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The Ethio-Eritrea Claims Commission on Use of Force: Issue of Self-Defense or Violation of Sovereignty

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Abstract**—**A decision that deals with international disputes, be it arbitral or judicial, has to properly reflect objectivity and coherence with existing rules of international law. This paper shows the decision of the Ethio-Eritrea Claims Commission on the *jus ad bellum* case is bereft of objectivity and coherence, which contributed a disservice to international law on many aspects. The Commission's decision that holds Eritrea in contravention to Art 2(4) of the UN Charter based on Ethiopia's contention is flawed. It fails to consider: the illegitimacy of an actual authority established over contested territory through hostile acts, the proper determination of *effectivites* under international law, the sanctity of colonially determined boundaries, Ethiopia's prior firm political recognition and undergirds to respect colonial boundary, and Ethio-Eritrea Border Commission's decision. The paper will also argue that the Commission confused Eritrea's right of self-defense with the rule against the non-use of force to settle territorial disputes; wherefore its decision sanitizes or sterilizes unlawful change of territory resulted through unlawful use of force to the effect of advantaging aggressions. The paper likewise argues that the decision is so sacrilegious that it disregards the ossified legal finality of colonial boundaries. Moreover, its approach toward armed attack does not reflect the peculiarity of the *jus ad bellum* case rather it brings about definitional uncertainties and sustains the perception that the law on self-defense is unsettled.

Keywords**—**Armed attack, self-defense, territorial integrity, use of force.

I. Introduction

THE use of force by and against states remains a protracted feature of international affairs [1, p-143]. Since the birth of states, international law has been developing rules with regard to when a state wage war. However, the contemporary rules of use of force are being subject to different interpretations by states, international law scholars/lawyers and judicial and arbitral organs— that is, it happens to be the most controversial and debatable area of international law. Amid this debated on the issue, the Eritrea and Ethiopia Claims Commission (hereinafter the Commission) issued a decision on the lawfulness of Eritrea's use of force against Ethiopia on 19 December 2005 [2]. Ethiopia accused Eritrea of using force against its territorial integrity and political independence in violation of its obligation under international law. The Commission dismissed Eritrea's claim of self-defense and based on Ethiopia's contention, it ruled Eritrea's violation of Art 2 (4) of the Charter [2, para-16]. And, the purpose of this paper is to critically examine the Commission's decision on the lawfulness of Eritrea's use of force (hereinafter the *jus ad bellum* case) vis-à-vis the pertinent rules of use of force under international law. Professor Gray did first critically react to the decision of the Commission on the *jus ad bellum* case [3]. However, this paper's grounds of critical analyses are different from that of Gray's; though, there are some points of confluence — but with different fashion of analysis. Gray's main issues of analysis are the properness of the arbitral body to pass on judgment on issue of *jus ad bellum*— and the commission's lack of jurisdiction to see the *jus ad bellum* case and self-defense. Different from that of Gray's paper, this paper, however, discusses substantively and in greater detail, the implications of the *jus ad bellum* case as it was decided with closed eye to recent incidents and the attendant relevant facts; the proper application of art 2(4) of the charter in conflicting territorial disputes taking into account the nature of authority established in the disputed territory of Badme, the finality of colonial boundary treaties, the decision of the EEBC; the Commission's confusion of Eritrea's claim of self-defense with the legal prohibition of use of force to settle territorial dispute; the definition of armed attack that comprise manifold elements; and proportionality and necessity. Professor Murphy also recently dwelt on the *jus ad bellum* case and unsurprisingly defied Gray's arguments and upholds the Commission's decision—though his paper is mainly focused on the procedures and the scope of damages in *jus ad bellum* claim [4]. And, this paper will also bring the germane arguments (from Murphy's) to spotlight and challenge it parallel with that of the Commission's decision.

II. General Overview of the Regulation of the Use of Force under International Law

The law of armed force in international relations involves two aspects: The right to use force in determined circumstances, known as *jus ad bellum*; and the right to lawful means/conduct that belligerents may employ in conflict, or *jus in bello* [5, p-1], [6, p-27]. The way of ending armed conflicts or armed hostilities also needs to be regulated through some sort of law, by which its rules are currently being developed and is referred as the *jus post bellum* [7, p-921]. Use of force by states is governed by the United Nations Charter (hereinafter the Charter) and customary international law.

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A. Prohibition of Threat or Use of force (Article 2 (4) of the Charter)

Concluded after and in response to the Second World War, the Charter stipulates specific provisions that regulate and centralize the discussion of the use of force [8, p-590], [9]-[11]. Art 2(4) of the Charter is the basis of any discussion of the problem of the use of force. Affirming its significance, it is labeled as 'basic rule of contemporary public international law' [12]. The provision reads:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations.

Since the drafting of the Charter, this provision has been subjected to different interpretations. Commenting on Article 2(4) Schachter stated, 'this paragraph is complex in its structure and nearly all of its key terms raise questions of interpretation. However, the principle was intended to outlaw war in its classic sense, that is, the use of military force to acquire territory (conquest) or other benefits from another state' [13]. The general prohibition in Article 2(4) goes beyond actual recourse to force, and it also prohibits mere threats of force [14, p-232], [15, p-1125].

The most fundamental debate on the interpretation of Article 2(4) is whether it absolutely prohibits use of force or it allows the use of force for aims which are consistent with the purpose of the UN [8, p-593]. It poses questions of interpretation as the provision states that 'against the territorial integrity, political independence or in any other manner inconsistent with the aim of the UN.' Some authors argue that these clauses were never intended to restrict the scope of the prohibition of the use of force; on the contrary, 'to give more specific guarantees to small States' and therefore they 'cannot be interpreted to have a qualifying effect' [12, p-117], [16], [13, p-113]. The International Court of Justice (hereinafter ICJ) supported such interpretation in the *Corfu Channel* case (*United Kingdom v Albania*) [17, p-11], [15, p-1128], [18].

The systematic analysis and elaborated definition (material scope) of article 2(4) is found in the 1970 UN Resolution No. 2625 (XXV) Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among Nations (hereinafter Friendly Relations Declaration) [19]. Despite the non-binding effect of the Declaration, it has important relevance in the interpretation of Article 2(4) [15, p-1123], [14, p-242].

B. Self-Defense under Article 51 of the Charter (an Exception to the Prohibition of Use of Force)

'Self-defense on the international level is generally regarded as a legal right defined and legitimated by international law [13, p-135]'. The idea of self-defense is an inherent and autonomous right [13]. The ICJ in the *Nicaragua* case acknowledged the natural or inherent nature of self-defense. [13, p-135] The first exception to the prohibition of use of force under Article 2(4) is Article 51, it reads:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security [9].

Beyond individual right of self-defense Art 51 preserves the rights of states to make mutual assistance of defensive agreements – which is referred to as collective self-defense. The decision whether or not to exercise the right of self-defense resides, first and foremost, with any state that believes it has been victim of an armed attack [20, p-23]. It is up on a state at the first place to decide that it is under attack in order to exercise its right of self-defense. However, such exercise of self-defense does not mean it is lawful only up on the factual assessment of the state who claimed the right but it is subject to international scrutiny, e.g. by the Security Council (hereinafter UNSC) and the ICJ. That is to say, acts of self-defense are subject to legal determination. According to Art 39 of the Charter the UNSC is authorized to determine act of aggressions and affirm states right to self-defense as it did when Iraq invaded Kuwait in 1990 [3]. Also, judicial (ICJ) and arbitral bodies determine the lawfulness of claim of self-defense when cases of such nature are brought before their attention.

Currently there are two different viewpoints on self-defense: The expansionist view [21, p-600], which countries like the United States hold and the narrow/restrictive view, [22] which the ICJ holds. As every situation of use of force has its own peculiarity, the standard for assessing the legality of defense is necessarily to some extent abstract. This is because the rules or standards have to be interpreted and applied taking into account the circumstances of different individual cases [13, p-147].

1. Armed Attack Defined

According to article 51, the first requirement that triggers a state to exercise its inherent right of self-defense is the existence of an 'armed attack'; nevertheless, it is left undefined. Though the term 'aggression' is not used in Article 51, there seems to be an overlap between the term 'aggression' and 'armed attack', as Article 51 is seen in light of the 1974 Declaration on the Definition of Aggression, General Assembly Resolution No. 3314 (hereinafter the Definition of Aggression) [5, p-39]. Their close relationship is that they are the grave violation of article 2(4) of the Charter [5]. The general definition of aggression which is found in Article 1 of the Definition of Aggression is almost replica of article 2(4) of the Charter [5]. The insertion of the words 'armed force' in Art 1 makes the concept of aggression to share almost the same meaning with the concept of 'armed attack' in Art 2(4)

[23, p-117]. The Definition of Aggression in Art 3 enumerates some lists of acts of aggression [24]. Hilaire and Nigel argues that it was needless to craft a separate definition of an 'armed attack', as the drafting of the definition of aggression by the UN would inevitably reflect that definition— article 3 of the Definition of Aggression listed the acts of aggression that are tantamount to armed attack [5, p-51]. Seemingly, it was based on that reason that the ICJ relied on Article 3(g) of the definition of aggression in the *Nicaragua* case in determining as to what constitutes indirect attack in the context of armed attack [5]. Therefore, 'with this in mind it can be stated that the concept of an armed attack in artic 51 is equivalent to the concept of armed aggression which is defined in the Definition of Aggression [5].' The ICJ in the *Nicaragua* case distinguished between the most grave forms (that are armed attack) of use of force and that constitutes less grave forms, that do not constitute armed attack [5]. However, the Court's move to distinguish between uses of force that amount to armed attack and less grave forms or frontier incident is not generally accepted and is being subject to criticisms for some legitimate concerns. There are also other requirements of self-defense (duty to report, proportionality and necessity) which are discussed in the next section vis-à-vis the *jus ad bellum* case.

III. Critical Assessment of the Commission's Decision on Ethiopia's Claim of Eritrea's Violation of Article 2(4) of the UN Charter

A. Background to the Eritrea-Ethiopia Conflict

In May 1998, fighting began between Eritrea and Ethiopia in the territory of Badme [3, p-699]. On 14 May, 1998, Ethiopia wrote to the UNSC accusing Eritrea of violating its sovereignty on 12 May 1998 [3]. On 15 May, Eritrea responded to the UNSC rejecting the version of events claimed by Ethiopia [3]. Eritrea claimed that the clashes resulted from the presence of Ethiopian troops on Eritrean territory. Eritrea asserted that the international boundary was clear and non-controversial [3], [25], [26]. Ethiopia averred the area held by Eritrea in 12 May 1998 was under its administration. Eritrea rejected any incursions into Ethiopian territory whereas accused Ethiopia of violating the colonial boundary and annexing large swaths of its territory on a map issued in 1997 [3, p-701], [25], [26].

The UNSC initially responded by passing Resolution 1177(1998) expressing grave concern at the conflict and stressing that the use of force was not acceptable to settle the dispute and demanded the parties to immediately cease hostilities [3]. It also called both states to cooperate with OAU (currently the African Union (AU)) [3]. The OAU Ministerial Committee on the Eritrea-Ethiopia conflict decided that the disputed Badme area was under Ethiopian administration before 6 May 1998. The OAU demanded Eritrea to withdraw from the area [3]. Eritrea argued that 'Ethiopia's insistence on finding out which authority was administering Badme before 6 May 1998' was intended to hide Ethiopia's use of force and other alleged violations across the border [3]. The OAU proposed some recommendations and proposals [27, p-40]. Ethiopia accepted these proposals, Eritrea did not. Eritrea was unwilling to withdraw from Badme as this could be understood as recognition that it was Ethiopian territory [3, p-702]. The OAU blamed Eritrea of undermining its peace effort. In 1999, the conflict soared to a full-scale war, both countries accusing each other of aggression [3]. Finally, Eritrea accepted the Framework Agreement on 27 February 1999. It also accepted the subsequent OAU proposal for Technical Arrangements to implement the Framework Agreement [3]. However, Ethiopia now refused to accept and demanded Eritrea to declare its recognition of Ethiopia's sovereignty over contested territories. The Framework Agreement was never signed [3].

After two years of intensified armed conflict, the Agreement on Cessation of Hostilities was signed in 18 June 2000 and both parties agreed to an immediate cessation of hostilities. [28] On 12 December 2000, Eritrea and Ethiopia also signed in Algiers an agreement (hereinafter the Algiers Agreement) to end the two year war fought between them [29]. Pursuant to the provisions of the Algiers Agreement, three bodies were to be established [29]. Among the two other bodies, the Commission was established to decide claims brought by both parties which resulted from the conflict [29]. Among other claims the *jus ad bellum* claim was filed to the Commission by Ethiopia to which the Commission gave its decision on 19 December 2005.

B. Deciding the Jus Ad Bellum Case and its Implication

The Commission's reference point for its mandate of jurisdiction stated by Art 5 of the Algiers agreement is that 'claims for loss, damage or injury by one government against the other…..*that are related to the conflict* and result from violation of international law…' The Commission understood the clause 'related to the conflict' to mean the armed conflict that began in May 1998 and which was formally brought to an end on 12 December 2000 [30].' Art 5(1) of the Algiers agreement does not specify the scope of the clause 'related to the conflict', though the Commission interpreted it to mean to the armed conflict between May 1998 and December 2000 [30]. However, it was detrimental to Eritrea in the *jus ad bellum* case [3, p-714], [2]. Because, based on that determination, events that took place before May 1998 barred from the Commission's scope of mandate. As it will be noted in the following section, there were manifold incidents taking place in the disputed territory which are related to the conflict that burst on May 1998.

Murphy, dwelling on the *jus ad bellum* case, stated that passing on a judgment up on a *jus ad bellum* (lawfulness of use of force) claim can have an 'important implications for understanding the past, for existing relations of the two countries……..' [4, p-1]. That is, the Commission's decision that made Eritrea responsible for violation of Art 2(4) would enable us to understand what the past looks like with regard to the relation between Eritrea and Ethiopia or what kind of relation could have been existed at the time when Eritrea resorted to force (aggressor or victim of aggression). However,

it is unthinkable, the Commission's decision to reflect an objective way of understanding the relations that could have existed between Eritrea and Ethiopia before or during 12 May, given the Commission's move to determine the lawfulness of use of force by excluding the incidents prior to May 1998 and particularly focusing in Ethiopia's allegation of Eritrea's use of force in 12 May. A decision given with a closed eye even to the recent past inevitably implies a wrong understanding of the relation that existed in 12th May, because without assessing the incidents that took place before Eritrea resorted to force, the Commission in the *jus ad bellum* case ruled the violation of Art 2(4) of the Charter and labeled Eritrea as invader, which is erroneous.

C. Whether Eritrea Violated Ethiopia's Territorial Integrity and Political Independence?

Before discussing Eritrea's assertion of self-defense before the Commission, the paper deals first with Ethiopia's contention that Eritrea violated its territorial integrity and political independence pursuant to Art 2(4) of the Charter. This paper critically reviews the Commission's approach and its finding of violation of Art 2(4) of the Charter.

The use of armed force by one state against another violates the territorial integrity of the state provided that it was made without its consent. It may also violate the political independence of the victim state when force is used to compel it to make a concession or adopt a particular policy which otherwise would not make. The intent of use of force may be consistent with the Charter (e.g. humanitarian intervention or to assist administration of justice) or it may have a short term effect (it may not be intended to deprive one state of its territory) but provided that it involves the non-consensual incursion in one state's territory, 'the fact that territorial sovereignty was violated is sufficient ground for the application of Art 2(4) which is the rule against use of force [13, p-113], [12, p-117].'

The contention of Ethiopia in the *jus ad bellum* case was that 'Eritrea violated art 2(4) of the Charter by resorting to force against its *territorial integrity and political independence'* [2], [31, p-715]. It did not refer to the third clause of art 2(4) which is 'inconsistent with the purpose of the UN.' The implication of this is that Eritrea's use of force in the Badme and area's adjacent to Badme violated the territorial integrity and political independence of Ethiopia. That is, Eritrea violated Art 2(4) not because the provision dictates the total prohibition of force but because Eritrea's use of force violated the territorial integrity and political independence of Ethiopia. The test applied by the Commission with regard to Badme was 'peaceful or effective administration' of the area by Ethiopia before Eritrea's use of force. The only evidence the Commission considered in finding 'Ethiopia's effective administration' was the line of withdrawal under the Cease-Fire Agreement of 18 June 2000. Under this agreement, Eritrean forces were obliged to withdraw from Badme [2]. It is the contention of the paper that there were other relevant facts the Commission should have assessed before concluding the violation of Ethiopia's territorial integrity and political independence under Art 2(4) of the Charter. Following is a discussion of the flaws of the Commission's finding of violation of Art 2(4).

1. The Establishment of Territorial Sovereignty in Contested Territory

It is undisputed that, in case of contested territory, the state which exercises sovereignty/actual authority over the contested territory benefits the attribution or having of the territorial integrity over the territory for the purpose of art 2(4). Affirming, Schachter suggested that to avoid ambiguities such expression or generality has to be made clear in authoritative instruments. He continues to state that such generality is qualified in circumstance where the actual authority results from continuous hostile acts (hostilities) [13, p-117]. In such a case, there is no territorial sovereignty established to the effect that the use of force against the occupant do not violate its territorial integrity pursuant to Art 2(4) of the Charter [13].

The Commission's conception of the *jus ad bellum* case was 'territorial claim' between Eritrea and Ethiopia, however, there was no deep analysis made by the Commission in this issue. The Commission stated that 'the only available evidence of the areas effectively administered by Ethiopia in early May 1998 was that line to which Ethiopian forces were obliged to withdraw in 2000 [2, para-15].' Thus, according to the Commission, Ethiopia was effectively and peacefully administering Badme at the time of Eritrea's use of force in 12 may 1998. Even if assuming Ethiopia's actual authority over Badme, it is worth evaluating whether the alleged Ethiopia's act before May 1998 on the Badme territory could amount to exercising actual authority devoid of any hostile act as a result of which any use of force by Eritrea at that time would violate territorial integrity of the former.

The problem with the border is considered by Eritrea as deeply rooted in expansionist and annexationist view of Ethiopia. Referring to historical role of Ethiopia's in shaping state borders, it is perceived as colonialist and expansionist in the Horn region [32] [33, p-160], [34], [35], [25]. Soon after Eritrea's independence, some incidents started to take place which caused a lot of concern for Eritrea. There were several border incidents preceding the May 1998 conflict that were not made public by Ethiopia or Eritrea [36]. Following are the incidents that Eritrea allegedly claim took place before May 1998, and which reveals a flaw of the Commission's position of assuming Ethiopia's sovereignty over Badme benefiting protection by Art 2(4) of the Charter.

After the incident of the village Hazo located in the locality of Indeli (which Ethiopian armed bands completely destroyed 32 houses on 30 Dec 1993) reports of dispute started to be heard from Badme [25]. In 1996, Ethiopian authorities intensified their campaign of harassment and expulsion of Eritrean farmers from the border villages, especially from territories around Badme [37], [25], [33].

In a joint administrative officials meeting in Shire, Ethiopia, the Eritrean government demanded Ethiopian authorities to stop the arbitrary expulsion of Eritrean and pointed out that the unilateral demarcation was neither known nor acceptable

to the Eritrean government. Ethiopian representatives were putting a caveat, that the Eritrean side should first recognize the unilaterally delineated boundary line before any other further discussion [25], [26], [37]. By July 1997, the harassment of Eritrean inhabitants in the entire 'unilaterally demarcated' areas was intensified [25], [38]. Eritrean territory inside the 'unilaterally demarcated' area was put under patrol too [25]. On 26-27 July 1997 Eritrean farmers who lived for at least 30 years in the Badme area were evacuated and sent across what the Ethiopian authorities determined as Eritrea-Ethiopia border [25].

In 19 July 1997, two battalions of Ethiopian army came to Adi Murug (Bada locality) in the Southern Red Sea Region of Eritrea. They entered the area under the pretext of chasing opposition elements. They declared the area as Ethiopian territory and they dismantled the Eritrean administration there [39, p-118], [40, p-92], [25], [36], [33, p-164]. Eritrean high level envoy travelled to Addis Ababa and asserted that using force to create facts in the ground was not acceptable [25]. On 16 August 1997, Eritrea's President Isaias Afewerki wrote to the then Prime Minster of Ethiopia Meles Zenawi and stated that the forcible occupation of Adi Murug was saddening and there was no justification for resorting to force to find solution [25], [33, p-164], [41, p-665]. Prime Minister Meles responded that Ethiopian troops moved to the area to pursue the Afar opposition elements; he did not refer to the forcible occupation of Adi Murug and the dismantling of the Eritrean administration [25], [41], [26]. As the situation in the Badme area was getting worse President Isaias again wrote to Prime Minister Meles on 25 August 1997, stating that, the measures taken at Adi Murug were in the Eritrean area by expelling Eritreans and by dismantling Eritrean administration. He also stated that similar measures were taken in the Badme area by Ethiopian authorities and requested Prime Minister Meles to assign officials and form a joint border commission to solve the problem [25], [33, p-164]. Joint Border Commission was set up. Before the first meeting was conducted, the Ethiopian Magazine 'Weyin' [42] printed a new official map of the Tigray Administration Region. The new map entered deep into Eritrean territory and included not only the unilaterally 'demarcated' area that was causing concerns, but large part of other Eritrean territory [25], [26, p-15], [33, p-164]. Tension was escalating in and around Badme. On 6 May 1998, on the eve of the second meeting of the Joint Border Commission Ethiopian troop's launched unexpected attack on Eritrean soldiers in the Badme area, claiming that they had transgressed on areas that Ethiopia had newly brought under its control [25], [33], [2, para-9], [43], [44]. 'According to a well-informed Ethiopian account, there were eight deaths on the Eritrean side and none on the Ethiopian side, suggesting the likelihood of an ambush [36].' These were the facts that Eritrea allegedly claims to be the nature of Ethiopia's presence across the border starting from Eritrea's independence. The Commission's determination of limiting its scope of mandate from May 1998 locked the door for Eritrea to bring these incidents before it and it also actuated the determination of peaceful/effective administration of Badme by Ethiopia without considering the aforesaid facts. The alleged acts of Ethiopian authorities across the border specifically in the Badme area were antagonistic or hostile which proves that Ethiopia was attempting to establish its authority in the area forcefully worst of all in a hostile manner. The alleged deployment of Ethiopian troops in Badme and the killing of the Eritrean soldiers signal that Ethiopia was trying to establish its authority by force. However, the Commission did not verify these alleged incidents. It did not seem to matter the Commission the nature of Ethiopia's presence in the area.

Eritrea also claims Ethiopia had been unilaterally demarcating the boundary by violating the colonial treaties. The claim was evidenced by the new Tigrayan administrative map and the map embossed in the new Ethiopian currency [37]. The new map suggested Ethiopia's claim of territory that virtually all other maps show as part of Eritrea [45], [25], [36], [46], [47]. Ethiopia never provided a convincing response as to why these maps appeared. Judge Yusuf in the frontier dispute between *Burkina Faso* and *Niger* stated that 'boundaries can be likened to the outer shell of the territory of the state; it is the inviolability of these boundaries which is found in the concept of territorial integrity [48].' Inviolability prevents changing an established boundary by force [49]. Eritrean government claimed that the Ethiopian authorities' forcible creating of facts in the ground was accompanied by the issuance of the official new Tigray administrative map and the map embossed in its new currency. This unilateral change introduced in the abovementioned maps was contrary to the colonial boundary treaties. Ethiopia seemed to exercise a prerogative of demarcating the border without the involvement of Eritrea. In the first place a country cannot unilaterally demarcate its border with its neighbor. Any territorial changes are supposed to be done by mutual consent, or through other means of peaceful settlement of disputes, in conformity with international law [48].

Different publications have also affirmed that Ethiopia was willfully and flagrantly violating Eritrean territories defined by the colonial boundaries. Francis asserted that the armed conflict resulted due to the border dispute between Ethiopia and Eritrea, was partly provoked by the former's dream of a '*Greater Tigray'* consisting of the Ethiopian state of Tigray and areas that Eritrea considers its national territory [49, p-382], [34]. To realize this dream of Greater Tigray, Ethiopia according to Francis was transgressing the colonial boundaries and putting it under its occupation. This move of Ethiopia conflicted with the Eritrean perception of the former as expansionist and its right to retain its border defined by colonial treaties. Trivelli also noted that, the Ethiopian government was the guilty party in the territorial issue by resorting to annexationist strategies rather than to settle territorial disputes peacefully [49, p-382], [50, p-287]. The unilateral demarcation of the boundary and the occupation of territories disregarding the colonial treaties that defines the boundary apparently proved Ethiopian policy of annexation as the abovementioned authors have properly noted.

Noting the aforementioned assertions, the contention of the paper therefore is, these assertions should have substantially

affected the determination of the *jus ad bellum* case as discussed in the following analysis. Provided that use of force in case of disputed territory is directly related to the territorial integrity of a state concerned, the exercise of actual authority over the disputed territory has to be cautiously established in order to determine the territorial sovereignty of either state over the territory. In the *jus ad bellum* case Eritrea's claim over Badme was based on the colonial treaty, while Ethiopia was claiming based on *effectivites* [51, p-382]. But taking into account the aforementioned alleged hostile acts of Ethiopia across the border specifically in Badme, it is far-fetched to approve Ethiopian's claim of *effectivites* to the effect of establishing Ethiopian territorial sovereignty over the area. Had the Commission not limited its point of reference from May 1998 and stuck to the line of withdrawal, Eritrea could have the chance to argue that Ethiopia's control over Badme resulted through continuous hostile acts. First, according to the principle of international law of 'effective administration [15, p-511]', the Commission did not attempt to determine whether there was actual, continuous and peaceful manifestation of authority over Badme or not, so that Ethiopia's actual authority to be regarded as effective administration. Second, an actual authority established in disputed territory through manifestation of hostile acts does not give rise to have territorial sovereignty by the occupant over the area as a result of which any use of force against the occupant does not violate its territorial integrity [13]. Therefore, had the Commission took the chance to consider these facts, it could have concluded that Ethiopian acts in the border with Eritrea specifically in the Badme area were hostile, thus, Eritrea's use of force over Badme did not violate Ethiopia's territorial integrity.

2. African Territorial Integrity Norm

In 1964, the first Summit of African Head States of the OAU adopted resolution AHG/Resolution 16(1) with regard to management of disputes among African states. According to that resolution, all African leaders agreed member states to strictly respect the principles laid down in paragraph 3 Article III of the OAU Charter and to respect the *legal finality* and *sanctity* of colonial boundaries [52]. The reference of the resolution to Article 3 paragraph III of the OAU Charter is construed as reference to the inviolability of boundaries, which is found in the principle of 'territorial integrity [32, p-181]'. The principle of inviolability of boundaries constitutes a basic element of the broader principle of territorial integrity of States which protects a state from unlawful interference by other states with regard to its territory [48, p-10]. Ethiopia which was not colonized and its boundaries with its neighbors were mainly fixed through its own bilateral treaties it signed with the colonial or administering powers of its neighbors [48, p-4]. Ethiopian rulers signed three treaties with Italy (Eritrea's colonial master) in 1900, 1902 and 1908 to define Eritrea-Ethiopia boundary. During the early sessions of the OAU conferences Ethiopia was particularly *advocating* to respect the colonial boundaries of the continent. It declared in the Cairo Summit in 1964 that, 'the acceptance of imperialist borders was necessary for Africa's safety and that the provisions of the OAU Charter regarding the preservation of territorial integrity must be supported [32, p-184-85].' Ethiopia was asserting this rhetorically now and then to illegitimatize and illegalize Somalia's claim of territory [32]. Having this historical fact/background of Ethiopia of advocating for the respect of colonial boundaries, its claim of Eritrean territory violating the colonial boundaries, the manifestation or use of force to occupy territories and create *de facto* situations on the ground, the unilateral demarcation of the border with Eritrea contradicts with its own stance and declarations. This line of argument could have estopped Ethiopia from asserting that Eritrea's use of force over Badme violated its territorial integrity and political independence in the *jus ad bellum* case, because Ethiopia has not only assented to respect the colonially inherited boundary treaties, but it firmly advocated for finality and legality thereof. In this context, Eritrea's use of force to recover its colonially determined territory was in line with Ethiopia's prior political recognition and stance of finality of colonial boundaries. Thus, Eritrea's use force was not meant to compel Ethiopia to take a decision it would not have taken otherwise. Eritrea's objective of using force was to reassert its sovereignty over Badme, that objective was affirmed by the EEBC decision too. In this case Eritrea's use of force did not violate Ethiopia's political independence.

3. The Proper Determination of Effectivites Vis-À-Vis the Background of the Line of Withdrawal and the EEBC's Finding

To determine Ethiopian's claim of effective administration over Badme, the only evidence that the Commission considered was the line of withdrawal under the Cease-Fire Agreement of 18 June 2000 [2, para-2]. Taking into account the pertinent rules of *effectivites*, the background of the line of withdrawal, and the EEBC's holding the Commission's move raise questions. 'The actual continuous and peaceful display of state functions in case of dispute is the sound and natural criterion of territorial sovereignty [15, p-511].' Without verifying/assessing the alleged acts of Ethiopia throughout its border with Eritrea specifically in the Badme area as noted above, it cannot be concluded that there was Ethiopia's actual and peaceful manifestations of authority in the area. What the Commission gave more significance was the line of withdrawal: it did not inquire if Ethiopia's claim of effective administration was accompanied by actual, continuous and peaceful governmental functions. Thus, the rules developed with regard to *effectivites* and the Commission's choice to regard the line of withdrawal as best evidence of effective administration seems to be discordant.

Background of the Line of Withdrawal

After the outbreak of the armed conflict in 1998, the OAU Ministerial Committee held that Badme was under the administration of Ethiopia before the outbreak of the conflict and it demanded Eritrea to withdraw from the territory [3, p-701]. The line of withdrawal was entered based on that

decision of the OAU ministerial committee between the governments of Eritrea and Ethiopia to facilitate the peace plan brokered by the international community. There was no fact-finding mission made on whether Ethiopia was administering the territory effectively or not. Gray criticized the holding of the OAU ministerial committee as 'somewhat less evenhanded [3].' Taking into account the conflicting claim of Eritrea and Ethiopia, the holding seems not to have been made on reasonable ground. Another critique also stated that the 2000 agreement of line of withdrawal 'was clearly dispensed' without any indication of impartiality [51, p-382], [53, p-11]. '…the agreement stipulated that Ethiopia would withdraw only from Eritrean territories taken after the last round of fighting to the positions that it unilaterally declares were under its administration prior to 6 May 1998 [51].' The author added that such holding confirmed the original intention of Ethiopia of making such determination its exclusive right [51]. When the OAU held Badme was under Ethiopian administration prior to the outbreak of the conflict, it clearly reflected Ethiopian's prerogative of determining the boundary. Ethiopia's prior unilateral demarcation of the boundary disregarding the colonial treaties took precedence in the OAU holding. Referring the original intention of Ethiopia by the author is related with Eritrean government's accusing Ethiopia of creating *de facto* situations in the border by occupation and effecting new unilateral demarcations. Thus, arguably the line of withdrawal seems to confirm Ethiopia's version of facts. After all, it must be noted that the line of withdrawal was decided by a political organisation (OAU) [4, p-21]. That is to say, the OAU as political organisation, its decisions are not necessarily based on *legal arguments* but on *political arguments*. Therefore, the Commission's move to regard the line of withdrawal as best evidence of effective administration in such complex area of international law (use of force) reveals the dearth of objectivity of the Commission's decision.

The EEBC's Finding of the Absence of Ethiopia's Effective Administration Over Badme

The EEBC, in its decision awarded the flashpoint of the war Badme to Eritrea rejecting Ethiopia's claim of exercising effective administration. Nevertheless, the Commission in the Central Front of Ethiopia's claim explained as to why it considered the line of withdrawal as best evidence of effective administration disregarding the EEBC. It stated:

> The EEBC was concerned to determine the boundary as of the independence of Eritrea on 27 April 1993, 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 [54, para-30]. The Boundary Commission was not charged with, and did not determine the respective areas of effective administration by the Parties in May 1998. The Claims Commission concludes that the best available evidence of the areas effectively administered by Ethiopia in early May 1998 is the line of withdrawal agreement [54].

The Commission is stating that the EEBC decision did not consider the effective administration of territories by the parties in 1998, thus it had to take the line of withdrawal as best evidence of effective administration. However, the EEBC noted that, Ethiopia produced no evidence of governmental activities west of the straight line (Badme area) to prove its claim of *effectivites*. The EEBC also added that 'what is relevant here is governmental and not private activity [55, para-5.92-5.95], [56, para-17], [45].' According to the EEBC, there was evidence brought by Eritrea of its governmental activity in the area, but provided that Ethiopia could not prove its claim of effective administration and provided that Badme lay on what was found to be the Eritrean side of the treaty line, the EEBC found it needless to consider Eritrea's governmental activity/presence in the area. The EEBC recorded that some maps submitted by Ethiopia not only showed the distinctive straight line between the Setit and Mereb Rivers, but marked Badme village as being on the Eritrean side of that line [55]. EEBC's decision on Ethiopia's claim of *effectivites* was that, there was no proof produced by Ethiopia of its effective control over the area at any time before the outbreak of the war [57, p-648], [58, p-228]. The EEBC awarded Badme to Eritrea when Ethiopia could not prove its claim of *effectivites.*

True, in case of territorial dispute, 'where there is a valid legal title, the legal title will have pre-eminence and *effectivites* may play a confirmatory role. However, where the *effectivites* are in contradiction to the legal title, the latter will have pre-eminence [15, p-514].' The EEBC did not reject Ethiopia's claim of *effectivites* because it contradicts with Eritrea's legal title based on colonial treaties. The EEBC simply stated 'the Commission does not find in them (in Ethiopia's bulk of items to support its claim to have exercised administrative authority) evidence of administration of the area sufficiently clear in location, substantial in scope or extensive in time to displace the title of Eritrea that had crystallized as of 1935 [55, para-5.94-5.95].' According to international law of effective administration there was no actual, peaceful and continuous display of state functions by Ethiopia up to the outbreak of the conflict. However, the Commission seems to apply an outlandish rule of *effectivites*, by which it skewed from the normatively accepted rule of *effectivites* applied by the EEBC. In its preliminary decision, while determining its jurisdiction to decide the *jus ad bellum* claim, the Commission stated that:

> '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 that *jus ad bellum* [30, para-32].

As a matter of fact, the UNSC did not put blame or responsibility to either side for the start of the conflict albeit

its power to do so under the Charter. And, the Commission avers that it is modestly assigned to determine the lawfulness of use of force based on Art 5 of the Algiers agreement, thus, it need not refer or defer the UNSC's position of not assigning culpability for initiating of the hostility. It follows then that based on the Commission's line of thought the EEBC's power and mandate happens to be modest from that of the OAU in case of determining *effectivites* over Badme. If the Commission is modestly empowered to determine the lawfulness of Eritrea's use of force based on the Algiers Agreement, so is the EEBC empowered to determine *effectivites* over Badme territory. That is to say, the EEBC's decision is authoritatively worth referring than that of the OAU determination. Thus, the Commission should have taken note of this—its own line of argument—before its apparently blind and cursory move of giving legal significance to the line of withdrawal ignoring the *modest* and genuine EEBC's holding. To sum up, the Commission's move to regard the line of withdrawal as best evidence of *effectivites* contradicts with the finding of the EEBC. Had the Commission considered the EEBC's finding of absent effective administration over Badme, it could have found Eritrea's use of force to recover Badme violates neither Ethiopia's territorial integrity nor its political independence.

D. Eritrean Assertion of Self-Defense in the Jus Ad Bellum Case

Eritrea argued that, 'its actions in taking Badme and adjacent areas on 12 May 1998 were in self-defense, consistent with Article 51 of the Charter, taken in response to the fighting near Badme that began on 6 and 7 May 1998 [2, para-9].' Eritrea brought before the Commission its defensive assertions; the unlawful occupation of its territory by Ethiopia, the aggressive intrusion into its territory carried out by Ethiopian armed militia near Badme in early May 1998, the shooting to death of its eight soldiers on 6 and 7 May and subsequent setting off fighting between small units in the area [2].

The Commission rejected Eritrea's claim of self-defense and it stated that, 'self-defense cannot be invoked to settle territorial disputes and localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter and Eritrea failed its obligation to report the measures it had taken to the UNSC [2, para-11].' The facts of the case as summarized by the Commission were: at least two brigades of Eritrean armed forces equipped with tanks and artillery occupied Badme and its adjacent Ethiopian territories of Laelay and Tahtay Adiabo on 12 My 1998. The evidence as to the nature of Ethiopian armed forces was conflicting, however, the weight of the evidence showed that they were militia and police who were shortly forced to retreat by the invading Eritrean forces [2, para-14].

The issue of self-defense in the international law has been subject to serious of debates and different interpretation. Following paragraphs critically reviews the Commission's treatment of the issue in the *jus ad bellum* case, in a dissected form.

1. The Goal of Self-Defense and the Commission's Confusion

Eritrea's first assertion to defend Ethiopia's *jus ad bellum* claim was 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,' as revealed by the EEBC [2, para-9]. Without directly responding to Eritrea's claim (the unlawfulness of Ethiopia's occupation) the Commission stated that:

> ….it is true that the boundary between Eritrea and Ethiopia in the area of Badme was never marked…. and it is clear that the parties had differing conceptions of the boundary's location. However, the practice of States and the writings of eminent publicists show that self-defense cannot be invoked to settle territorial disputes [2, para-10].

After the Commission conceived the presence of territorial dispute, it stated that 'self-defense cannot be invoked to settle territorial dispute'. Ethiopia was asserting that the territory (Badme) never been under Eritrea's control, it had been administered by Ethiopia. On the other hand, Eritrea argued based on the colonial treaties; thereby it used force to defend its integral part of its territory against Ethiopian occupation accompanied by the attacks [3, p-711]. As most authors agree self-defense is permitted to repel an armed attack or to remove its consequences such as ending an occupation [59, p-499]. Besides, the primary objective that naturally follows from the nature of defense is the recovery of (occupied) territory. André de Hoogh stated that, though, the permissibility of this particular goal of self-defense has been denied by the Commission, 'it ought to be noted that it confused the goal of recovery of occupied territory in a continuing situation of self-defense with the legal prescription that States shall refrain from the threat or use of force to settle international and territorial disputes [60].' And, this paper argues that, this confusion results from the blanket characterisation of the *jus ad bellum* case as territorial dispute and from the selective application/reading of the international instrument and works of eminent publicists without appraisal the essence and the main assertion of Eritrea, which are discussed in detail below.

The first problem is regarding the way by which the Commission reached to its decision that there was territorial dispute. To respond to Eritrea's assertion—that Ethiopia was unlawfully occupying Badme—the Commission stated that the boundary around Badme was not marked and the parities had differing conception. Thus, the Commission characterized it as disputed area. However, this characterisation ignores some relevant facts. First, 'Borders are imagined lines that are rarely demarcated on the ground,' and African countries boundary are result of colonially inherited treaties, and demarcation is practiced rarely [61, p-342], [62], [63]. Thus, the Commission should have referred the African practice instead of outright inference from the unmarked nature of the boundary as disputed. That is to say, as far as African boundaries are

concerned, its unmarkedness does not necessarily entail an existence of dispute. Again the EEBC noted that, '……..even maps submitted by Ethiopia not only showed the distinctive straight line between the Setit and Mareb Rivers, but also marked Badme village as being on the Eritrean side of that line [56].' The EEBC decision was already given when the Commission was deciding the *jus ad bellum* case. This makes hard to believe the Commission's description that the parties had differing conception of the boundary—if the two states were issuing maps that marked Badme on the Eritrean side of the line, reasonably, they are not expected to have a differing conception of the boundary.

Ethiopian historian Professor Bahru Zewde stated 'all the maps show this straight line that connects the Mereb and Setit Rivers, however capricious it might be, there is no way that line could bend [45], [51, p-380].' The new map issued by Ethiopia in 1997 made a major alteration to the historic border along the straight line connecting the Merb and Setit Rivers. It strangely bent and twisted to the northwest (encroaching in to Eritrean territory to the northwest) [45], [51]. Eritrean government described the Ethiopian act as willful claim of Eritrea's territory and flagrant violation of colonial boundary treaties [64], [49, p-382], [33, p165]. Eritrea believed that the colonial boundary treaties were clear [64]. After the EEBC affirmed Eritrea's claim of Badme its sovereign territory based on the colonial treaties, in 2003 the Ethiopian government declared the EEBC decision as '*totally illegal, unjust and irresponsible* [3, p-708].' And, this bespeaks Ethiopia's flagrant disregarding of the finality and legality of colonial boundaries [3, p-713]. Ethiopia claimed Badme as its territory even after it was found out to be Eritrean territory by the EEBC. Therefore, the Commission's conclusion that there was border dispute is not well-founded. After Ethiopia described the EEBC decision as '*totally illegal, unjust* and *irresponsible*' and after refusing to withdraw from Badme, the Commission could have concluded that, now it became apparent that Ethiopia was willfully claiming Eritrean territory and flagrantly violating the colonial treaties. Otherwise, the Commission's position in this regard could cause/persuade African states to unabashedly and violently claim territory of their neighbors under the guise of unmarked nature of colonial boundaries.

Supporting the Commission's holding, Murphy problematized two issues with regard to Eritrea's first argument of the unlawfulness of Ethiopia's occupation. The first problem he deemed was, 'no international arbitral or other authoritative decision clarified whether Badme was part of Eritrea or Ethiopia…… but throughout the period of the war there was no delimitation let alone demarcation of the boundary [4, p-19].' First, in this case Murphy seemed to ignore the nature of colonial treaties, which defines the boundary. If there was no authoritative decision (the colonial treaty Ethiopia signed with Eritrea's colonialists) based on what authority did the EEBC decided? All OAU states affirmed the OAU resolution of 1964 to accept the legality and finality of colonial boundary treaties— and this affirmation makes the OAU resolution of 1964 an authoritative decision as a result of which colonial treaties are also authoritative instruments. Thus, if it was for the colonial treaties, it authoritatively placed Badme within Eritrea. Second, Murphy's description that there was no delimitation at all seemingly contradicts with the status of the colonial treaties as discoursed by the EEBC. As far as African boundaries are concerned delimitation is related with the creation of boundaries through colonial treaties. There are two stages of establishing boundary (Delimitation and demarcation). The first stage is delimitation which is referred as 'the description of the alignment in a treaty or other written document,' or 'the definition of a boundary in a treaty or other legal instrument [32, p-228], [65]'. The EEBC concluded that, based on the subsequent conduct of the parties (Italy and Ethiopia) the straight line boundary that connects the Mareb and Setit Rivers was crystallized in 1935 (there was mutual acceptance of the parties of the boundary to be so). The EEBC considered the maps issued by both parties-subsequent to the conclusion of the treaty of 1902- as it defines and delimits the boundary based on that treaty. The crystallisation was considered by the EEBC as delimited so and binding to the parties thereafter [55, para-5.88-5.90], [66]. The Commission's statement also implied the delimited nature of the boundary when it stated 'the unmarked nature of the boundary between Eritrea and Ethiopia.... [2, para-10]'

The second problem Murphy stated was, 'The evidence before the Commission as of May Badme and its environs were under peaceful and effective administration of Ethiopia…..that Boundary Commission's decision was not driven by proof of administration of territory. Instead, the focus of the Boundary Commission was on the proper interpretation of colonial-era treaties [4, p-20].' First, Murphy simply accepted and echoed the Commission's position to take the line of withdrawal as best evidence of effective administration. He did not discuss the nature of effective administration which is legitimate by international law. Murphy described the EEBC as if it only employed the interpretation of colonial treaties. As discussed in the foregoing, though ultimately the decision was based on interpretation of colonial treaties, it was when Ethiopia failed to bring convincing evidence of effective administration that the EEBC only employed the interpretation of colonial treaties. Thus, Murphy's position that the focus of the EEBC was only on the interpretation of colonial treaties is simply wrong.

The legal prohibition of force to settle territorial disputes is prescribed to maintain the stability of international boundaries and to avoid restricting of the scope of the prohibition of use of force. Iraq used force against Kuwait in 1990 claiming that the latter was its territory. But the Iraq's use of force was condemned because it violated a commonly accepted international boundary [13, p-117], [3, p-712]. Argentina used force to occupy the Falkland Islands in 1982 claiming it as its territory unlawfully occupied by British [3]. However, Shaw noted that, 'It would appear that conquest formed the original basis of British title over the island' (before 1830s, conquest was legitimate to acquire territory) [15, p-533]. 'This coupled with the widespread recognition by the international

community, including the United Nations, the status of the territory as a British would appear to resolve the legal issues [15]'. That is why the Argentina's use of force was condemned by the UNSC in the same way as the Iraq's use of force was condemned. Somalia fought with Ethiopia in 1978 to recover territories from Ethiopia. Somalia's claim was an irredentist claim; it was claiming territory from Ethiopia based on historical title, violating the colonial treaties that define the boundary. Somalia's claim did not get acceptance by the OAU and international community as well [32, p-201]. In the aforesaid cases, the states that used force were claiming territories which they believed was theirs. The goal of their use of force was to recover a territory. Again their claim was an irredentist one which is not accepted internationally. Thus, the application of the rule against the use of force to settle the dispute in these cases then gets pertinence. When the Commission stated 'self-defense cannot be invoked to settle territorial dispute', it implied that the mere aim of Eritrea's use of force was a means to solve a territorial dispute with Ethiopia. However, the goal of Eritrea's use of force was to repel the attacks from Ethiopian force in its territory and soldiers. There was a continued situation of self-defense, which is repelling the source of the attacks and recovery of the territory under the attacks. However, the Commission viewed Eritrea's assertion like the above mentioned cases, and it treated Eritrea's use of force as it was meant to settle territorial dispute. It did not try to see if the first actual use of force by Ethiopia in the territory was a policy of force to effect territorial change. The blanket application of the prohibition of force to settle territorial dispute by the Commission seems to keep/protect territorial change effected through unlawful use of force from being restored by the lawful sovereign state.

Among others, Schachter was one of the authors which the Commission cited his work to support its position that 'self-defense cannot be invoked to settle territorial dispute [2, para-10]'. However, his position was not as the Commission briefly invoked. He properly discussed other issues that go in tandem with the prohibition of force [13, p-116-117]. Moreover, its particular focus on Eritrea's use of force on 12 May 1998 [3, p-711] and its selective application of the 'Friendly Relations Declaration [3]' made the Commission to equate the *jus ad bellum* case with territorial dispute, as a result of which it confused Eritrea's claim of self-defense with the legal prescription of the non-use of force to settle territorial dispute [19]. The paragraph of the 'Friendly Relations Declaration', which the Commission cited, do not only prohibit states from the threat or use of force to settle territorial disputes; it is crystal clear the Commission hides from the reader that the same paragraph imposes upon states the duty to refrain from the threat or use of force to violate the existing international boundary of another State. Shaw noted that, after Eritrea got its independence it was recognized internationally within the former administrative border; the former administrative border had originally been international boundary established between Eritrea and Ethiopia according the colonial treaties [67, p-500], [33, p-164]. The border defined by the colonial treaties continued to be regarded as international boundary between Eritrea and Ethiopia. However, the Commission did not discuss who was violating the international boundary with threat or use of force. Though, the Commission regarded the boundary as contested one, in fact it was Ethiopia that was violating the international boundary through the unilateral redrawing and demarcation of the boundary, maintaining of armed forces in the territory and killing of Eritrean soldiers to effect the violations. These facts, germane as they are, should have been discussed according to the friendly declaration

As Gray has put it, the presence of Ethiopian militia in Badme without the consent of the Eritrean government was an illegal armed attack. 'The Commission failed to consider 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 [3, p-717].' Eritrea also argued 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 [3].' A territory put under the authority of a hostile army is regarded as occupied even if the territory meets with no armed resistance [68, p-4]. The manifestation of force in the territory coupled with the killing of Eritrean soldiers apparently shows the maintaining of Ethiopian military there. Therefore, the Commission's decision to equate Eritrea's assertion as mere goal of settling territorial dispute advantaged Ethiopia to hide its prior violations of the international boundary and occupations of Eritrean territory and the killing of its soldiers. It is safe to state then, despite the continuing situation of self-defense right of Eritrea, the Commission blindly applied the rule against the use of force to settle territorial dispute.

The other problem with the Commission is that although it dismissed Eritrea's contention on the basis of territorial dispute, it inscrutably avoided discussing the situation of peaceful settlement of the dispute. Schachter has stated that, 'Art 2(4) cannot in itself restrain force when deeply felt rights to territory are claimed and peaceful means of the dispute settlement have been unavailing [13, p-117];' and the principles that underlie the prohibition of threat or use of force to settle territorial dispute is that states have to apply other means of peaceful settlement of solving their problems. The Commission noted the establishment of Eritrea-Ethiopia Joint Border Commission prior to the outbreak of the conflict. However, it did not make any inference from that- it did not discuss whether there was possibility of solving the problem peacefully before Eritrea used force. The Commissions invocation of the principle of the nonuse of force to settle territorial disputes and its failure to shed light on the principle of peaceful settlement of territorial disputes (either bilateral or using UN mechanisms [10, p-39] of dispute settlement) is byword improper application of international law rules.

Murphy stated 'Ethiopia could use force to reclaim territory it regarded as illegally occupied by Eritrea, so long as it did so shortly after Eritrea seized the territory by force or as soon as diplomatic efforts are exhausted [4, p-25].' Though, he had in mind that the territory was disputed Murphy ignored Eritrea's right to resort to force if situation of peaceful settlement were

unavailing in the same vain as Ethiopia was entitled to resort to force. From Murphy's line of argument it can be deduced that in the first place Eritrea had the right to resort to force to reclaim territory it regarded as illegally occupied by Ethiopia when diplomatic efforts to solve the problem were exhausted. Though the action might not be immediate to Ethiopia's act of occupying Badme, it could be argued that Eritrea had been downplaying Ethiopia's act to pursue peaceful means.

Finally, the Commission stated 'border disputes between States are so frequent that any exception to the prohibition of the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law [2, para-10].' According to the Commission, Eritrea's use of force was unlawful because it was contrary to the fundamental rule of international law which is the rule against use of force to settle territorial dispute. In fact, it is the Commission's decision that is creating a dangerous precedent. As noted in the above, it blindly applied the rule against the use of force (to settle territorial dispute) while there was a continued situation of self-defense resulted from Ethiopia's grave violations of the colonial boundaries and armed attacks. The Commission's decision will have a negative impact on the colonial treaties that establishes or defines African boundaries. It will bring about uncertainty of African boundaries established by colonial treaties. Because, the Commission's decision implied that Ethiopia could change a border simply by keeping military forces and claiming it as its own. By characterising the *jus ad bellum* case as territorial dispute and by applying the blanket rule against the use of force, the Commission's decision will advantage aggressions or aggressors and make the rule against the use of force to be interpreted as unjust rule. Because, according to the Commission, Eritrea had to tolerate the violation of the colonial treaties to the effect of its territory being taken away and its soldiers being killed; that is the actual use of force by Ethiopia to impose its will. It is apparent that states would take the Commission's position as a strategic advantage to violate an international border and claim a neighbored territory, even to the extent of enforcing their will militarily, provided that the illegitimate position's (E.g. occupation of territories) effected through unlawful use of force are going to be *sterilized* by the blanket application of the rule against use of force to settle territorial disputes.

2. The Definition of Armed Attack and The Commission's Approach

Given the debatable and controversial nature of self-defense, the Commission is naturally expected to give an elaborated and analyzed discussion so that its findings would serve good to this area of international law and contribute a lot to the enhancement of the rules of use of force. The Commission's discussion of the *jus ad bellum* case, however, is too short and lacks analytical thoroughness and seriousness. As prescribed by Art 51 of the Charter, a state has the inherent right of self-defense against an occurrence of armed attack. There are various arguments being proposed with regard to the interpretation of the same provision. However, Eritrea's argument in the *jus ad bellum* case is 'in theory the most straightforward form of self-defense [3, p-717]'. That is Eritrea's measures were in response to actual and lethal armed attack from Ethiopian armed force within its territory.

The targets of an armed attack which triggers self-defense are generally related with a state's territory (including persons or property in the territory), military unit or armed force of a state [23, p-178]. Here in the *jus ad bellum* case Eritrea asserted that its territory and soldiers were the target of Ethiopia's attack. Following paragraphs reveal the Commission's flaws in dealing with the issue of armed attack in the *jus ad bellum* case.

a. Seriousness of an Attack

The view the Commission took to Eritrea's claim was that, 'localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter [2, para-11].' The Commission further stated that the minor incidents were not of a magnitude to constitute an armed attack by either state against the other within the meaning of Article 51 of the Charter [2, para-14]. Art 51 does not specify as to what amounts a use of force to be qualified an armed attack; whether, grave, large, direct… etc. But the Commission seemed to follow the precedence of the ICJ. The ICJ in the *Nicaragua* case distinguished the gravest forms of use of force which qualified as an armed attack and lesser forms of use force which are mere frontier incidents [3, p-719]. Considering the nature of intervention by third state in the *Nicaragua* and others alike cases, 'there is a policy argument for relatively high threshold of an armed attack [3].' The first problem with the Commission's interpretations of 'armed attack' therefore lies in failing to apply different reading of the circumstances of the *jus ad bellum* case. Schachter stated that, having the different forms of self-defense it stands to reason to apply and interpret the standard of armed attack taking into account the nature of individual cases [3, p-720], [13, p-147]. What follows from this is that, Eritrea's claim of armed attack from Ethiopian armed forces is coupled with unlawful occupation of its territory. Taking into consideration the conflicting territorial claims in the Badme area, and the unilateral form of claim of self-defense, the Commission should have evaluated the gravity or seriousness of the attack from a different view of that of the ICJ. If the ICJ applied the high threshold requirement for an armed attack to limit third party involvement [69], the Commission should have applied another test that would properly appraise the effects and nature of the attack. The incidents in the Badme area were not mere firing of gunshots across the international border. The incident was accompanied with the loss of lives and a serious threat to the inviolability of Eritrea's territorial integrity. The nature of the incident as frontier or border incident may not necessarily make it be of less grave forms. As it is stated in the final report in the meaning of armed conflict, a state can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action [70]. Thus, the number or nature of the armed forces involved in the

6-7 incidents could be small, but nature or number cannot make them be equated as minor incidents or less grave forms without appraisal the reason behind or the effects of the incidents. Different publications have argued that the history of Ethiopia is one of conquest of independent peoples [71, p-11]. Ethiopia's participation in the Berlin conference to scramble for Africa with its European counterparts and its carving out by conquering and incorporating different independent peoples evidences Ethiopia's character of colonial territorial expansion [72, p-4], [73, p-9], [32]. Eritrea was later became victim of Ethiopia's ambition of territorial expansion when it was federated against the wishes of its inhabitants and later unlawfully annexed by the latter. Taking into account Ethiopia's role of shaping the boundaries of this region, its historic claim of Eritrea and its character of territorial expansion, any act of Ethiopia that has something to do with the border inevitably raises serious concern on the part of Eritrea. Thus, the gravity and seriousness of the incidents (occupation of territory and killing of soldiers by Ethiopia transgressing the colonially defined territory) should have been seen within the context of the threat that such incidents pose to Eritrea- fear of falling pray of Ethiopia's territorial expansion again which is, indeed a serious threat to the inviolability of its territorial integrity

Despite the nature of the self-defense (which was collective in the *Nicaragua* and *Oil platform* cases), it is worth noting that even the ICJ's interpretation of 'armed attack' is criticized by many international authors and its members. Many international law authors do not accept the ICJ's high threshold requirement of an armed attack. This makes the ICJ definition of armed attack not generally accepted definition [1], [23, p-174], [74]. Judges Schwebel and Jennings in their dissenting opinion in the *Nicaragua* case rejected the majorities holding of the high threshold requirement of armed attack and argued that the high threshold requirement might rule out otherwise lawful self-defense measures in the time where the UN is not capable of doing its job under the Charter [75, p-511]. In the same vain Richard Gardner argues that the ineffectiveness of the UN collective security system under Chapter VII of the Charter necessitates the liberal interpretation of Art 51 [76, p-53]. It could be argued that the ineffectiveness of the UN was evident in 2005 when it did not take an action of forcing Ethiopia to withdraw from the territory it held unlawfully after the EEBC decision. Uncontrovertibly, Ethiopia is obliged to honour international law and abided by the decision of the EEBC; however, the UN, let alone to employ force to compel Ethiopia to comply with the law, there is no indication that it will impose sanctions against the latter for failing its obligation [35, p-102]. This status quo, too, should have impressed the Commission to assess the gravity of the attacks and Eritrea's right of self-defense to reassert its sovereignty and repel the attacks that threatens its territorial inviolability.

According to the prevailing view of a number of authors and states, 'an armed attack that triggers for exercise by the victim state of its right to use force in self-defense may range from a fairly restricted use of force, such as a border raid causing limited loss or damage, to a full-scale invasion of its territory [77, p-243].' The Commission described the incidents in the Badme area as 'geographically limited clashes between small Eritrean and Ethiopian patrols along a remote, unmarked, and disputed border [2, para-12].' What follows from this statement is that uses of force that involve massive military operation are only equated as an armed attack. In the contrary in the *Oil platforms* case the ICJ implied that even the mining of a single vessel may amount to armed attack [15, p-1133], [74, p-15]. In the *Nicaragua* case the ICJ admitted that armed attack not necessarily take the form of massive military operation when it stated that 'sending of armed bands or irregulars into territory of another state may count as an armed attack [23, p-176]'. Therefore the Commission's labeling the incidents of Badme as 'geographically limited clashes' or 'localized border encounter between small infantry units' without appraising the effects of such incidents apparently contradicts the contemporary definitional view of 'armed attack'. Above all it exacerbates the uncertainty of the minimum requirement of the threshold of armed attack that triggers a state's right of self-defense. The Commission simply stated that 'localized border encounters between infantry units…..' it failed to discuss further as to what amount of minimum armed force is required then any use of force to be equated as an armed attack. There are also authors who support the ICJ's high threshold requirement of armed attack. They argue that, lowering the threshold may make less serious uses of force qualify as armed attacks triggering self-defense, to the effect of broadening the scope of self-defense and at the same time weakening of the general prohibition on the use of force [78]. But it should be noted here that the Commission regarded the incidents in the Badme area as minor incidents without addressing the consequences out of the incident that could be serious.

b. Armed Attack and the Definition of Aggression

As discussed in the previous section, armed attack is equivalent with the concept of armed aggression as defined in the Definition of Aggression [14, p-264], [16, p-163]. In the *jus ad bellum* case the Commission described Eritrea's use of force as 'the invading Eritrean forces [2, para-14-5]'. First, invasion constitutes the main case of aggression listed in art 3(a) of the Definition of Aggression. The lists of forms of aggression in Art 3(a) includes; 'the invasion or attack by the armed forces of a state of the territory of another state, or any military occupation resulting from such invasion or attack, or an annexation by the use of force of a territory of another states or part thereof….. [24]' According to art 2 of the Definition of Aggression the first use of force is *prima facie* evidence of aggression [14, p-264]. The Commission did not attempt to verify who used force first in order to determine the aggressor. 'The first who starts hostilities using armed force is the aggressor or invader' pursuant to the Definition of Aggression—however, this rule is anomalously disregarded in the Commission's decision. Without verifying who used force first, the Commission called Eritrea invader which is erroneous; and this labeling of Eritrea as invader lacks

coherence with the said Definition of Aggression. Had the Commission took the opportunity to verify who used force first, it could have found that Ethiopia was using force to invade and occupy Eritrean territories and attack Eritrean armed force. Arguably, then such initial invasion and attack could have been equated as an aggression tantamount to an armed attack guarantying Eritrea its inherent right of self-defense.

c. Intention to Attack

The term armed attack 'requires the attacker to have an intention to attack [74, p-6].' The ICJ in the *Oil Platforms* case made reference to this requirement when it inquired into the question 'whether the US was able to prove that certain of Iran's actions were specifically aimed at the US or that Iran had the specific intention of harming US vessels [74], [15, p-1133], [75, p-510].' In the *jus ad bellum* case the Commission made no reference of this requirement. Despite Eritrea's assertion of the attacks of Ethiopia on its soldiers and territory [2, para-9], the Commission did not give light of the day whether Eritrean soldiers were intentionally attacked- it did not require Eritrea to prove the intentional or non-intentional nature of the attacks. Had the Commission required proving the intention of the targeting of the eight Eritrean solders, arguably it could be reached in to conclusion that Ethiopia was using a blatant and direct use of force to compel Eritrea to yield territory. Vaughan Lowe argued that if there is an intention of imposing the will of the attacker upon some part of the territory of the other state it is considered as an armed attack [74, p-16]. The Commission's decision to dismiss Eritrea's assertion of armed attack without assessing the intentional targeting of its soldiers and territory by Ethiopia to impose its will is contradictory with the requirement of armed attack which is applied by the ICJ and supported by international publicists.

d.Accumulation Theory

The 'accumulation of events doctrine', which is new trend of armed attack, did not come in to picture of the Commission's discussion [3, p-720]. The ICJ, in the *Oil Platforms* and in the *Armed Activities on the Territory of the Congo (DRC v. Uganda)* cases 'used language that suggested the cumulative nature of a series of forcible actions could possibly turn them into an 'armed attack' [3], [14], [75, p-511], [78, p-244]. Many states including US and Israel have also relied on this theory to justify their acts [59, p-516], [77, p-243-44]. The Commission without ruling on the different descriptions of events brought by the parties, it stated the incidents in the vicinity of Badme occurred within 6-12 may of 1998 [2, para-12]. If the Commission viewed that these events were of minor incidents which could not reach the level of armed attack as considered separately, it should have applied the cumulative events theory where a series of minor attacks, taken together, reaches the threshold level of armed attack. The adverse effect of the Commission's determination of its scope of jurisdiction to claims occurred after May 1998 is felt in this issue as well. Had the Commission did not limit its scope of jurisdiction from May 1998; Eritrea could have brought before the Commission's attention the incidents that were taking place before May 1998. Taking into account the threat or danger that arises out of the whole series attacks this new trend has started to gain acceptance by states. Given the facts of the *jus ad bellum* case, the Commission has missed an expedient opportunity to contribute to the jurisprudence of international law to elaborate the cumulative theory and give its support.

e. Other Defensive Measures

The ICJ (in the *Nicaragua* case), after it found the initial use of force were short of armed attack, it envisaged or suggested that in such circumstances a state is permitted to respond with proportionate counter measures. It is legitimate counter measure which is less grave than self-defense in response to the use of force which is less than armed attack [5, p-110], [23, p174]. This important issue of the use of force is left unaddressed in the *jus ad bellum* case. It seems that presuming Eritrea from the scratch as on the wrong side swayed the Commission to leave the other form of response available to Eritrea unaddressed—which is a response to the killing of its soldiers coupled with its claim of unlawful occupation of its territory. Given the facts of the *jus ad bellum* case the Commission also missed to elaborate, analyze and add some flesh to this rule of international law on self-defense. The Commission's failure to discuss on this issue implies that Eritrea had to tolerate the series of attacks (which according to the Commission were of low intensity). Following that trend can cause increase of violence in international relations. Because, Eritrea being target of the attacks have no choice, but to resort to the same technique of warfare as Ethiopia did. The Commission's failure to guarantee other form of defensive measure seems to immunize unlawful use force from being remedied and with the effect of rendering Art 2(4) of the Charter unfunctional.

In international law the rule of coherence has an important place. That is to say, rules 'to be perceived as legitimate must emanate from principles of general application [20, p-57].' However, as discussed above, in addition to the brief and short analysis of the *jus ad bellum* case, the Commission's position to dismiss the attacks as minor incidents without discussing important elements of armed attack arguably exacerbates the perceived nature of international law on self-defense as unsettled or debatable; and devoid of coherent rules of general application.

E. Duty to Report to the UNSC

According to ICJ, either reporting or failing to report to the UNSC 'may be one of the facts indicating whether the State in question was itself convinced that it was acting in self-defense [5, p-101], [14, p-247], [23, p-190].' Judge Schwebel in his dissenting opinion in the *Nicaragua* case stated that 'reporting is a procedural matter which does not go to the extent of depriving a state of its substantive and inherent right of self-defense [23].' Scholars also argue that failure to report *per se* does not demonstrate conclusively that a state was not acting

in self-defense; it is a procedural requirement, not a mandatory requirement [3, p-719], [16, p-149]. The Commission simply put Eritrea's failure to report as a failure of its obligation under Art 51 [2, para-11]. It did not expressly state that Eritrea did not believe that its actions were not defensive. However, as Murphy stated, it 'appears the Commission to have regarded Eritrea's failure to report to the UNSC as a form of evidence that Eritrea itself, in early May 1998, did not regard itself as the object of an armed attack necessitating the exercise of a right of self-defense [4, p-26].' Dinstein asserted that 'the proposition that a failure to comply with the subsequent duty [after taking measures of self-defense] undermines the legality of the preceding measures does not fit the scheme of the Charter [23, p-190].' The Commission did not make any discussion as to the intention of Eritrea's during the time in question. The Commission seems to put a blanket obligation of 'reporting to the UNSC.' It may be argued that actions taken as measures of self-defense have to be reported to the UNSC for such requirement cannot be seen as 'unduly onerous'. That is, if the action is truly defensive the state has nothing to hide. It might be based on this situation, as the ICJ in the Nicaragua case did, that failure to report may be a factor taken into consideration to determine the legitimacy of a state's claim of self-defense. However, 'it is clear from the UN practice that failure to report an action allegedly taken in self-defense does not make it unlawful [5, p-101], [23, p-90], [79, p-17].'

Art 51 of the Charter intends a state to inform the UNSC of its claim of acting in self-defense, in order the UNSC may take collective action in place of its individual action [5], [16, p-149], [80, p-114]. However the institutional machinery of the collective security system of the UNSC has never been put into effect. States also usually leaves the task of bringing the matter to the attention of the UNSC to their adversary [5], [16]. Likewise Eritrea wrote a letter to the UNSC in 15 May 1998 'challenging Ethiopia's version of events' when Ethiopia appealed to the UNSC in 14 May 1998 [3, p-700], [81]. Though the matter was brought before the UNSC, it did not take an action except later issuing resolutions that condemn the use of force by both states. It seems then that, even if Eritrea had reported its actions of self-defense immediately, the UNSC would not have taken any effective measure in short time or it would not have decided who the aggressor was. Nevertheless, the Commission applied blanket obligation of reporting without discussing what 'reporting to the UNSC' is all about.

Murphy stated that the letter sent by Ethiopia in May 1998 that states 'a war of aggression has been launched by Eritrea proved significant in establishing that, at the time in question, Ethiopia regarded itself as the victim of an armed attack, whereas Eritrea did not [4, p-12].' Nevertheless, in 3 June 1998 Eritrea wrote to the UNSC stating that 'it consistently refrained from publicising [the] aggressive attacks in the past and condemns Ethiopia's repetitive acts of aggression. Affirming its legitimate right of self-defense, again reiterates its firm conviction that the current crisis can only be resolved by peaceful and legal means [3, p-718].' Eritrea argued that earlier it was down playing the impact of Ethiopia's attacks hoping to pursue peaceful settlement [3], [81]. According to this letter and other letters, Eritrea regarded itself as a victim of an attack before May 1998. Worth noting and germane point as it is, 'Eritrea was betrayed by various manifestations of the "international community"' [82, p-482]. Despite the overwhelming majority of the people of Eritrea wanted independence coupled with its strong case of right for self-determination within its colonially defined territory, the UN resolved to federate Eritrea with Ethiopia [83, p-73], [84, p-22]. The UN, though it was the primary author and supervisor of the implementation of the federation, it kept silent while Ethiopia violated the terms of the federation and annexed Eritrea; even it abstained to hear and react to the continuous appeal of the people to the same organisation to compel Ethiopia to stop the violation [85, p-37], [86, p-644]. The UN's indifference to Eritrean case is being strongly felt now as well— as a guarantor of the Algiers Agreement, the UN is not taking any action to compel Ethiopia to abide by the EEBC decision. This continued *betrayal experience* of Eritrea by the international community specially the UN, inextricably prompts deep rooted lack of trust on the organisation. Thus, Eritrea's failure to report of its measure of self-defense should have been assessed against this background of historical betrayal experience by the UN. That is to say, it could be argued that the embedded lack of trust caused or swayed Eritrea to be indifferent of reporting to the UNSC. Therefore, it can be safely concluded that, without considering the facts discussed in the foregoing, the Commission's position to apply a mandatory nature of reporting to the UNSC do not objectively reflect whether Eritrea truly believed its actions were defensive or not. The Commission's approach of siding with (favoring) the view of the 'mandatory' nature of the duty to report would encourage creating situations where a state acting to protect itself from an aggressor to be seized in contravention of international law, wherefore mere injustice will be served.

F. Proportionality and Necessity

Murphy stated that Eritrea would have had difficulty of establishing that the measures it had taken were proportional and necessary to 6-7 May incidents even had these incidents were regarded as an armed attack, and he added, the Commission need not reach that issue [4, p-27]. It seems that the Commission did not discuss the issue because it had already concluded that there was no armed attack that legitimize Eritrea's claim of self-defense [2, para-14], [15, p-1142], [16, p-163]. To respond to Murphy's assertion; first he seems to indicate that Eritrea's measure were not proportionate or necessary to the initial attacks. Nevertheless, Murphy wrote in his book (previously) quite to the contrary; he argued that, 'proportionality does not require that the force be a mirror image of the initial attack, or that the defensive actions be restricted to a particular geographic zone. Rather, proportionality is assessed based on the result sought from the defensive action; not the forms, substance and strength of the action itself [21, p-446].' True, Eritrea's measure might not be

mirror image of the 6-7 incidents and the measures might not be restricted to a particular geographic zone. The intended result of the measure was to remove the sources of attacks and to recover territory which was under Ethiopia occupation. Therefore, it seems unsound why he thought in the *jus ad bellum* case Eritrea would have had difficulty to establish that its actions were necessary or proportionate. His approach toward the *jus ad bellum* case merely bespeaks discordancy in his line of arguments in the issue of proportionality and necessity.

It is generally understood that the first question that arise with necessity is, if force was necessary at all or if there were other non-forcible measures available to the victim state to defend itself [77, p-274]. This is quite narrow understanding of necessity by some authors as 'a situation where it is unavoidable to rely on force in response to an armed attack since no alternative means of redress is available [14, p-271].' Despite the preference of peaceful settlement of disputes, states were never required to demonstrate if they had first attempted to apply non-forcible means of resolving the matter before resorting to armed force [14, p-248], [59, p-520]. The Commission did discuss the availability or unavailability of peaceful settlement. Even it cannot be contended that Eritrea had only to pursue or to resort to peaceful settlement [13, p-153] if Ethiopia was trying to impose its will through armed force. It could have argued that, its defensive measure was strictly necessary and directed to removing the violation and restoration of the violated right which was the occupation of its integral part of its territory and to repel the attacks on its armed forces. Schachter stated that a state may not enter deep in to a territory of attacking state in response to isolated attack in disputed territorial zone [13, p-154]. Eritrea's measure cannot be dismissed as disproportionate and unnecessary to the initial attacks for the mere fact that the measure was not restricted in Badme [15, p-1142], [77, p-236]. The Ethiopian Adiabo territory to which Eritrea's measure was expanded is located adjacent to Badme. Thus, it cannot be said that Eritrea's measures entered deep into Ethiopia's territory. Eritrea could have also argued that if part of its defensive measure took place in the Ethiopian territory, it was not unlawful use of force but the result of reasonable belief to repel or remove the Ethiopian forces [32, p-180].

Gauging proportionality depends on the facts of a particular case [14, p-269]. The *jus ad bellum* case is characteristically different—the claim of attack was intermingled with claim of occupation of territory. Different terms might be employed to define proportionality. But the prevailing and most accepted approach is 'a response is proportionate if there is a reasonable relationship between the measures employed and the objective [14, p-248-49], [87, p-12].' Thus, the employment of larger force than the original attack does not undermine proportionality provided that the force used in self-defense can reasonably be related with the aim self-defense—which is a measure taken to repel and halt an attack or to remove its consequences, such as ending an occupation [77, p-260], [59, p-500], [8, p-600]. Provided that there was no rule of international law that legitimizes Ethiopia to occupy Badme and maintain its presence militarily, Eritrea's territory is deemed under armed attack. Eritrea could have argued that its use of force was aimed at repelling and halting continuous attacks on its force and to end occupation of its territory. Having that aim, Eritrea is not expected to employ small armed forces. Thus, the employment of bigger number of armed force could reasonably be related with the intended objective of Eritrea use of force [49, p-382]. Sloane argues that proportionality in the *jus ad bellum* means, 'force, even if it is more intensive than (the *casus belli*) is permissible so long as it is not designed to do anything more than protect the territorial integrity or other vital interests of the defending party [88, p-109].' It has to be noted here that, though the Commission did not throw light on it, according to Eritrea's argument the objectives of its use of armed force was to protect the violation of its territorial integrity. Once it mastered the colonial frontier (which it lost by federation and later by unlawful Ethiopian annexation) through bitter armed struggle, Eritrea does not want to see its boundary questioned by its former colonial master [89, p-16]. Eritrea could also have argued that its employment of bigger armed forces was to avoid or reduce the risks to the lives of its forces (previously eight of its soldiers had been killed).

IV. Conclusion

It has been introduced that the area of the use of force in international law is controversial and debatable. It is against this background that the paper critically appraises the decision of the Commission in the *jus ad bellum* case. The paper shows that the determination of scope of jurisdiction was detrimental to an objective analysis of the *jus ad bellum* case. The decision which was given with closed eye to the recent past can hardly reflect an objective understanding of the relation that existed before or during Eritrea's use of force but an implication of misguided understanding.

On Ethiopia's contention of violation of its territorial integrity and political independence, the Commission failed to cautiously assess the hostile nature of Ethiopia's acts in Badme area which proves Ethiopia's lack of territorial sovereignty. It also failed to consider the notion of territorial integrity in Africa—the legal finality and sanctity of colonial boundaries. Ethiopia's prior affirmation and undergirds for the respect of finality and legality of colonial boundaries in the OAU and the EEBC's reaffirmation of Eritrea's sovereignty over Badme could prove that Eritrea's use of force was not compel Ethiopia to take a decision or a concession it would not take otherwise. Thus, the use of force by Eritrea to regain Badme did violate neither Ethiopia's territorial integrity nor its political independence as contended by Ethiopia in the *jus ad bellum* case.

In determining lawfulness of Eritrea's use of force the Commission used the line of withdrawal as best evidence of Ethiopia's effective administration of Badme in early May 1998. This paper asserts that the line of withdrawal should not have been used as a basis for legal determination of the lawfulness of use of force. First, it was criticized as less evenhandedly decided that affirmed Ethiopia's original

intention of having a prerogative of determining the boundary—as it had been unilaterally drawing and demarcating the boundary and annexing Eritrean territory. Second, it might have been decided based on political arguments not necessarily on legal arguments so long as it was decided by a political organisation. This negatively affects the objectivity of the Commission's decision. The Commission also failed to refer to the EEBC finding that ruled out Ethiopia's *effectivites* over Badme. Based on the EEBC decision, it should have been made unthinkable for the Commission to consider *effectivites* of Ethiopia over Badme. The Commission apparently applied an outlandish standard of *effectivites* unknown by international law-and this reveals the Commission's decision lacks objectivity and coherence. The paper therefore argues that, the Commission should have rejected Ethiopia's contention of violation of its territorial integrity and political independence, considering the illegitimacy of the latter's control over Badme coupled with Ethiopia's strong documented political decision and affirmation to respect colonially inherited boundaries.

With regard to issue of self-defense, the Commission confused Eritrea's claim of self-defense with the legal prescription of the prohibition of force to settle territorial disputes. First, it did not try to refer the practice of both parties across their common boundary and the African states practice of marking a boundary: it cursorily assumed existence of boundary dispute based on the facts that the boundary was unmarked and the parties had differing conceptions of the boundary—which is unreasonable. The Commission's blanket application of the prohibition of force to settle territorial disputes in the *jus ad bellum* case will, therefore, be a bad precedent as a result of which states may tend to use it as normative basis to claim territories under the guise of unmarked nature of African colonial boundaries. And, its mundane position implicates uncertainties of African boundaries, which is creating a situation of bedevilment to the legal finality of colonial boundaries. The Commission's decision also indicates that the illegality and illegitimacy of territorial change effected through unlawful force is *sterilized* by the prescription of prohibition of force to settle territorial disputes, wherefore it makes the rule against the use of force be regarded as unjust rule that advantages aggressions or aggressors.

The Commission's ruling on the issue of the existence of armed attack did not consider the different nature/ characteristics of the *jus ad bellum* case. Its conclusions do not properly reflect the seriousness and the effect of the attacks (Ethiopia's initial use of force) in conflicting territorial claim situation. The decision of the Commission that regarded the incidents around Badme as minor incidents without evaluating the effect and seriousness in the context of the *jus ad bellum* case is not in line with the contemporary view of armed attack, but adds fuel to the uncertainty of the minimum requirement of the threshold of armed attack that legitimize a state to go for self-defense.

The Commission also gave no light of the day to some elements of armed attack. It called Eritrean armed force as invading forces without referring to the Definition of Aggression which states 'the first use force is *prima facie* evidence of armed aggression,' and under the prevailing view an act of aggression proves the existence of an armed attack; nevertheless, the Commission failed to first verify who used force first to properly label the putative invader thereby determine the existence of armed attack in line with aforesaid definition. The Commission was not in a position to use the peculiar circumstances of the *jus ad bellum* case as also missed an expedient opportunity to discuss and add some flesh aiming at international norm to the new and important element of armed attack which is cumulative theory of armed attack. The Commission did not also discuss or require Eritrea to prove that it was intentionally attacked, for intention to attack is decisive element without which the existence of armed attack cannot be established. After finding out the absence of armed attack of grave form, the Commission failed to allow Eritrea to resort to other form of defensive measure which is less than full scale self-defense. Thus, the Commission's treatment of armed attack would apparently increase violence in international relations to the effect of debilitating Art 2(4) of the Charter; for the implication of its decision is that use of force of less grave forms fall below the radar screen of Art 2(4) and insufficient to be equated as armed attack under Art 51 of the Charter—as such Eritrea had to follow the same trend of warfare as Ethiopia followed to protect its integrity.

Precipitately, the Commission failed to fit the situation of the *jus ad bellum* case into the normatively established law of self-defense. The paper asserts that in May 1998 Eritrean territory and armed forces were under armed attack provided that Ethiopia's presence in Badme was not legal and legitimate under international law. The Commission's move to disregard the above mentioned issues or elements of armed attack led to miscarriage of justice as it ruled out Eritrea's claim of self-defense that is based on relative clarity and applicability of established international norms. Above all, the short and brief discussion of the Commission that did not consider important elements of armed attack arguably exacerbates the perceived nature of the law on the use of force as unsettled or devoid of rules of general and coherent application—by which its only contribution to international law is disservice.

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