

Enclosure**Attachment to paragraph 6 of the twenty-second report of the Eritrea-Ethiopia Boundary Commission: letter dated 27 November 2006 from the President of the Commission to the Minister of Foreign Affairs of Ethiopia**

I have received and read with care your letter to me of 13 November 2006. Although it is not usual for international tribunals to respond to criticisms made by a discontented party, it is not possible for the Commission to leave your observations without some response — the more so as you have already given much publicity to your letter and have requested that it should be published as a Security Council document. I do not reply in full detail because the Commission's understanding of the facts is set out in the Statement which it is issuing today, of which I attach a copy. Nonetheless, with great respect, I have to tell you that, insofar as your letter purports to set out facts, those that it states are, regrettably, in significant detail wrong or highly selective.

At the outset, as a striking example of misleading selection, I refer to the manner in which, towards the end of your letter, you refer to the statement made by the President of the Security Council on 17 October 2006. You quote the whole of that statement with the exception of the highly relevant final paragraph bearing on the conduct of Ethiopia. This reads as follows: "Members of the Security Council call on Ethiopia to implement fully the EEBC decision". This was not the first time that the Security Council has called on Ethiopia to fulfil its obligations in respect of the Demarcation Decision. Nor is Ethiopia's failure to respond positively to such a call the first time that it has disregarded the call of the Security Council. It is a matter of regret that Ethiopia has so persistently maintained a position of non-compliance with its obligations in relation to the Commission.

You again put forward Ethiopia's contention that the Commission's procedure "does not conform with international practice and does not allow sufficient consideration of anomalies and impracticabilities as between the lines set out in the April 2003 Delimitation Decision and the realities on the ground". (The Decision was actually rendered a year earlier than the date you give.) The Commission has met this contention in detail in its Observations of 21 March 2003. There the Commission explained that it was not empowered by the Algiers Agreement to vary the line of delimitation that it had determined on the basis of the evidence before it. Indeed, the Commission is expressly prohibited from doing so by the provision in the Algiers Agreement that "the Commission shall not have the power to make decisions *ex aequo et bono*" (Article 4 (2)). The prohibition of recourse to *ex aequo et bono* can only mean that the Commission must implement what it finds to be the strict legal position in accordance with the terms and procedures clearly prescribed by the Parties.

You complain of the conduct of Eritrea, saying that it "has refused to heed either the Commission's requests or the Security Council's demand" and you observe that "under the circumstances, I cannot imagine that appeasement of Eritrea is the appropriate step". There is no basis for the suggestion that the Commission has been appeasing Eritrea. Nor can such a suggestion, however unfounded, obscure the fact that Ethiopia has itself been in breach of its obligations under the Algiers Agreement in several important respects. It is sufficient here to mention one serious

one, namely, Ethiopia's continued failure to comply with the Commission's Order of 17 July 2002 requiring Ethiopia forthwith to arrange for the return to Ethiopian territory of those persons in Dembe Mengul who were moved from Ethiopia pursuant to an Ethiopian resettlement programme since 13 April 2002 and to report to the Commission on the implementation of this order by 30 September 2002. Ethiopia has made no report to the Commission. A more detailed account of Ethiopia's lack of cooperation and breaches of its obligations is set out in today's Statement of the Commission.

You state that "it is impossible to understand or accept the Commission's plan to issue a Demarcation Decision, notwithstanding the clear understanding by the Parties and Witnesses to the Algiers Agreement that the final demarcation would be impossible without a cooperative process with a view to understanding and dealing with anomalies and impracticabilities". A "cooperative process", it is true, is important if it can be achieved. What you do not mention is the fact that Ethiopia has by its conduct on many occasions repeatedly obstructed the Commission's field personnel and prevented them from carrying out the necessary investigations in the field and made a "cooperative process" impossible. Ethiopia's actions in this respect preceded the more recent episodes in which Eritrea's conduct, largely by making it impossible for UNMEE to provide necessary assistance to the Commission's field personnel, has contributed to the impasse.

The Commission does not contest the assertion that its approach to demarcation by way of setting out coordinates indicating precise Boundary Points was not part of its original intention. Its intention had been to go on the ground and, in consultation and cooperation with the Field Liaison Officers of the Parties, to establish the locations for the emplacement of boundary pillars. Despite repeated initiatives on the part of the Commission supported by requests of the Security Council that the Parties cooperate, Ethiopia, for one, has made this approach impossible. The Commission cannot be left in limbo as a body charged with a function that the very Parties creating it have prevented it from performing.

One of the elements in Ethiopia's complaints is that Eritrea is guilty of the same obstruction. Eritrea's non-cooperation with the Commission only really developed after Ethiopia insisted that the boundary should be altered to meet with what Ethiopia chose to call "anomalies and impracticabilities", despite the clear statements of the Commission that this could not be done. When asked to confirm its continuing acceptance of the Delimitation Decision, Ethiopia repeatedly qualified its position by saying that it wished negotiations to take place regarding such "anomalies and impracticabilities". Eritrea's insistence on strict adherence to the terms of the Delimitation Decision was a position which it was entitled to adopt in accordance with the Algiers Agreement.

You place great emphasis on "the need for dialogue and support by neutral bodies to help the two Parties make progress in demarcation and normalization of their relations". Of course, "the normalization of relations" is a desirable objective but that is a matter that falls outside the scope of the Commission's mandate, which is solely to delimit and demarcate the border. The scope for "dialogue" is limited to what is necessary between the Commission and the Parties to further the actual process of demarcation on the ground. There is no room within the framework of the Algiers Agreement for the introduction of "neutral bodies" into the demarcation process.

You ask “Why has the Commission abruptly and without notice chosen to abandon the process for demarcation embodied in its rules, instructions and decisions?” The answer is that the Commission has been unable to make progress, initially, because of Ethiopia’s obstruction and, more recently, because Eritrea has followed a similar course. Matters cannot be left in this uncertain condition. Something must be done. You will see from today’s Statement of the Commission attached to this letter that the Commission has not abandoned the idea of pillar emplacement. In that Statement the Commission again provides the Parties with an opportunity to cooperate with it in the pillar emplacement process. Only if no real progress is made during the next 12 months will the Commission resort to demarcation by coordinates alone to identify boundary point locations.

You complain about the Commission’s “engagement” with the Security Council. You disregard the fact that the Commission has since its inception been “engaged” with the Security Council by reason of the Commission’s quarterly reports to the Secretary-General of the United Nations, which have then been annexed by him to his own reports to the Security Council and have formed the basis of numerous references to the situation and requests to the Parties by the Security Council. Moreover, the Security Council has repeatedly shown its concern with the process of demarcation by the adoption of a number of resolutions calling upon Ethiopia, and more recently Eritrea also, to comply with the terms of the Algiers Agreement.

Your letter seeks to blame the Commission for Ethiopia’s failure to meet its obligations under the Algiers Agreement. Such blame is entirely misplaced. The truth of the matter appears to be that Ethiopia is dissatisfied with the substance of the Commission’s Delimitation Decision and has been seeking, ever since April 2002, to find ways of changing it. This is not an approach which the Commission was empowered to adopt and is not one to which the Commission can lend itself.

I regret that it has been necessary to address you in such direct terms but your letter — and the publicity that you have given it — have left me with no alternative. It would be unacceptable for an international tribunal to be exposed to the kind of criticism which you have lodged without replying to it in necessary detail.

(Signed) Sir Elihu **Lauterpacht**
President of the Eritrea-Ethiopia Boundary Commission
