of Kuwait in 1990–1991. (These same cases were also cited by Ethiopia.) In each case, it was established through a multilateral process enjoying broad international approval that a State had initiated an aggressive war, and was to be responsible for the consequences. Eritrea maintained that nothing comparable has occurred here, and emphasized the position of the Security Council as the body charged by Article 24 of the UN Charter with primary responsibility for the maintenance of international peace and security. It contrasted the Council's treatment of Iraq's invasion of Kuwait – where it unequivocally assigned total responsibility for the conflict to Iraq – with its approach to the conflict between Eritrea and Ethiopia. In Eritrea's view, the Council's resolutions dealing with this conflict took much more measured positions, and did not assign responsibility for the conflict to either party.

19. The Commission is mindful of the factors that led each Party to seek its maximum position regarding the scope of liability at the April 2007 hearing. Nevertheless, the Commission does not regard either Party's arguments as an appropriate basis for assessing the issue.

20. Because of the importance of the issues, and in order to afford both Parties an opportunity for further reflection regarding their positions in light of the views expressed here, the Commission reserves decision on Ethiopia's *jus ad bellum* claims. It will return to these issues at the second stage of the proceedings, after receiving further views from the Parties taking account of this Decision.

IV. CONSIDERATIONS RELEVANT TO ASSESSING *JUS AD BELLUM* LIABILITY

21. As both Parties indicated, there have been few modern instances in which a State has been determined to bear responsibility for damages resulting from a war as a matter of international law. Throughout history, indemnities frequently have been exacted from the losing parties in wars, but this has resulted from the exercise of power by the victor, not the application of the international law of State responsibility.

22. In the Commission's view, the few twentieth century cases in which States have been held to be internationally responsible for extensive war damages do not provide clear guidance, and instead counsel caution. The war guilt and reparations provisions of the Treaty of Versailles reflected a collective judgment by the victorious parties to the First World War that Germany bore responsibility for the initiation and continuation of that war, and authorized a massive program of reparations. However, the history of those provisions makes clear that they were heavily shaped by motives of policy and revenge unrelated to the principles of law. The program of reparations under the Treaty of Versailles had a brief and unsatisfactory history.

23. The Commission likewise does not see the international community's measures relating to compensation following the Second World War as providing compelling reference points in the present situation, involving a violation of law of a much different order. At the end of that war, there was a broad consensus on the part of the Allied Powers – that Germany and Japan were responsible for initiating and waging aggressive war on a massive scale. Individual leaders of both States were held criminally responsible for their conduct, and some senior leaders were executed.

24. Nevertheless, the practice of States at that time does not support the expansive view of State responsibility Ethiopia urges now. The States deemed by the international community to be directly responsible for the war ultimately bore financial consequences that were modest in relation to the resulting damages. For reasons largely related to the post-war division of Germany, there was no comprehensive multilateral peace treaty with Germany corresponding to the Treaty of Versailles, and there was no internationally agreed program of reparations or compensation. The Soviet Union for a time carried out its own program of enforced reparations from Germany, but this was "victor's justice," not a principled application of the international law of State responsibility enjoying international support and legitimacy. Germany subsequently carried out extensive programs of compensation and assistance to the State of Israel and to many groups of persons injured by its conduct, but these were largely shaped by considerations of morality and politics, not by the law of State responsibility.

25. The September 1951 Treaty of Peace with Japan included substantial provisions relating to claims and property, but again does not provide compelling guidance. While the Treaty of Peace brought about or confirmed substantial transfers of assets, its provisions resulted from a negotiation aimed at reintegrating Japan into the global community, not an application of the law of State responsibility.[16] Article 14 of the

[16] Treaty of Peace with Japan, signed Sept. 8, 1951, 136 U.N.T.S. p. 45, 3 U.S.T. p. 3169.

Treaty illustrates this negotiated aspect, as well as the parties' decision not to repeat the experience of the Treaty of Versailles.[17]

26. Given its purposes, the Treaty of Peace did not require the immediate commitment of fresh funds to provide compensation. Instead, Article 14(a)(2)(I) gave each of the Allied Powers and China the right to seize and keep or liquidate certain overseas property of Japan and Japanese nationals and entities. Under Article 14(a), Japan also agreed to "promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work ... ." Compensation under the Treaty was exclusive. In Article 14(b) " the Allied Powers waive[d] all reparations claims ... arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war...."

27. Thus, the post-war practice of States regarding Nazi Germany and Japan, both generally regarded by the international community as having initiated and waged aggressive war on a massive scale, provide no clear reference here. There either were no reparations determined through application of international law (Germany), or reparations were determined through negotiations shaped by the defeated State's ability to pay and other political and economic factors (Japan).

28. The most recent precedent invoked by Ethiopia is the UNCC, the claims and compensation process established in response to Iraq's 1990–1991 invasion and occupation of the State of Kuwait. As indicated elsewhere, the Commission regards some aspects of the UNCC's experience as relevant to its current tasks. However, its relevance to Ethiopia's claims for compensation is less clear, given the unusual and compelling circumstances leading to the UNCC's creation.

29. The Commission sees as particularly significant in this regard the central role of the Security Council, the organ bearing primary responsibility for the maintenance of peace and security under the United Nations Charter, in creating the UNCC. The Council created that commission and defined its mandate following breaches of international law of unusual seriousness and extent. Beginning with Resolution 660 on August 2, 1990 – the day Iraq invaded Kuwait – the Council adopted numerous resolutions unequivocally condemning the Iraqi invasion, directing Iraq to withdraw immediately and unconditionally, and demanding that Iraq cease hostage taking, mistreatment of civilians, violence against diplomats and diplomatic premises, and other forms of behavior in breach of international law.[18] In Resolutions 661, 665 and 670, the Council imposed severe economic sanctions on Iraq and provided for their enforcement. Finally, in Resolution 678, the Council took the exceptional step of

[17] Article 14(a) provides "It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations."

[18] These included Security Council Resolutions 660 (Aug. 2, 1990), 661 (Aug. 6, 1990), 662 (Aug. 9, 1990), 664 (Aug. 18, 1990), 665 (Aug. 25, 1990), 677 (Sept. 16, 1990), 670 (Sept. 25, 1990), 674 (Oct. 29, 1990), and 678 (Nov. 29, 1990).

authorizing UN Members "to use all necessary means" – including the use of force – to uphold and implement the Council's earlier resolutions.

30. As both Parties noted, this was the context – involving pervasive, continuing illegal conduct by Iraq extending far beyond an initial breach of the *jus ad bellum* – in which the Council adopted Resolution 674, where the Council first "reminded" Iraq "that under international law it was liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq." As noted above, when the Council subsequently created the framework of the UNCC in Resolution 687,[19] it adopted more cautious terminology. In Paragraph 16, the Council indicated that Iraq was liable for "direct" loss, damage or injury.

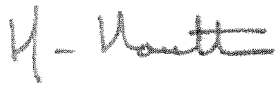
31. The Security Council's actions in relation to the war between Eritrea and Ethiopia took a quite different course. Its resolutions are markedly different in substance and tone from those adopted regarding the invasion and occupation of Kuwait. None of them assigned responsibility for the conflict to either party. Like all of the resolutions that followed, the Council's first resolution on the war spoke to both parties, not to Eritrea alone.[20] The resolution's preamble found unacceptable the use of force both to address territorial disputes and "changing circumstances on the ground"; its key operative provision demanded that both parties immediately cease hostilities and refrain from further use of force. When hostilities intensified in early 1999 during Ethiopia's Operation Sunset, the Security Council again addressed both parties in equal terms. It supported efforts by the Organization of African Unity to find a peaceful solution and called on both sides to exercise restraint and refrain from military action.[21] As hostilities intensified a few days later, the Council condemned the recourse to force by both sides, and urged all States to immediately end arms sales to both.[22] At the time of Ethiopia's May 2000 incursion into Eritrea, the Council again directed its response to both parties, demanding that both end the fighting, and imposing a mandatory arms embargo on both.[23]

32. Ethiopia dismissed the difference in the Council's approach to these two situations as a "regrettable" failure by the Council to respond to an act of aggression, but maintained that it did not affect the extent of Eritrea's liability. The Commission does not agree that the great differences in the Council's treatment of these situations can be dismissed in this way. The Security Council – a body given great powers and responsibilities by the Charter – made judgments regarding the invasion and complete occupation of Kuwait that it did not make in the case of Eritrea's unlawful use of force against Ethiopia. This Commission's mandate and powers are far more modest than those of the Security Council. The Commission concluded that it had jurisdiction to decide Ethiopia's claim that Eritrea had violated the *jus ad bellum*. It made a specific finding regarding that violation that did not include a finding that Eritrea had waged an aggressive war, had occupied large parts of Ethiopia, or otherwise engaged

[19] Security Council Resolution 687 (Apr. 3, 1991) (deemed by some "the mother of all Security Council Resolutions" because of its breadth).
[20] S/RES/1177, June 26, 1998.
[21] S/RES/1226, January 29, 1999.
[22] S/RES/1227, February 10, 1999.
[23] S/RES/1297, May 17, 2000.

in the sort of widespread lawlessness that the Security Council identified in the case of the invasion and occupation of Kuwait. Moreover, this Commission did not – nor could it – alter the international law rules defining the extent of compensable damages that follow from the breach of international law that it identified.

33. Accordingly, at the next stage of the proceedings, the Commission invites – and expects – the Parties to address in a more considered and precise manner the scope of damages following from the Commission's partial award in relation to the specific elements claimed by Ethiopia on the basis of *jus ad bellum*, taking full account of this Decision.



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