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Ethiopia's Sovereign Right of Access to  
the Sea under International Law

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# ETHIOPIA'S SOVEREIGN RIGHT OF ACCESS TO THE SEA UNDER INTERNATIONAL LAW

by

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Under the direction of Daniel Bodansky

## ABSTRACT

Since Eritrea's secession from Ethiopia there has been continuous opposition by intellectuals and the opposition to the government's policy of making Ethiopia a landlocked country. Some totally reject the secession, while others accept the independence as a "fait accompli" and voice concern over the lack of an outlet to the sea, and still others acknowledge the right of self-determination and secession of Eritrea but denounce the inconsistency of the application of the Transitional Charter regarding the Red Sea Afar and the Algiers Agreement for denying Ethiopia its legitimate right to access to the sea and allege that the government is acting against the paramount national interest of the country.

INDEX WORDS: Ethiopia, Eritrea, International Law, Treaty, Access to the Sea, Self-Determination

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UNDER INTERNATIONAL LAW

by

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LLB, Addis Abeba University, Ethiopia, 2006

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## DEDICATION

TO MY FATHER BARAMBARAS TEKLEHAIMANOT KAHSAY

For the extra dedication you showed us to be educated and for all Ethiopians who are investing on their children so that Ethiopia will have a better future. Father, you didn't live to witness it because we chose a different path.

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Abebe T. Kahsay (Major General)

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## CHAPTER 1

### INTRODUCTION

Since Eritrea's secession from Ethiopia there has been continuous opposition by intellectuals and the opposition to the government's policy of making Ethiopia a landlocked country.<sup>1</sup> Some totally reject the secession; while, others accept the independence as a "fait accompli" and voice concern over the lack of an outlet to the sea, and others acknowledge the right of self-determination and the secession of Eritrea but denounce the inconsistency of the application of the Transitional Charter regarding the Red Sea Afar<sup>2</sup> and the Algiers Agreement for denying Ethiopia its legitimate right to access to the sea and allege that the government is acting against the paramount national interest of the country.<sup>3</sup>

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<sup>1</sup> Michela Wrong, *I DIDN'T DO IT FOR YOU, How the World Betrayed a Small African Nation*, Harper Perennial, (2005) Wrong writes on page 379

"While Meles still maintains he has no designs on the coast, his people are less restrained. The curse of the Queen Sheba has returned with a vengeance in Ethiopia, with opposition parties, civic groups and independent newspapers all arguing that Eritrea's duplicity has proved Ethiopia must secure its own port."

<sup>2</sup> The Afar Revolutionary Democratic United Front, which has been, and still is, fighting for the Unity of Afars of Ethiopia and Eritrea, within Ethiopia, see Patrick Gilkes and Martin Plaut, *War in the Horn: The conflict between Eritrea and Ethiopia*, pp 17, the royal institute of international affairs(1999), Sultan Ali Mirah the traditional leader of the Afar ethnic group declared that Afar is one and the Red Sea Afar should be allowed to self-determination and join Ethiopia during the Conference of the Transitional Charter, Interview with Lieutenant General Tsadkan former Chief of Staff and a participant of the Conference

<sup>3</sup> I was a member of the Central Committee of the ruling party (Ethiopia Peoples Revolutionary Democratic Front) until 1994 and as one of the highest commanders of the Ethiopian Defense Forces, had the opportunity to know what actually the government's position was. I am not implicating any new secret or unknown position of the government, but we really believed that the governing legal regimes are the colonial treaties and the national interest of Ethiopia can only be upheld by accepting the 'reality' and promote peace to fight poverty. I used to think that (and may be most of the party and state officials) those who raise the right of access to the sea are those who reject the new Constitution, especially Article 39 which is a guarantee of nations and nationalities on self-determination, and who are adherents of the feudal and military dictatorships as war mongers who do not accept the independence of Eritrea. I used to reject the views of those who were struggling for the right of access to sea with out rendering them 'the benefit of the doubt'. The Eritrean invasion and confiscation of all Ethiopian properties which were

Access to the sea is an important issue in Ethiopian politics that needs to be addressed and the issue should be dealt with beyond the incumbent government. Ethiopia regained the right of access to the sea by the Resolution of the General Assembly of the United Nations 1952. After about 40 years of enjoyment of its sovereign right it is again in the verge of permanently becoming landlocked. The present government of Ethiopia has agreed and signed the Algiers Agreement that could make Ethiopia a landlocked country. If the opposition wins the next election or any election there after, it may officially denounce the Algiers Agreement and demand a new arrangement that recognize the right of access to the sea.<sup>4</sup> It is believed that access to the sea is one of the burning issues that contributed to the success of the opposition and the declining support of the government during the last election.

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located at Asseb and Massawa, the two “Eritrean ports” that Ethiopia used to get service from, made me question the issue of the access to the sea. After I retired from the Ethiopian Air Force I was in a better position to listen to the arguments of those who were calling for the Algiers Agreement to be terminated and a new treaty that acknowledges Ethiopia’s right to outlet and allowed me to deal with Ethiopia’s right of access to the sea as one of my legal issues to research upon. Why we had that position is a mystery that history may tell. To me, it is a combination of ignorance and arrogance.

<sup>4</sup> The Manifesto of the Coalition for Unity and Democracy (CUD), the strongest opposition in Ethiopia states that “landlocked countries are less attractive for direct foreign investment than maritime ones, attracting only 34% of the latter. The TPLF/EPRDF move on this issue is eminently one of treason. • Although the legitimacy of Ethiopia’s demand for a sovereign right of access to the sea is legal and well realized by the international community, the intransigent position taken by the ruling party has closed the door for the possibility of discussing the issue. Therefore because the question is interlinked, the legal question of sovereignty and survival of the nation, a request will be put forward before the international community for a balanced support.”

<http://www.kinijit.org/static/KINIJIT-MANIFESTO-English-ver-1.0.pdf>

Some of the former executive and central committee members of the ruling party denounced the Algiers Agreement and some of them are on the verge of setting up a new political party with a platform of sustaining the supposedly lacking real democracy of Ethiopia and protecting the sovereignty of the country. Recovering the Port of Asseb also lies at the top of its agenda. July 01 2007

<http://www.addisfortune.com/Former%20TPLF%20Members%20to%20Establish%20New%20Party.htm>

In this thesis, I argue that Ethiopia has the right to access to the sea as recognized by the recommendation of the United Nations General Assembly of 1950 which was implemented accordingly by federating Eritrea to Ethiopia. I recognize the right of self-determination and independence of the Eritrean peoples, but, argue that the independence of Eritrea and the sovereign right of access to the sea of Ethiopia are not mutually exclusive. The legal regime that governs the territorial disputes between Ethiopia and Eritrea is the “treaty between the United Nations and Ethiopia’ or strictly speaking as the ‘treaty between the Victorious Four Powers of WWII and Ethiopia’ according to which Eritrea was federated to Ethiopia in 1952.

The peoples of Eritrea have decided on their fate and become independent and their wishes have been fulfilled by the blood that they paid during the struggle for their independence. But the ‘treaty between Ethiopia and the Four Powers’ is not only about the wishes of inhabitants of Eritrea: it is also about the consideration of the security of East Africa and the legitimate need of Ethiopia to access to sea. In fact, I argue that the main objective and purpose of that ‘treaty’ is the right of Ethiopia access to the sea. The foundation of any settlement that is meant to solve the territorial disputes between Ethiopia and Eritrea should be the recommendation of the UN General Assembly of 1950 and international law, which guarantee Ethiopia’s right to access to the sea.

I also argue that the 1900, 1902, and 1908 treaties between Ethiopia and Colonial Italy cannot be the basis for resolving the current territorial disputes between Ethiopia and Eritrea. First, Italy breached the treaties by invading and occupying Ethiopia. Ethiopia invoked material breach of the treaties and declared them null and void according to customary international law. Secondly, the latest UN recommendation as a ‘treaty between the Four Powers and Ethiopia’

supersede the former treaties. Even if Italy had not breached the treaties, the treaties of 1900, 1902, and 1908 are made irrelevant by the latest 'treaty'--that is, the recommendation of the General Assembly as delegated by the four powers and implemented half a century ago.

This thesis does not address the Algiers Agreement as a whole nor the legal solutions to the obstacles that this agreement may have created. This thesis establishes Ethiopia's right of access to the sea under international law and treats the Algiers Agreement as an anomaly that should be discarded. The Algiers Agreement is mentioned intermittently to clarify and ascertain Ethiopia's right of access to the sea.

The thesis begins by reviewing the background history. A short description of the geography and demography of the Horn of Africa is followed by the geo-politics of the region. The modern history of Ethiopia and Eritrea starting from the 'creation' of the colony of Eritrea and up to present is described chronologically. The paper continues by addressing the problems of landlocked countries in general and their ramification to the economic and security of landlocked Ethiopia in particular. The thesis then analyzes the different legal regimes that may govern the territorial disputes between Ethiopia and Eritrea. The bilateral treaties of 1900, 1902, and 1908 between Ethiopia and Italy are briefly discussed. The invasion of Ethiopia by Italy and its legal consequences are broadly discussed, based on the Vienna Convention on the Law of Treaties, which is declaratory of customary international law regarding material breach and termination. The paper continues by discussing state practice on material breach and termination regarding territorial treaties. The Munich Agreement and the Riga Treaty of 1921 are taken as examples. This discussion concludes that, the invasion of Ethiopia by Italy was a material breach

of the treaties and that Ethiopia had the right to declare the treaties null and void, which it legally did according to international customary law.

Chapter 4 of the paper then addresses the treatment of Eritrea after the Second World. The first section of this chapter discusses the meaning of the 1947 Peace Treaty with Italy--especially the renouncement of its African colonies including the Ethiopia-Italy treaties of the first decade of the 20 century and the process of the disposition of Eritrea. It describes the position of the Four Victorious Powers on the disposition of Eritrea and the alterative proposals presented. It then continues to show how the issue was dealt with by, the United Nations General Assembly and the conclusions reached. UN Resolution Eritrea 390 A, recommended that Eritrea should constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown, and enumerated the basic tenets of the Federation. This section argues that the legal effect of this resolution vis a vis, the 1900, 1902, and 1908 treaties was that even if Italy did not invade Ethiopia and the treaties were not made null and void, this Resolution makes the earlier treaties irrelevant. The recommendation<sup>5</sup>--which was made pursuant to a delegation by the Four Powers --in essence constituted a “treaty between the Four Powers and Ethiopia”. The thesis argues that, that treaty is the governing legal regime that regulates the relationship between Eritrea as an independent state and Ethiopia

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<sup>5</sup> Recommendations of the General Assembly of the United Nations do not have binding legal effect on issues outside the United Nations organization itself. The Four Powers which were the successors of Italy's rights on its colonies decided to accept the recommendation of the General Assembly and implement it and as such the recommendation is the decision of the Four Powers who had the right over the Italian colonies pursuant to the Paris Peace Treaty of 1947. Shaw described it as: “In the event, the United Nations, given a determinative role by the Big Four Powers, decided to maintain the territorial integrity of the unit, partly because of the views of the parties involved and partly since the territory was administered as one unit. Shaw, Malcolm, *Title to Territory in Africa*, pp119 Oxford University Press (1986)

The thesis argues that in light of, Article 31 of the Vienna convention on the law of treaties, the main objective and purpose of the “treaty between the Four Powers and Ethiopia” regarding the status of Eritrea was that Ethiopia should have security and the right of access to the sea. The thesis concludes that because this resolution is the governing legal regime whose main object and purpose is to implement Ethiopia’s recognized right of to access to the sea, implementation of this right should be the foundation of any territorial settlement. The paper then discusses the opportunity lost in implementing this right during the 1998-2000 War between Ethiopia and Eritrea. It concludes by a short recommendation.

## CHAPTER 2

### BACKGROUND

#### Geography and Demography of the Region

The Horn of Africa which consists of Ethiopia, Djibouti, Eritrea, and Somalia, is roughly three-quarters of a million square miles in the northeast of the continent that juts out for hundreds of kilometers into the Arabian Sea, and lies along the southern side of the Gulf of Aden.<sup>6</sup> Ethiopia is the center of the Horn of Africa and is bordered by Djibouti 349 km, Eritrea 912 km, Kenya 861 km, Somalia 1,600 km, and Sudan 1,606 km.<sup>7</sup>

Ethiopia shares different ethnic groups with its neighbors. There are different ethnic groups residing in Ethiopia, Sudan, and Kenya. As will be discussed later, the most controversial are the Somalis residing in Ethiopia and Somalia. In Ethiopia's Somalia Region there are 4.5 million while in the country of Somalia there are 7.7 million of Somali speaking people. Directly related to the issue of access to the sea are the Afar people. Of the two million Afar people more than one million are in Ethiopia and the rest are in Djibouti and Eritrea.<sup>8</sup> The Afar extends from the Gulf of Tadura -(Djibouti) to the Gulf of Zula Eritrea.<sup>9</sup> The Afars who inhabit the Asseb zone of Eritrea make up 3% of the population of Eritrea.<sup>10</sup> Asseb separated from the main population of Eritrea by over 400 kilometers and developed closer economic connections with central Ethiopia than it did with the rest of Eritrea during the period 1938- 1991. Consequently, Asseb symbolizes the issue of Ethiopian access to the sea, which drove Ethiopians long struggle

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<sup>6</sup> Tom J. Farer, *War Clouds on the Horn of Africa*, 1 Carnegie Endowment for International Peace, 1976

<sup>7</sup> CIA: The World Fact Book, <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html>

<sup>8</sup> David H. Shinn and Thomas P. Ofcansky, *Historical Dictionary of Ethiopia*, 2004, the Scarecrow Press, Inc. see also the CIA: The World Fact Book on Somalia

<sup>9</sup> Tom Killion, *Historical Dictionary of Eritrea*, pp6, the Scarecrow Press Inc.1998

to gain and retain control over Eritrea.<sup>11</sup> The cultural ties between the Red Sea Afar in Eritrea and the large majority of Afar is so firm that most do not recognize an Eritrean Afar<sup>12</sup> There are four million Tigreans in Ethiopia while nearly two million are in Eritrea (about 50 % of the population of Eritrea)<sup>13</sup> Kunama minorities reside on both side of the border in Ethiopia and Eritrea.

All countries bordering Ethiopia have one or more sea outlets except Ethiopia which is allegedly denied an outlet to the sea by the Algiers Agreement. The population of the countries are as follows;<sup>14</sup>

Djibouti	496,374
Eritrea	4,906,585
Somalia	8,863, 338
Kenya	36,913,721
Sudan	39,379,358
Ethiopia	76,511,887.

Ethiopia has Christian 60.8% (Orthodox 50.6%, Protestant 10.2%), Muslim 32.8%, traditional 14.6%, other 1.8% (1994 census).<sup>15</sup> Most of the Christians are in the highlands of the country, while most Moslems are in the lowlands and all of the bordering countries in the region.

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<sup>10</sup> Id

<sup>11</sup> Id

<sup>12</sup> Tadesse Berhe and Yonas Adaye, Conflict in the Afar and its Impact on Sub-Regional Stability, unpublished, (2006)

<sup>13</sup> See note 8 p378

<sup>14</sup> CIA, World Fact Book, on the mentioned countries, <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html>

### Geo-Politics of the Region

The intent to control the Red Sea and the passage to the Indian Ocean makes the Horn of Africa a strategic area. The attempt of the Arabs to make the Red Sea an “Arab lake” and the spread of Moslem fundamentalism coupled with the role of Egypt and its vital interest of controlling the Nile River makes the politics of the region complex. The perceived differences in national interests of the different countries in the Horn complicate the relationship of the neighboring states which is abused by other power out side the region especially Arab countries.

As early as 1952, the constitution of Syria identified the “Arab home land” as a national home for the Arabs. It consists of the area that extends beyond the Taurus Mountains.... the Gulf of Basra, the Arabian Sea, the Ethiopian mountains... the Atlantic Ocean, and the Mediterranean Sea, and constitute one single complete unit, and which no part may be alienated.<sup>16</sup> The Iraqi Baathists and the Palestinian Liberation Organization used to treat the Eritrean struggle as an inseparable part of the Arab revolution, when Eritrea was part of Ethiopia.<sup>17</sup> The late President Sadat of Egypt observed that the Red Sea is an Arab lake.<sup>18</sup> Arab countries have been interfering in the internal affairs of Ethiopia on the pretext that Ethiopian Moslems are being persecuted.

Egypt’s interest in utilize the waters of the Nile in disregard of the rights of the upper riparian countries is one of the issues that shape the politics of the region. Professor Haggai Erlich describes the importance of the Nile and how it is intermingled with Pan Arabism and Pan Islam:

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<sup>15</sup> Id

<sup>16</sup> Daniel Kindie, the five dimensions of the Eritrean conflict 1941-2004, pp267 Signature Book Printing, Inc. (2005)

<sup>17</sup> Id

<sup>18</sup> Id 268

“It has to do with the very existence of Egypt. As these lines are being written, the “gift of the Nile” enters the twenty-first century facing an ever-deepening controversy over its waters. In the coming decades, gradually and perhaps inescapably, the Nile River will become an issue of life and death. Egypt was the capital of both state and political Islam. It was the Nile centered state that aspired to control the greater Nile basin. It also became the capital of the modern Arab revolution that threatened to unite the Moslems of the horn of Africa.<sup>19</sup>

In 1997, the Egyptian government launched an ambitious desert irrigation plan, namely the Toshika Canal, which, upon completion, would increase Egyptian dependency on the Nile and intensify Egypt’s commitment to exploit its “historic rights” to the fullest possible.<sup>20</sup> Prime Minister Meles Zenawi of Ethiopia, reacting to the launching of the Toshika project “He accused Egypt of striking a ‘proprietary attitude’ over the waters of the Nile river and charged that Egypt was trying to maximize its use of Nile water in order to make it impossible for an equitable quota system to be negotiated. The Egyptians treated the waters of the Nile, through Toshika project and the 1959 agreement as though they were a purely Egyptian affair rather than one concerning all the states in the basin.”<sup>21</sup> The Nile delta is rich in silt brought from the Ethiopian Plateau which makes the soil the most fertile in Africa.<sup>22</sup> Ethiopia provides 86% of the water that Egypt and Sudan consume and the Egyptians have tried to control the source of Blue Nile from the 19th century onwards. Khedive Ismail Pasha of Egypt attempted to control the source of the Blue Nile by invading Ethiopia.<sup>23</sup> However, his army met crushing defeats in 1875 at Gura and then at Gundet in 1876.<sup>24</sup> Egypt has continued to abuse its leadership position

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<sup>19</sup> Haggai Erlich, *The Cross and the River: Ethiopia, Egypt, and the Nile*, pp1, Lynne Rienner Publishing, Inc.(2002)

<sup>20</sup> Id 214 Water pumped from Lake Nasser and brought to the Western Desert to the Oasis of Farafara and Alkharji, would irrigate vast areas and provide the infrastructure for eighteen new towns and hundreds of villages. A huge pumping station, the largest in the world, at Lake Nasser would be completed by 2002. by the year 2017 these waters, representing some 10 percent of the quantity collected each year in lake Nasser.

<sup>21</sup> Id 214

<sup>22</sup> Nile River." *Encyclopædia Britannica*. <<http://www.britannica.com/eb/article-9108302>>.)

<sup>23</sup> See note 8

<sup>24</sup> Patrick Gilkes and Martin Plaut, *War in the Horn: The conflict between Eritrea and Ethiopia*, pp 20, the royal institute of international affairs(1999)

by coordinating, Syria, Iraq, Yemen, Libya and Saudi Arabia in an effort to weaken Ethiopia on the assumption that a strong Ethiopia would be in a better position to assert its right.<sup>25</sup> Three of Ethiopia's neighbors--, Sudan, Somalia and Djibouti-- are members of the Arab league and Eritrea is becoming a conduit for the Arabs who want to disrupt Ethiopian development. In Contrast, Ethiopia is primarily perceived as a "Christian Island" because Christianity was the state religion of Ethiopian Emperors before 1974, even though it has been a secular state after 1974. Of course the dominance of the Christian elite continues to this day. The disrupting activities have been done through Ethiopian opposition armed groups and neighboring states like Somalia which had fought a number of wars with Ethiopia. 'Pan-Somalism' or 'Greater Somalia' is a unifying factor in Somalia that attempts to unify Somali speakers in Djibouti, Kenya and Ethiopia. The Journal of Foreign Affairs discussed the legitimacy of Ethiopia's concern by stating that:

The Ethiopian government had a number of reasons for taking out the Islamic Courts. Ethiopia and Somalia have had a tense history, including three wars between 1960 and 1978. Somalia has hosted al-Itihaad al-Islamia, a terrorist organization that planted several bombs in Ethiopia in the 1990s, prompting the Ethiopian government twice during that period to send troops into Somalia to destroy the group and dismantle its training camps. Last year, senior court officials made clear that they intended to incorporate Somali populations in the Somalia region of southeastern Ethiopia into a greater Somalia. They were already backing Ethiopian opposition groups such as the Ogaden National Liberation Front and, in southern Oromia, the Oromo Liberation Front.<sup>26</sup>

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<sup>25</sup> Id

<sup>26</sup> Prendergast & Thomas-Jensen, *Blowing the Horn*, Foreign Affairs, March-April 2007 at 63, 64

### The Modern History of Ethiopia and Eritrea

Ethiopia which included the present-day Eritrea is one of the oldest countries in the world though not in its present shape.<sup>27</sup> A unique, African civilization emerged at the beginning of the first millennium A.D in the northern highlands of Ethiopia and Eritrea. Axum, located in the Tigray region of northern Ethiopia, flourished for almost seven centuries and become one of the most powerful kingdoms of the ancient world. The kingdom extended across the Red Sea into Southern Arabia and west to Sudan's Nile valley.<sup>28</sup> Ethiopia is also the place where humans originated, as evidenced by the finding of "Lucy" or "Dinkinesh".<sup>29</sup>

The modern history of Ethiopia and Eritrea began with the Italian occupation of Asseb in 1882 and the possession of part of the Abyssinian highlands in 1889.<sup>30</sup> On March 15 1883 Italy concluded a treaty of peace and friendship with Mohammed Hanfire, the Sultan of Asseb and chief of the Danakil (Afars).<sup>31</sup> The name Eritrea was given to these regions occupied by Italy in 1890. In March of 1896, Italy invaded Ethiopia from Eritrea but was defeated at the famous battle of Adwa.<sup>32</sup> Ethiopia and Italy agreed to delimit the boundaries in treaties of 1900, 1902 and 1908.<sup>33</sup> The delimitation was far from clear and the demand of Ethiopia to demarcate the boundary fell on deaf ears.

Italy again invaded Ethiopia in 1935<sup>34</sup> and occupied it until 1941. Italy had started to reorganize its 'East Africa Colony' from Eritrea in the north to Somalia in the south east in

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<sup>27</sup> See note 8

<sup>28</sup> Id

<sup>29</sup> Id

<sup>30</sup> Rubatino Shipping Company purchased a coastal tract adjoining the small village of Assab in 1869. In 1882 Assab was transferred from the Company to the Italian State. See, Stephen H. Longrigg, *A Short History of Eritrea*, p113, Oxford Clarendon Press, (1945)

<sup>31</sup> See note 8 pp 1i,

<sup>32</sup> Bahiru Zewde, *History of modern Ethiopia 1855-1991*, 2<sup>nd</sup> ed. ,77 , Addis Abeba University Press(2001)

<sup>33</sup> See note 8

<sup>34</sup> See note 32 at pp 153

different regions. But, British and Ethiopian forces drove the Italians out and Ethiopia regained its independence in 1941. Eritrea remained under British administration until 1952.<sup>35</sup>

The UN in its resolution in 1950 decided that Eritrea should be federated with Ethiopia as an autonomous entity under the sovereignty of Ethiopia and it was federated in 1952. The same year, Emperor Haile Selassie of Ethiopia declared the treaties signed with Italy null and void. The Emperor abrogated the federation and made Eritrea the 14<sup>th</sup> province of Ethiopia in 1962.

An armed struggle had already started in 1961 in the lowlands of Eritrea by Eritrean groups demanding independence<sup>36</sup> Emperor Haile Selassie was overthrown in 1974 by a military junta.

In 1991, the military government of Ethiopia was ousted by armed opposition fronts, led by Ethiopian Peoples Revolutionary Front (EPRDF) and a transitional government was formed.<sup>37</sup> That same year Eritrean fighters entered Asmara and occupied all the places that they claimed were part of Eritrea with the exception of some villages around the boundary area. These Eritrean fighters formed a de facto government.<sup>38</sup> The transitional charter of Ethiopia that was meant to be the “constitution” for the transitional period recognized the right of nations and nationalities to self determination including by means of secession.<sup>39</sup>

Eritrea was recognized as an independent country after its people voted for independence. Ethiopia was instrumental in getting the recognition of Eritrea by other countries and by the United Nations by becoming one of the first countries to recognize the new state of Eritrea.

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<sup>35</sup> Id 180

<sup>36</sup> See note 8

<sup>37</sup> Id

<sup>38</sup> Id

<sup>39</sup> Transitional Charter of Ethiopia No 1 Negarit Gazeta, 1991-07-22, Vol. 50, No. 1, pp. 1-5

Initially, the two governments had relations<sup>40</sup> that were admired by many as exemplary although many Ethiopian held resentments over the relationship alleging that it was to Eritrea's advantage<sup>41</sup> The honey moon did not last long, however. In 1996 and early 1997 Ethiopia tried to tighten the uncontrolled economic relationships between the states. Eritrea was frustrated and relations deteriorated<sup>42</sup>

In May 1998 Eritrean forces invaded Ethiopia using mechanized forces by occupying north-west of Ethiopian town of Badme. Ethiopia demanded the withdrawal of Eritrean forces from occupied places and the restoration of the '*status qua ante*'.<sup>43</sup> Eritrea rejected this demand. In 2000, in what has been estimated to be the biggest battle on African soil since the expulsion of Nazi forces from Egypt during the Second World War,<sup>44</sup> Ethiopia practically annihilated the Eritrean armed forces and liberated all occupied areas. In the Algiers Agreement, Eritrea was forced to accept a humiliating cease-fire agreement which created a temporary security zone within its 'territory'.

The Algiers Agreement created two commissions, a boundary commission and a reparation commission.<sup>45</sup> The Boundary Commission was given the task of delimiting and demarcating the boundary according to the 1900, 1902, and 1908 treaties between Ethiopia and colonial ruler Italy and according to international law.<sup>46</sup> The terms of reference in the agreement

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<sup>40</sup> See note 24 pp 10

<sup>41</sup> Id 15

<sup>42</sup> Id 47

<sup>43</sup> See note 8 pp 20

<sup>44</sup> See note 1 at pp 371 Wrong states that "Engaging over 500,000 troops and displacing 600,000 people, the Badme war won the dubious honor of being not only the worst conflict ever staged between two armies in Africa, but the biggest war in the world at that time, more devastating than the rather better-publicized Kosovo crisis."

<sup>45</sup> The Algiers Peace Agreement( December Agreement) between Ethiopia and Eritrea, 2000, [http://www.unmeeonline.org/index.php?option=com\\_content&task=view&id=15&Itemid=50](http://www.unmeeonline.org/index.php?option=com_content&task=view&id=15&Itemid=50)

<sup>46</sup> Id

automatically made Ethiopia a landlocked country. The opposition<sup>47</sup> and many intellectuals<sup>48</sup> opposed the agreement and unsuccessfully pressed the government and the House of Representatives to reject the proposal.

The Algiers Agreement has stalled. The new Secretary General's most recent report warned that:

The continuing stalemate in the peace process shows no sign of ending, and the impasse has the potential to not only lead to renewed hostilities between the two countries, but to destabilize the wider region, especially given the recent developments in neighboring Somalia. Ethiopia has refused to implement, fully and without pre-conditions, the Boundary Commission's demarcation of the border with Eritrea, even though its decisions are supposed to be binding under a peace agreement that followed a two-year war in the late 1990s. For its part, Eritrea has maintained a troop presence in the Temporary Security Zone (TSZ) along the border, as well as tanks, rocket launchers and guns, and it has also imposed a ban on UN helicopter flights, severely restricting the work of UNMEE.<sup>49</sup>

Many intellectuals and the opposition allege that the Algiers Agreement is a betrayal of Ethiopia's national interest and that, whatever result, may come from that agreement,- it will be a time bomb that may explode at any time and affect the peace and stability of the region. Many Ethiopians feel that their necks have been slashed by the secession of Eritrea and by being made landlocked and the same people think that it is only for some time before justice is done. The Red Sea is only 60 kilometers from the "boundary", a reminder of the strategy of isolating Ethiopia and weakened it so that it would be 'ready' to be colonized by Italy.

#### Lack of Access to the Sea and its Impact on the Economy and Security

The economic and security issues are also important factors to consider when one investigates the right of access to sea, although these factors alone cannot be sources of

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<sup>47</sup> See note 4

<sup>48</sup> See articles by professor Negusie Ayele March 31, 2007, at [http://www.ethiomeia.com/articles/meles\\_zenawi\\_and\\_eritrea.html](http://www.ethiomeia.com/articles/meles_zenawi_and_eritrea.html) , Professor Techola Hagos at <http://www.tecolahagos.com/part4.htm> Ato Belai Abbai

<sup>49</sup> Secretary General of the United Nations Bani Ki-moo , January 25, 2007

sovereign right of access to the sea. Modern economic progress requires rapid, reliable, efficient, and cost-effective international trade. Kishor Uprety cites the United Nations Commission on Trade and Development (UNCTAD) stating “the actual experience, like the logical historical evolution, proves that the absence of access to the sea constitutes a major obstacle for economic and social development.”<sup>50</sup> Uprety lists the major economic difficulties that land lock countries in the developing countries face as

a) Additional transport cost b) Foreign trade deficit, trade between land locked and coastal developing states is rarely important because the two economies do not complement one another; on the contrary they often enter into competition for foreign and external resources within the international market. Land locked countries face additional economic burdens that flow from their lack of access to the sea. They depend heavily on the transport policies of transit states including payment of a portion of their transport costs in convertible currencies and bear increased costs resulting from the necessity of warehousing stocks, port delays and expenditures in the itineraries of re-exchange. c) Access to the resources of the sea on the same terms and conditions as coastal states.<sup>51</sup>

Ethiopia’s export and import ratio as laid down in the data below, shows the importance foreign trade and that, obstacles to this trade have grave ramifications on the development of the subsistence economy.

Current account balance: -\$3.384 billion (FY05/06 est.)

Exports: \$1.085 billion f.o.b. (2006 est.)

Exports – commodities: coffee, qat, gold, leather products, live animals, oilseeds

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<sup>50</sup> See, Kishor Uprety, Right of Access to the sea of Land-locked States: Retrospect and Prospect for Development, 1 J. Int’l Legal Stud. 21(1995)

<sup>51</sup> Id

Exports – partners: Germany 15.5%, China 10.5%, Japan 8.5%, Saudi Arabia 6.9%, Djibouti 6.8%, Switzerland 6.4%, Italy 5.9%, US 5.5%, Netherlands 4.2% (2005)

Imports: \$4.105 billion f.o.b. (2006 est.)

Imports – commodities food and live animals, petroleum and petroleum products, chemicals, machinery, motor vehicles, cereals, textiles

Imports - partners: Saudi Arabia 14.7%, China 12.6%, US 12.4%, India 6.7%, Italy 4.6% (2005)<sup>52</sup>

Poverty is the main enemy of Ethiopia, and the main threat of Ethiopia's existence originates from it.<sup>53</sup> There can be no long lasting peace, stability or security when a state's system cannot feed, educate, or maintain the health of the great majority of its people. Denial of access to the sea is a source of insecurity because it hampers development. Ethiopia may use the ports of its neighbors Djibouti, Berbera, Zeila, Mombassa, Massawa and even Port Sudan. But, political uncertainties and the influence of other foreign countries have made it very difficult to rely on them because Ethiopia will constantly be vulnerable to blackmail. In western Europe the landlocked and transit states have managed to devise a system of international rivers, special transit rights, free zones in ports and arrangements to secure the relatively free flow of goods and people between the landlocked states and the sea. In unstable Africa where the system of governance is not institutionalized access to the sea depends upon circumstances. Coupled with

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<sup>52</sup> CIA Fact book on Ethiopia, CIA: The World Fact Book, <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html>

<sup>53</sup> The Federal Democratic Republic of Ethiopia Foreign Affairs and National Security Policy and Strategy,

the geo-politics of the region this makes Ethiopia a high risk and vulnerable country. Belai Abbai and Zeru Kihishen a former minister and a politician in describing the security threats said that:

Ethiopia's historic enemies will attempt to strangle her from the sea, if she is denied its own outlet to the international waters. As in the past, Egypt, because of its strategic interests on the Nile will attempt to destabilize Ethiopia to prevent her from focusing her development efforts on the Blue Nile basin. With Eritrea and Somalia controlling the waters, the potential for destabilization will always be there to be activated at the most critical moments maximum effect by any of her historic and strategic adversaries. Those who control the ports used by Ethiopia for importing and exporting its goods and services will also be in a position to collect all intelligence data for hostile purposes.<sup>54</sup>

Somalia's irredentism and Djibouti's position, Arabs perception of Ethiopia as a Christian state and the advent of Moslem fundamentalism, the question of the Nile and the role of Egypt in the Arab world makes Ethiopia permanently vulnerable in its security and ability to use alternate outlet to the sea. Sudan, Somalia and Djibouti are members of the Arab League. The Port of Mombassa of Kenya is too far for most of Ethiopia and the Eritrean government is allegedly becoming an instrument of Egypt and Libya. Even tiny Djibouti tried to black mail Ethiopia after the Eritrea- Ethiopia war. A commentator on the Ethiopia situation said that:

To take a similar situation, since the seizure of the Bolivian port by powerful Chile in 1879, the date that that started the "Bolivian National Neurosis" there had been a number of wars between Chile and Bolivia, numerous changes of government in Bolivia, with each successive regime demanding that Chile return the sea coast. The same national neurosis may hang up in Ethiopia in a much consolidated way if the Algiers Agreement is implemented.<sup>55</sup>

But Ethiopia is not the Bolivia of South America. Ethiopia enjoyed an outlet to the sea until recently. It is militarily the strongest country in the region and one of the strongest on the

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<sup>54</sup> Belai Abbai and Zeru Kihishen, Belai Abbai and Zeru Kihishen, Meles' Assab Policy Threatens Ethiopia's National Security [http://www.ethiopians.com/belai\\_and\\_zeru.htm](http://www.ethiopians.com/belai_and_zeru.htm) July 15, 2000]

<sup>55</sup> Commentator

continent.<sup>56</sup> Ironically, however, it is in the verge of losing its right of access to the sea despite having won the war with Eritrea. . The most populous country in the Horn and the third in Africa<sup>57</sup> is in the brink of loosing one of the essential elements of its survival. As a result, it may become the most populous landlocked country in the world.<sup>58</sup>

To sustain long-lasting peace, security, and stability Ethiopia has to get rid of poverty. Poverty can be minimized and eradicated if there is immediate and sustainable development. One of the vital instruments is international trade which demands efficient, cost effective and competitive market. All obstacles to this trade and especially the transit process should be tackled with. External forces who do not want Ethiopia to develop may exploit Ethiopia's lack of an outlet to the sea and destabilize Ethiopia.

The security of Ethiopia significantly affects and may be decisive of the security of the region because of its strategic position. A country denied of its rights and “a people that feels injured and betrayed by the deal must eventually destabilize both countries”<sup>59</sup> This is a vicious circle. To break from this circle Ethiopia has to regain it's legally recognized, historically and economically based sovereign rights of access to the sea.

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<sup>56</sup> See note 8 pp x lix

<sup>57</sup> Id

<sup>58</sup> Samuel Pyeatt Menefee, “THE OAR OF ODYSSEUS”: Land Locked and “Geographically disadvantaged” states in historical perspective, 1992, 23 Cal. W. Int'l L.J. 1

<sup>59</sup> See note 54

## CHAPTER 3

THE 1900, 1902, 1908 TREATIES BETWEEN ETHIOPIA AND ITALY, AND THE  
INVASION AND THE OCCUPATION OF ETHIOPIA BY ITALY IN 1935

## The 1900, 1902, and the 1908 Treaties between Ethiopia and Italy

The famous Ethiopian General Ras Alula who later became the governor of the area that is now Eritrea, in asserting Ethiopia's rights against the Italy proclaimed that " I have beaten the Italians once [ at Dogali], and I will beat them again. As far as I am concerned, Ethiopia's natural frontier is the Red Sea and that the Italians will get land in Ethiopia only when Alula becomes Governor of Rome".<sup>60</sup> The ports of Massawa and Asseb were switching hands between, Ethiopians Egyptian and later Italians. But as announced by Ras Alula, Ethiopian rulers never abandoned their right access to the sea and fought with Egypt and Italy. Ethiopian warriors defeated a more ambitious attack launched from the coastal city of Massawa in which the Egyptian forces were almost completely destroyed. A fourth Egyptian army was decisively defeated southwest of Massawa in 1876.<sup>61</sup>

In 1889 Emperor Menelik, signed the Treaty of Wichale giving the Eritrean highlands to Italy.<sup>62</sup> The Italians tried to swindle him by having two different versions of the treaty, one in Amharic, and one in Italian; with different version of Article 17. The Italian version stated that "The Emperor consents to use the Italian government for all the business he does with all the other Powers or Governments." Whereas under the Amharic version , "The Emperor has the option to communicate with the help of the Italian government for all matters that he wants with

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<sup>60</sup> Portal, Gerald, *My Mission to Abyssinia* (London: 1892) as cited by Daniel Kindie pp9,

<sup>61</sup> *Encyclopedia Britannica*. <<http://www.britannica.com/eb/article-9003778>

the kings of Europe”.<sup>63</sup> When Menelik realized that he had been cheated he rejected the treaty and ceased all gratuities from the Italians. The Italians invaded Ethiopia and at the famous Battle of Adwa Ethiopian forces led by Emperor Menelik defeated them. Humiliatingly routed and with as much 70 percent of the Italian forces killed, wounded, or captured, the Italians were forced to abandon their claim to a protectorate over all Ethiopia. The Treaty of Addis Ababa, signed in October 1896, abrogated the Treaty of Wichale and reestablished peace. Why the Emperor stopped the war then and sought peace in stead of pursuing the routed Italians and reclaiming the lost territories is a mystery. For some it was merely a prudent decision not to undertake an impossible military adventure with logistical night mare, to others it was an act of treachery<sup>64</sup> Erlich entertains both views “Menilek realized that he could not afford pressing the Italians too hard and risk meeting them in Eritrea where they were entrenched in heavily fortified positions.

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<sup>62</sup> Donald N. Levine, The Peter B. Ritaman Professor of Sociology at the University of Chicago

<sup>63</sup> Id

<sup>64</sup> Italy was defeated in 1896 at the famous Battle of Adwa. Again, Menelik was in no position to expel the Italians from Eritrea, so he left Eritrea in Italy's possession. Minase Haile, Legality of Secessions: The Case of Eritrea, 8 Emory Int'l L. Rev. 479(1994)

What the Italians had occupied by force of arms thus obtained legal sanctions. This has remained probably the most serious shortcoming of the victory of Adwa, and of Menilek's policy as far as Ethiopia is concerned. Adwa failed to resolve Ethiopia's centuries-old quest for an outlet to the sea. The quest had become particularly acute in the modern period, as evidenced by the letters and activities of Tewodros and Yohannes. Bahru Zewde, History of Modern Ethiopia 1855-1991, Second Edition Addis Abeba University Press (2001)

Menilik's treason against the people of Ethiopia continued in his not pursuing the battle won at great sacrifice at Adowa because he did not get Italy out of Ethiopian historic territory.  
[http://www.tecolahagos.com/king\\_sahleselassie.htm](http://www.tecolahagos.com/king_sahleselassie.htm)

Longrigg writes that, Menelik had entered Eritrea and seized the fort of Adi Ugri; Adigrat was blockaded, and Major Pristiani forced to capitulate. Baldissera evacuated Adi Caieh and Saganeiti, and visualized a defense line as far back as Ghinda. But the Emperor, surprisingly, did no more to pursue his advantage. He retired towards his own country of Shoa, leaving Mangasha and Aula in command. Longrigg also acknowledged the strong reinforcements ordered in Italy some weeks before reached Massawa. A bare month after Adua, Baldissera commanded an army of 40,000 men, 60 cannon, and better transport and supplies than ever before; and it is interesting to observe how easily Italian forces could then have invaded Ethiopia, and with fair prospects of complete success. Stephen H. Longrigg, A Short History of Eritrea,p129, Oxford Clarendon Press, (1945)

He probably also felt that a reoccupation of Tigrean-in habited territories would strengthen Tigrean political aspirations.”<sup>65</sup>

The Treaty of Addis Abeba was followed by different treaties of 1900, 1902, and 1908, to delimit the boundary between Italian Eritrea and Ethiopia and in the case of the treaty of 1902 among British Sudan, Italian Eritrea and Ethiopia. The 1900 treaty delimited the north and north and west borders of Ethiopia with Eritrea. :-

Art. I.-The line Tomat-Todlue-Mareb-Belesa-Muna, traced on the map annexed, is recognized by the two Contracting Parties as the boundary between Eritrea and Ethiopia. Art. II.-The Italian Government binds itself not to cede or sell to any other Power the territory comprised between the Line Tomat, Todlue, Mareb-Mai, Ambessa-Mai, Feccia-Mai, Maretta-Mai, HaMahio, Piano galine Faraone, and the line Tomat, Todluc, Mareb, Belesa, Muna, left by His Majesty Menelik II, King of King of Ethiopia, to Italy. What would be the legal significance of Article II to peace treaty with Italy after the Second World War?

The 1902 treaty is a modification of the 1900 Treaty that gave more land to Italy in the North West of the frontier of Ethiopia. The 1908 Treaty officially and legally made Ethiopia Completely land locked Article I:

From the most easterly point of the frontier established between the Colony of Eritrea and the Tigre by the Treaty of the 10th July, 1900, the boundary continues south-east, parallel to and at a distance of 60 kilometers from the coast, until it joins the frontier of the French possessions of Somalia.<sup>66</sup>

There are some Ethiopians who argue that these treaties were void abinitio, asserting that their were made under duress, alleging that Britain, France and Italy were conspiring to handover Ethiopia to Italy and that Italy was preparing another invasion and that the treaties were signed under such coercive pressure. But many treaties were made through the use of military force during that period. Use of military force to induce or force a state to sign treaty was not

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<sup>65</sup> Haggai Erlich, Ethiopia and Eritrea during the scramble for Africa pp193 (1982)

<sup>66</sup> Hertslet, Map of Africa by treaty, vol. II, p, 1225

considered unlawful. Before international law prohibited the use of force in international relations, territorial changes often came about by virtue of conquest. A policy not to recognize the validity of territorial acquisitions brought about by force was adopted after the Kellogg-Briand Pact.<sup>67</sup>

For what ever compelling circumstances the Emperor might have had, or calculations that he might have made, the hero of the famous Battle of Adwa that signaled the downfall of European colonialism had to lose at the negotiation table.<sup>68</sup> It is difficult to prove that Ethiopia signed the treaties under duress. Even if it was signed under duress, it was not unlawful at that time and non retroactivity of the Vienna Convention on the Law of Treaties forbids its applications in such circumstances.<sup>69</sup> The argument that the treaties were void abinitio in both cases cannot hold water.

#### Invasion of Ethiopia by Italy as the Grounds to Render the Treaties Null and Void Treaties Signed in the 1900s

Ethiopia's repeated call to demarcate the boundary according to the treaties of 1900, 1902, and 1908 fell in deaf ears in Italy. It, in fact made some military advances in different areas. Italy was not ready to implement the treaties in good faith. Italy's bad faith culminated in its invasion of Ethiopia in 1935. Italy not only invaded Ethiopia but rearranged the boundaries of Somalia, Eritrea, and Ethiopia to form the colony of Italian East Africa. Boundaries of the new administrative units did not follow the previous Italian colonies of Eritrea and Somalia or the international boundaries of Ethiopia as they existed before the Italian conquest. Tigray of

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<sup>67</sup> Lori F Damrosch et al, International Law: Cases and Materials, Fourth Edition, pp341 (2001)

<sup>68</sup> Donald N. Levine, The Peter B. Ritaman Professor of Sociology at the University of Chicago

northern Ethiopia was included in the government of Eritrea and the Ogaden of south east of Ethiopia was made part of Somalia. Italian East Africa had five units, Somalia, Galla-Sidamo, Harar, and Eritrea.<sup>70</sup> By this flagrant decision, Italy wanted to dissolve Ethiopia as a nation and put the name in historical archives.

The Vienna Convention on the Law of Treaties<sup>71</sup> was largely declaratory of customary international law<sup>72</sup> Article 60 on termination or suspension of the operation of a treaty as a consequence of its breach, as a material breach of the treaty is a rule of customary international law. Under the Advisory Opinion on Namibia, 1971 I.C.J. 16, 47, the Court treated the rules laid down in Article 60(3), concerning termination on account of breach as a codification of existing customary law.<sup>73</sup> In the cases concerning a ‘material’ breach of a bilateral treaty by one party entitles the other to invoke it as a ground for terminating the treaty or suspending operation in whole or in part Article 60 (3) defines material breach it as: “

- a) Repudiation of the treaty not sanctioned by the convention; or
- b) The violation of a provision ‘essential to the accomplishment of the object and purpose of the treaty”

Territorial treaties are relatively consummated transactions like the conveyance of a territory, leases and servitudes and other agreements that have already been performed in whole or in part, also compliance is negative, thus consisting primarily of refraining from action and perhaps not requiring continuous positive action. Rights from these kinds of treaties are

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<sup>69</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 33

<sup>70</sup> British Military Administration of Occupied Territories in Africa, pp59,(1941-1947, Her Majesty’s Stationary Office, see also, Longrigg, a Short History of Eritrea, pp141, Oxford Press (1945)

<sup>71</sup> See note 69

<sup>72</sup> See note 67 pp 453

<sup>73</sup> Id .

“earned,” “acquired,” or “real” rights and are meant to be relatively permanent because unilateral termination is unlawful.<sup>74</sup> Unilateral termination of the treaty usually cannot be made without a resort by the claimant party to an overt act of coercion. However, according to general principle [i.e. customary international law] of law that a right of termination on account of breach must be presumed to exist in respect to all treaties, except regarding provisions relating to the protection of the human person contained in treaties of a humanitarian character.<sup>75</sup>

The object and purpose of territorial treaties is the recognition by ‘neighboring’ states of the party’s sphere of full control as a matter of asserting its sovereignty and the mutual recognition of the existence of two sovereign states. The invasion and fragmentation of Ethiopia is a process of erasing the conditions of Statehood. Treaties cannot exist without the existence of one party. As far as Italy was concerned Ethiopia did not exist from 1935 onwards.

Italy breached the boundary treaty with Ethiopia by invading and occupying Ethiopia. Of course the breach of a bilateral treaty by one of the parties does not ipso facto put an end to the treaty, but only entitles the other party to invoke the breach as a ground for terminating the treaty or suspending its operations. This has been accepted as customary international law.<sup>76</sup> Accordingly, Emperor Haile Selassie, by declaration and by the adoption of the Eritrean Constitution and the ratification of the Federal Act in 1952 made the 1900, 1902, and 1908 conventions between Ethiopia and Italy null and void.<sup>77</sup> The Emperor’s declaration of null and void may be taken as a wise legal precautionary arrangement, since the treaties of 1900, 1902, and 1908 were made obsolete pursuant to the Paris Peace Conference of 1947 and the Resolution

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<sup>74</sup> Arie E David, *The Strategy of Treaty Termination*, (1975)

<sup>75</sup> ICJ Advisory Opinion on the Legal Consequences for States of the Continued presence of South Africa in Namibia, ICI Rep (1971), p 47

<sup>76</sup> Robert Jennings, *Oppenheim’s International Law*, 9<sup>th</sup> Ed. 1300

of the United Nations General Assembly. Italy renounced its rights to its colonial territories and the “successors” of these rights, i.e. the Victorious Four Powers, upon the recommendation of the United Nations General Assembly, decided to federate Eritrea to Ethiopia, thereby effectively extinguished the 1900, 1902, and 1908 treaties.

Customary international law is a law that derives from the practice of states and is accepted by them as legally binding.<sup>78</sup> The principle of material breach of a treaty and the right of the party which is upholding its obligation in good faith to deem the treaty null and void has been established by state practice. These practices can be described in many instances in the modern world in different treaties. Most treaties can be breached by action or omission of obligations and are usually time bounded. Territorial treaties are meant to be permanent and can only be breached by action usually accompanied by force as discussed above. The Munich Agreement and Riga Treaty represent contemporary states practice that reflects the customary law that may invoke a material breach to declare a territorial treaty null and void.

### The Munich Agreement

On September 29, 1938, in Munich Germany, France, Italy, Germany, and the United Kingdom signed an agreement regarding the cession to Germany from Czechoslovakia of the territory known as the Sudetenland.<sup>79</sup> The agreement was made to avert the Second World War and give an international guarantee for the new boundaries of the Czechoslovakian state against

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<sup>77</sup> Order No. 6 of 1952 (Official Gazette) 11 September 1952 see also Digest of International Law pp27. The Emperor's declaration

<sup>78</sup> Black's Law Dictionary Eighth Edition, Bryan A. Garner (2004)

<sup>79</sup> Digest of International Law pp157, Czechoslovakia was so weak that other powers had to make territorial agreements that affect its sovereignty and interests. In fact it was forced to comply with an ultimatum presented by Poland and seceded its Teschen territory to Poland. VII Hudson, International Legislation, 1938-1941, pp.131, 134-135 Today, however, it would be found under the Vienna Convention that the Munich Agreement created no obligations for Czechoslovakia. Pursuant Vienna Convention on the Law of Treaties,

unprovoked aggression.<sup>80</sup> But Germany invaded Czechoslovakia and took over the rest of the country at the beginning of the war.

In announcing that the United Kingdom did not bind itself to continue to accept the transfer of the Sudetenland Land to Germany according to the Munich Agreement, the Prime Minister declared that:

....as Germany has deliberately destroyed the arrangements, concerning Czechoslovakia, reached in 1938 in which His Majesty's Government in the United Kingdom participated, His Majesty's Government regard themselves as free from any engagements in this respect. At the final settlement of Czechoslovakia frontiers to be reached at the end of the war, they will not be influenced by any changes affected in and since 1938.<sup>81</sup>

Similarly, President of the French National Committee Charles de Gaulle wrote a letter to the Czechoslovakian Prime Minister on September 29, 1942 stating that:

In this spirit the French National Committee, rejecting the agreements signed in Munich on September 29, 1938, solemnly declare that they consider these agreements as null and void as also all acts accomplished in the application or in consequence of these same agreements. Recognizing no territorial alternations affecting Czechoslovakia supervening in 1938 or since that time, they undertake to do everything in their power to ensure that the Czechoslovak Republic within frontiers prior to September 1938, obtains all effective guarantees for her military and economic security, her territorial integrity and her political unity.<sup>82</sup>

In June, 1945, the Victorious Four Powers also implicitly treated the Munich Agreement as null and void by declaring that Germany, with her frontiers as they were on December 31, 1937, would for the purposes of occupation, be divided into four zones, one to be allocated to each power.<sup>83</sup>

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<sup>80</sup> Id

<sup>81</sup> Holborn, War and Peace Aims of the United Nations (1943) 253-54

<sup>82</sup> Id 574

### The Riga Treaty of 1921

The USSR was in a difficult position after the October Revolution and the War with Poland. Due to its military setbacks, the Soviets Union with resentment offered the Polish peace delegation substantial territorial concessions in the contested border areas. It did so under the Riga Treaty of 1921 to get some respite. Lenin said that while a few weeks earlier the Riga Conference has gone through crises, “we decided to make some more concessions, not because we thought them just but because we considered it important to smash the intrigue” of White Guardists and the entente.<sup>84</sup>

The USSR unilaterally terminated the Riga Treaty and on September 28, 1939, concluded a Frontier and Friendship Treaty with Germany in “recognition of the collapse of the former Polish state.”<sup>85</sup> They agreed in Article I to partition and determine boundary of their respective interests in the territory of the “former” Polish state.<sup>86</sup>

On June 22, 1941, German military forces invaded the Soviet Union. On July 30, 1941, the Soviet Union and Poland signed an agreement as to war against Germany. Article 1 states that:

The Government of the USSR recognizes the Soviet- German treaties of 1939 as to the territorial changes in Poland as having lost their validity. The Polish Government declares Poland is not bound by any agreement with any third power which is directed against the USSR.<sup>87</sup>

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<sup>83</sup> XII Bulletin, Department of State, No. 311, June 10, 1945, pp. 1051, 1052; U.S. TAIS 1520; 60 Stat. 1649, 1650-1651; 68 UNTS 189, 190-192

<sup>84</sup> Piotr S. Wandycz, *Soviet-Polish Relations 1917-1921* pp. 282, Harvard University Press (1969)

<sup>85</sup> The text of the Frontier and Friendship Treaty, *Nazi-Soviet Relations 1939-1941* (Department of State publication 3023, 1948) as written in Whiteman, *Digest of International Law* Vol. 3 pp 183

<sup>86</sup> *Id*

<sup>87</sup> *Documents on American Foreign Relations 1941-1942* (1942) as written in Whiteman, *Digest of International Law* Vol. 3 pp 195\*\*

The USSR signed the Riga Treaty of 1921, unilaterally terminated it by signing a treaty with Germany, which divided Poland between them. The USSR declared null and void the territorial treaty with Germany when it was invaded by the same. The USSR re-installed the Riga Treaty by signing another treaty with Poland as cited above. Later, however, the USSR concluded an agreement with the United States, and the United Kingdom, which Poland was made to endorse, declaring the re-installed Riga Treaty null and void. The United Kingdom proposed the Curzon line, which the Soviet Union claimed, as a boundary between the USSR and Poland, by invalidating the Riga Treaty of 1921. On January 11, 1944, the USSR as a justification of the occupation and its demand for new frontier declared that: "... The injustice committed by the Riga Treaty of 1921, which was imposed upon the Soviet Union, in regard of the Ukrainians inhabiting the western Ukraine and the Byelorussians inhabiting Western Byelorussia, was that rectified".<sup>88</sup> United Kingdom and the USSR agreed that Poland should obtain equal compensation in the West from Germany including Eastern Prussia and frontiers on the Oder to compensate for the areas which would be in the Soviet Union.<sup>89</sup>

In discussing how the invalidation of a territorial treaty was justified Steven R, Ratner has stated:

Despite pleas from the Polish government in London, the U.S. and British governments were prepared to meet Stalin's demands. But what about the Riga Treaty—how could it be changed without Poland's consent? Again, the parties invoked international law to defend their solution. Though Eden principally argued to a skeptical House of Commons in terms of justice and stability of the modified Curzon line, he also emphasized that Poland had violated the post—world war minority treaty regarding Eastern Galicia; he added that the UK had never guaranteed Poland's 1939 frontiers, implying that Britain was legally free to endorse a new line that took significant territory away from the Poland. For good measure, however, the Allied agreed at Yalta that the 'opinion' of the new Polish government would be "sought in due course" and that the final decision

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<sup>88</sup> See note 81 pp 763-765

<sup>89</sup> Id

would await a peace conference, that is, be confirmed by treaty. A treaty was made that guaranteed the USSR Occupation.<sup>90</sup>

### Conclusion

Germany was offered some territories of Czechoslovakia to avoid war, and maintain peace and stability. But as discussed above, Germany invaded Czechoslovakia and breached the Munich Agreement. After the war the four powers by explicitly declaring that Germany destroyed the Munich Agreement and implicitly making territorial arrangements made the treaty null and void. The British Foreign Minister had to invoke international law to ignore the Riga Treaty of 1921 and recognize the territories occupied by the USSR to be taken away from Poland because, 'Poland had violated the post- world war minority treaty regarding Eastern Galicia.

The contemporary practices of the major powers re enforce the customary law and make it clearer why Ethiopia had the right to invoke material breach and declare null and void the treaties of 1900, 1902, and 1908 after Italy invaded and occupied Ethiopia in 1935. The above examples make Ethiopia's case clearer because of the flagrant invasion and occupation by Italy of the whole country despite the treaties of the first decade of the last century.

The attempts to compromise territorial rights to avoid war, and maintain peace and stability during the Second World War, the role of force in making new territorial arrangements after the war and flexibility exhibited according to circumstances for a greater policy objective are also some of the lessons that can be drawn from these practices and which will be discussed latter.

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<sup>90</sup> Steven R, Ratner, AJIL

## CHAPTER 4

REVOLUTION 390 V OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS IS  
THE FOUNDATION FOR THE TERRITORIAL DISPUTES BETWEEN ETHIOPIA  
AND ERITREA

## Ethiopia's Claim to Access to the Sea

After Italy renounced its rights and title on its colonial territories, no other country had superior right than Ethiopia's in case of disposition of Eritrea. As mention above the treaties of the 1900,s had a provision that asserted that Italy could not transfer to any other state the territories that were referred to in the treaty. In other words Italy was under an obligation to hand over the territories back to Ethiopia in case it wanted to dispense with the territories. Given the of Ethiopia's prior right and the historical, cultural and ethnic relationships of south and south east of Eritrea with Ethiopia, and the legitimate need to have an outlet to the sea, Ethiopia was in a better position than any country to claim an out late to the sea.

Ethiopia first asserted its claim to an outlet to the sea before the World War II was over. In 1940 when Haile Selassie realized that Britain would sponsor his return to Ethiopia, he had begun a campaign to have Eritrea placed under Addis Abeba's sovereignty.<sup>91</sup> Great Britain's official position was that this matter can only properly be considered at the peace settlement.<sup>92</sup>

On 13 February 1945 Emperor Haile Selassie met President Roosevelt of the United States in Cairo after the Yalta Conference.<sup>93</sup> The Emperor outlined Ethiopia's major concerns,

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<sup>91</sup> Harold G. Marcus, Ethiopia, Great Britain, and the United States, 1941-1974, p20, University of California Press,(1983

<sup>92</sup> Id

<sup>93</sup> Id 49

where were substantially detailed in five memoranda handed to Roosevelt .<sup>94</sup> Concerning the memoranda, Marcus writes that:

The first reflected Ethiopia's continuing dismay with Paris's refusal in 1935-1936, to permit arms to be shipped via the Franco-Ethiopian railway to Addis Abeba, "notwithstanding the fact that by virtue of Article II of the [rail way] concession [of 30 January 1908] the railway was to be placed in time of war at the disposal of the Ethiopian Government." This denial of rights "was clearly one of the most important factors leading to the defeat of 1936" and amounted to abrogating the concession...

Even with complete control of the railroad, Ethiopia remained landlocked, a condition which the second memorandum sought to remedy. Addis Abeba explained that it had never recognized the validity of the 19th-century, inter-European treaties which had parcelled out Ethiopia's Red Sea littoral, even if forced to enter "certain bilateral agreements concerning these territories." Without its ports, Ethiopia had suffered indirect control by the adjacent colonial powers, the best case in point being France's refusal to permit arms shipments from Djibouti. "Apart from the use of poison gases, it is clear that the immediate and most powerful cause for the defeat of...1936 was the political control exercised over the Franco-Ethiopian Railway." Logically therefore, Ethiopia's isolation from the sea was the real antecedent of fascist occupation.<sup>95</sup>

The emperor sent Yilma Deressa a vice-minister in his government to the United States in June of 1943 to demand assistance in different field one of which was the issue of access to the sea. Yilma's reference to Ethiopia's need for an outlet to the sea was also heard with equanimity by the United States.<sup>96</sup> The office of the US Secretary of State was of the opinion that a fairly strong case could be made in support of the Ethiopian contention that Eritrea, or a part of it, should be incorporated into Ethiopia.<sup>97</sup>

Led by the then Foreign Minister and later Prime Minister of Ethiopia, Aklilu Habtewold, Ethiopia had consistently fought for its right to access to the sea, during the Paris Peace Conference and after, in all important forums until Eritrea was federated to Ethiopia. Professor

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<sup>94</sup> Id 50

<sup>95</sup> Id pp50-51

<sup>96</sup> Id 20

Techola Hagos has written about Ethiopia's struggle and the role of Aklilu Habtewold and said that:

Italy vehemently fought to have Ethiopia excluded from the process by mounting a campaign of misinformation, and possible corruption. It was the great skill and tenacity of the young international law lawyer, Aklilu Habtewold, that convinced France (hostile to Ethiopia), Britain (with conflict of interest, ambition to carve out an East Africa dominion), the Soviet Socialist Republic (against the interest of Ethiopia, with acute reservation as to the role of Emperor Haile Selassie), and the United States (very supportive with new strategy for the area in its mind) government representatives the justice of including Ethiopia in the Peace Treaty.<sup>98</sup>

Ethiopia learned the importance of the outlet to the sea in the hardest way for there is nothing more important for a state to lose than its sovereignty. That is why Ethiopians started the issue of access to the sea before the World War ended. The conspiracy of the major powers that surrounded Ethiopia, in allowing and recognizing Italy's conquest of Ethiopia which was a member of the League of Nations is a reminder to the existing generation what landlocked mean when surrounded by hostile surroundings.<sup>99</sup>

#### The Proposals of the Victories Four Powers of the Second World War Regarding the Disposition of Eritrea

Since 1942 the issue of Italian colonies in Africa has been considered by the Allied Powers since 1942. The fate of the colonies was jointly discussed on July 22, 1945, during the six plenary meetings of the Potsdam Conference<sup>100</sup> and on August 2, 1945, the leaders of Britain, U.S.A, and USSR reached an agreement for the establishment of a Council of Foreign Ministers representing China, France, United Kingdom, United States, and the Union of Soviet Socialist

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<sup>97</sup> Id

<sup>98</sup> See Techola Hagos <http://www.tecolahagos.com/part4.htm> See also Zewdie Reta for details of the diplomatic activities and the obstacles the then Foreign Minister was encountering, (2000)

<sup>99</sup> See note 91 pp 50

Republics, to consider the disposal of the Italian colonies among other very wide issues of peace and security.<sup>101</sup> On July 15, 1946, Secretary of State Byrnes reported the progress which had been made by the Council of Foreign Ministers at the second part of its Paris meeting:

No final decision was reached on the disposition of the Italian colonies ...If the Four principal Allied Powers do not agree upon the disposition to be made of the colonies within a year after the coming into force of the treaty, they have bound themselves to make such disposition of them as may be recommended by the General Assembly of the United Nations.<sup>102</sup>

The four powers had diverse positions regarding the disposition of Eritrea each reflecting different strategic motives. Common to all was the right of Ethiopia to access to the sea. All of them recognized this historical right (USSR had not pronounced it for a “tactical period” as will be explained later). Even Italy had to acknowledge the right. Just prior to the opening of the first session of the Council of the Foreign Ministers at London, the Italian foreign minister wrote to his U.S. counterpart that:

[i]f even for Somaliland a trusteeship system could be discussed, in our old colony of Eritrea the maintenance of Italian sovereignty is essential. This is fully reconcilable with Ethiopia’s requirement for a free outlet to the sea, for which purpose Italy has built the road leading from Dessie to Assab. This access could be guaranteed either within Italian territory or, if requested, through frontier rectifications. Furthermore, to meet the legitimate requirements of the northern Abyssinian regions, a free zone could be established at Massaua.<sup>103</sup>

To conclude the war with some of the countries a conference was convened usually referred as the “Paris Peace Conference”. The conference adopted a set of peace treaties with Italy, Rumania, Bulgaria, Hungary, and Finland. The Treaty of Peace with Italy, which was signed on February 10, 1947, provided among other things “Italy renounces all right and title to

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<sup>100</sup> ( Marjorie M. Whiteman, Post War Territorial Settlements, Digest of International Law, Volume 3, pp5, October 1964, U.S. Government printing Office

<sup>101</sup> XIII Bulletin, Department of State, No 319, Aug.5, 1945, pp. 153,160

<sup>102</sup> Id 12

the Italian territorial possessions in Africa, i.e. Libya, Eritrea and Italian Somaliland.” in article 23 (1) of section IV and Article 23(3), of the Treaty gave the mandate for the final disposition of the territories to France, Britain, the U.S.A and the USSR. China was omitted. The four powers in a joint declaration (Annex XI) announced that they will determine the final disposition of Italy’s territorial possessions in Africa within a year and that the Deputies of the Foreign Ministers should continue to consider the question of disposal and submit their recommendation to the Council of Foreign Ministers. They also declared that in case of disagreement among the four powers, the matter should be referred to the General Assembly of the United Nations for a recommendation. They agreed to abide by the General Assembly’s recommendation and to take appropriate measures for giving effect to it.<sup>104</sup>

The renouncement by Italy of its rights and titles, pursuant to Article 23(1) of the Treaty of Peace with Italy brought the treaty between Ethiopia and Italy to an end, because the rights and titles of Italy were transferred to the Victorious Four Powers by the same treaty. A new legal regime started to develop to govern the relationship between Ethiopia and Eritrea. The ‘Successors’ of Italy regarding its colonies i.e., the Four Powers were meant to negotiate and provide the means of disposition of the said colonies. But they could not agree on a common disposition. On August 31, 1948 the Deputies of Foreign Ministers of the Four Powers described their respective countries position as follows:

USSR

“[That the former Italian Colony of Eritrea be placed under the trusteeship of Italy for a definite acceptable term”. According to Daniel Kindie the USSR had different calculations to

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<sup>103</sup> See note 100 pp 9

<sup>104</sup> Treaty of Peace with Italy, Feb. 10, 1947, U.S. TIAS 1648; 61 Stat. 1245, 1382, 1457-1458; 49 UNTS 1, 139, 214-215

promote its positions one of which was that the USSR was trying to influence the outcome of the Italian elections in favor of the Communist Party of Italy. He declares that the USSR abandoned its position after the Communist party lost the election and proposed that the former Italian colonies be under the United Nations Trusteeship system and that a territorial concession be made in favor of Ethiopia, so that it obtains access to the sea through the port of Assab.<sup>105</sup>

U.K.

“[1] Ethiopia should be appointed to be the administering authority in Eritrea for a period of ten years. “[2) At the end of ten years the General Assembly of the United Nations would decide whether, and if so under what conditions Ethiopian administration should continue in definitely.” “[3) An advisory Council would be appointed to assist the Ethiopian Administration. This Council would consist of local Eritreans and the representatives of four Powers, for instance, Italy Switzerland, a Scandinavian country and a Moslem State]”

France

“[1) With the exception of the territories situated between the Gulf of Zula and French Somaliland, Eritrea should be placed under the trusteeship of Italy. “[2) The territories situated between the Gulf of Zula and French Somaliland should be assigned to Ethiopia in full sovereignty.” “[3) The frontier between the territories assigned to Ethiopia and those which would be placed under the trusteeship of Italy should follow the present eastern administrative limit of the district of Akkele Guzai from the Gulf of Zula to the present Ethiopian Frontier. It should be demarcated by a composition composed of an equal number of Ethiopians and Italian representatives before the 15<sup>th</sup> of September, 1949.]”

U.S.

“[The United States recommends the cession to Ethiopia of the southern section of Eritrea (including the Danakil Coast, and the districts of Akkele Guzai and Serai, the new frontier to start at the Gulf of Zula, following the northern borders Akkele Guzai and Serai Districts to the Ethiopian frontier.

“the United States further proposes that the Foreign Ministers recommend to the General Assembly of the United Nations that the question of the disposition of the remainder of Eritrea, that is, the northern and predominantly Moslem portion including Asmara and Massawa,

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<sup>105</sup> quoting Op.Cit., Official Records of the Third Session, 23-24 Daniel pp311-14, citing Op. Cit., Official Records of the Third Session

be postponed for one year in order that it may be given further study before attempting to come to a definite solution.]

U.K. U.S. and France

“[The frontier between the territories assigned to Ethiopia and French Somaliland should follow the course of the Wadi Weima.]<sup>106</sup>

The Deputies had sent a Commission to Eritrea to collect necessary data and ascertain the views of the local population. The Commission submitted its recommendation on ..... The deputies after studying the report of the Commission and consulting interested governments completed their recommendations, which were not unanimous. Having failed to reach agreement, the Four Powers, submitted the question to the General Assembly according to the terms of the Treaty of Peace with Italy.<sup>107</sup>

#### The Resolution of the United Nations General Assembly and the Federation

The First Committee of the General Assembly took the task of making a recommendation regarding the disposition of Eritrea and the other Italian colonies. The committee adopted the Bevin Sforza formula and presented it during the second part of the third regular session in April 1949. According to the formula, Eritrea, subject to the guarantees for its minority, Eritrea was to be incorporated into Ethiopia except for the Western Province which was to be handed over to the Sudan.<sup>108</sup> But annexation of the Western Province by the Sudan was defeated by the Latin American and Soviet blocs.<sup>109</sup> This part of the formula on Eritrea was, therefore, left in blank when the vote came on the entire resolution.<sup>110</sup> But, the proposal as a whole was rejected by the

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<sup>106</sup> See note 100 pp 17 & 18

<sup>107</sup> XIX Bulletin, Department of State, No, 482, Sept. 26, 1948, p. 402

<sup>108</sup> John H. Spencer, Ethiopia at Bay: A Personal Account of the Haile Selassie Years pp211, Reference Publications, Inc.(1984)

<sup>109</sup> Id

<sup>110</sup> Id

General Assembly due to the failure to obtain a two-thirds majority in favor of either Libya or Somaliland.<sup>111</sup>

At its Fourth regular session the General Assembly of the United Nations adopted Resolution 289 A (IV) on November 21, 1949, established a commission made up of Burma, Guatemala, Norway, Pakistan and the Union of South Africa due to the fact that the available information was considered insufficient by several delegates.<sup>112</sup> The commission's task was to investigate and make proposal or proposals according to the terms of reference given by the Assembly. The terms of reference were:

- (a) The wishes and welfare of the inhabitants of Eritrea including the views of the various racial, religious and political groups of the provinces of the territory and the capacity of the people for self-government
- (b) The interests of peace and security in East Africa
- (c) The rights and claims of Ethiopia based on geographical, historic, ethnic and economic reasons including in particular Ethiopia's legitimate need for adequate access to the sea.<sup>113</sup>

From 10 January 1950 up to 8 June 1950 the commission held seventy meetings of which forty were public.<sup>114</sup> It collected information from representatives of the population of the territory, including minorities, and had consultations with the government of the United Kingdom, Egypt, Ethiopia, France, and Italy.<sup>115</sup>

The UN commission, like the earlier four powers commission of investigation could not come to agreement on the factual review of the problems of Eritrea or on recommendation of

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<sup>111</sup> Report of the United Nations Commission for Eritrea, official records: Fifth Session, 1950

<sup>112</sup> Id

<sup>113</sup> Res. 289 A (IV), Nov. 21, 1949

<sup>114</sup> See note 111

<sup>115</sup> Id

solutions.<sup>116</sup> Thus circumstances forced it to submit two sets of factual findings and recommended solutions.<sup>117</sup> The delegation of Burma, Norway, and Union of South Africa agreed on the factual findings and supported similar solutions with some differences.<sup>118</sup> Three of them proposed that, given the commission's terms of reference independence for Eritrea was not a solution: instead close political association with Ethiopia represented the fair and lasting solution. Norway suggested that Ethiopia should be allowed to adopt the constitutional provisions which best suited the conditions in this part of Africa and proposed that the whole territory of Eritrea be reunited to Ethiopia and that the Western Province could provisionally and for a limited period of time be left under the present British Administration.<sup>119</sup> Burma and Union of South Africa proposed that Eritrea should not be partitioned and that there should be a federal government of Ethiopia and Eritrea.<sup>120</sup> The delegations of Guatemala and Pakistan concluded that the majority of the inhabitant of Eritrea wished to be independent and proposed that the best solution for the future of Eritrea was independence, following direct trusteeship by the United Nations for a maximum period of ten years.<sup>121</sup>

In its resolution 390 A (V) the United Nations General Assembly based on the report of the Interim Committee of the General Assembly on the Report of the United Nations Commission For Eritrea recommended that Eritrea should constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown and enumerated the basic

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<sup>116</sup> Id

<sup>117</sup> Id and see also note 1 Wrong on page 167 states "Its various factions not only failed to agree a solution, their interpretation of the facts on the ground jarred so wildly Commission members might have been visiting entirely different territories."

<sup>118</sup> Id

<sup>119</sup> Id

<sup>120</sup> Id

<sup>121</sup> Id

tenets of the Federation.<sup>122</sup> It elected Mr. Eduardo Anze Matienzo to the office of United Nations Commissioner in Eritrea<sup>123</sup> and welcomed the establishment of the Federation of Eritrea with Ethiopia under the sovereignty of the Ethiopian Crown in its 404<sup>th</sup> plenary meeting on 17 December 1952.<sup>124</sup>

Every country that participated in the decision making regarding the disposition of Eritrea took a position on the status of the country according to its ideological and religious affiliations and the effect on its assumed national interests in the region. The United States was concerned about the communications and intelligence installations in Eritrea and thought that a satisfied Ethiopia might play an important role in the defense of the Middle East.<sup>125</sup> The USSR wanted to participate in the trusteeship process, minimize the western influence in the area, and support the Italian communist party in the elections at the expense of the region. France wanted to minimize the influence of the United Kingdom and create balance of forces by trying to reinstate Italy. The United Kingdom wanted the Western province of Eritrea under its influence.<sup>126</sup> Members of the Commission of Eritrea seem to have read the facts and to have provided recommendations based on their affiliations to the Four Powers, and on their religion and other ideological relationships. But note should be taken about the position of the minority, i.e., Guatemala and Pakistan which totally ignored the third point of the terms of reference namely, “The rights and claims of Ethiopia based on geographical, historical, ethnic or economic reasons, *including in particular*

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<sup>122</sup> GA. Res. 390 A, U.N. GOAR 5<sup>th</sup> Sess., Supp. No. 20, at 20, U.N. Doc. A/1775(1950)

<sup>123</sup> Id

<sup>124</sup> Report on the United Nations Commissioner on Eritrea, U.N. GOAR, 7<sup>th</sup> Sess., Supp. NO.15, 118, U.N. Doc. A/2188(1952)

<sup>125</sup> Note 91

<sup>126</sup> See note 16 pp311-13

*Ethiopia's legitimate need for adequate access to the sea*".<sup>127</sup> The Memorandum submitted by the delegation of Guatemala and Pakistan argued that:

It has often been repeated that Ethiopia needs the control of Eritrean territory for reasons of security against possible aggression from outside. Such possibility does not exist. The surrounding countries, such as the Anglo-Egyptian Sudan, the countries of the other side of the read sea, and the neighboring colonial territories administered by France and the United Kingdom, as well as former Italian Somali Land, which is now under the International Trusteeship system of the United Nations, do not present any danger to the peace of Ethiopia, nor, in general, to the peace and security of that area of the world."<sup>128</sup>

The argument of Guatemala and Pakistan on the peace and security in East Africa was ridiculous and did not reflect the then existing geopolitics of the region. Italy used Eritrea as spring board to invade Ethiopia in 1896 and in 1935. This delegation might not have been aware of the Battle of Adwa in 1896, but it could not forget the invasion and occupation of Ethiopia from Eritrea during the Second World War which was the cause for the formation of the Commission for Eritrea. Egypt had repeatedly attempted to conquer Ethiopia in the second half of 19 century following Werner Munzinger advice" It believed that Ethiopia with a disciplined administration and army, and European allies, was a danger to Egypt which Egypt must either take over and Islamize or retain in anarchy and misery."<sup>129</sup> The Geo- Politics of the Red Sea and the attitude of Moslems countries including Turkey towards Ethiopia as a 'Christian island' was a clear signal to danger of the security of the region. The argument of the delegation of Guatemala and Pakistan was also 'short sighted' when it guaranteed Ethiopia's security on the then existing Anglo-Egyptian Sudan, the countries of the other side of the read sea, and the neighboring colonial territories administered by France and the United Kingdom, as well as former Italian Somali Land, as if the colonial powers and the trusteeship would last long

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<sup>127</sup> Note 111, emphasis mine

<sup>128</sup> Id

The Main Objective and Purpose of the “Treaty of Four Powers and Ethiopia” Regarding the Federation of Eritrea to Ethiopia was the Security and Right to Access to the Sea of Ethiopia

The fact that Eritrea has seceded from Ethiopia and has become an independent state brings a new relationship. This relationship, between two sovereign countries created different disputes, including in particular territorial disputes. As discussed in Chapter 3 the treaties of 1900, 1902, and 1908, were declared null and void by Ethiopia on the bases of the material breach by Italy. Beyond that and before Ethiopia declared the treaty null and void, Italy renounced its rights over Eritrea when it signed the peace Treaty as the end of the World War II. The ‘successors’ of Italy i.e., the Victorious Four Powers created a new ‘treaty’ with Ethiopia, when they accepted Resolution 390 V of the United Nations General Assembly that federated Eritrea to Ethiopia. Although it may not be the standard treaty but it has all the characteristics of a treaty. In a similar situation Sir Jennings states that, in the ICJ case concerning the status of South West Africa that the provisions of the Mandate for South West Africa- which was in the nature of a treaty between the Council of the League of Nations and South Africa –were not decisively affected by the fact that the League had ceased to exist.<sup>130</sup> The League of Nations conferred the Mandate over South West Africa to the Union of South Africa. The Territory was placed under a “C” mandate which permitted South Africa to administer it as an integral part of the Union.<sup>131</sup> Similarly the General Assembly of the United Nations recommended that Eritrea should constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown and Eritrea was made part of Ethiopia governed by the “federal Ethiopian

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<sup>129</sup> See note 16 pp 193-4

<sup>130</sup> See note 76 pp 1205

<sup>131</sup> Africa in the United Nations System

laws”. The Eritrean Constitution and the “Federal Act” were negotiated between the UN Commissioner of Eritrea and the Ethiopian government and were ratified by the Emperor and approved by the General Assembly of the United Nations in 1952. That is why the recommendation of the General Assembly and the acceptance of that recommendation by Ethiopia have all the characteristics of a treaty. The Victorious Four Power delegated the United Nations General Assembly to recommend a solution for the disposition of Eritrea, and its recommendation on the disposition of Eritrea was in essence a treaty between Ethiopia and the Victorious Four Powers.

The Ethiopia- Eritrea case is not as complex as the Israel- Palestinian case. But the role of the General Assembly of the United Nations is similar in establishing legal relationships based on the delegation of Mandatory Power which serves as a basis for future dispute resolution appear to be similar.

The territory of Palestine was administered by the United Kingdom under a Mandate received in 1922 from the League of Nations.<sup>132</sup> Among the issues that had to be dealt with by the Mandatory Power was the question of a Jewish home in Palestine. Increasing Jewish immigration to Palestine following the Second World War was strongly opposed by the Arab inhabitants, who in the mid-1940s comprised about two thirds of the territory’s population of two million. Faced with escalating violence, the United Kingdom decided, in February 1947, to bring the question of Palestine before the United Nations.<sup>133</sup>

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<sup>132</sup> The Origins and Evolution of the Palestine Problem, 1917 - 1988, United Nations, 1990,

<sup>133</sup> Id

At the special session, the Assembly established the United Nations Special Committee on Palestine (UNSCOP), made up of 11 Member States, to investigate all questions relevant to the problem of Palestine and to recommend solutions to be considered by the General Assembly at the regular session in September 1947. UNSCOP completed its work on 31 August 1947, with the members agreeing on the question of terminating the Mandate, the principle of independence and the role of the United Nations.<sup>134</sup>

There was no consensus, however, on a settlement of the question of Palestine. The majority of the members of the Committee recommended that Palestine be partitioned into an Arab State and a Jewish State, with a special international status for the city of Jerusalem under the administrative authority of the United Nations. At its second regular session, after an intense two-month-long debate, the General Assembly, on 29 November 1947, adopted resolution 181 (II), approving with minor changes the Plan of Partition with Economic Union as proposed by the majority in the Special Committee on Palestine.<sup>135</sup>

Meanwhile, on 11 May 1949, Israel became a Member of the United Nations. In admitting Israel, the General Assembly specifically took note of Israel's declarations and explanations made earlier to the Assembly's Ad Hoc Political Committee regarding the implementation of resolutions 181 (II) and 194 (III). Those declarations and explanations referred, among other things, to the international regime envisaged for Jerusalem, the problem of Arab refugees and boundary questions.<sup>136</sup>

Since Resolution 181(II) there were three major wars of 1948, 1967, and 1973 between Israel and its Arab Neighbors. There have also been continuous non conventional armed conflicts

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<sup>134</sup> Id

<sup>135</sup> Id

<sup>136</sup> Id

in Israel, Palestinian Territories and outside the region between the Palestinians and Israel. There have been numerous resolutions of the General Assembly of the United Nations and the Security Council of the United Nations.<sup>137</sup>

Israel had made peace with some Arab nations and has recognized a Palestinian State in the future in exchange for recognition by the Palestinian Authority of the right of Israel to exist as a state. Although Resolution 181(II) could be the bases for dispute settlement between Israel and Palestinian Authority, there has been so much dramatic change and development since the resolution that international law has to recognize these developments when peaceful solutions are sought for.

Resolution 390 V became the governing legal regime to all relationships when Eritrea was federated with Ethiopia. “The agreement of marriage should be the basis for dispute settlement between the parties when the marriage is dissolved by divorce”.<sup>138</sup> Eritrea which seceded from Ethiopia is now a recognized member of the United Nations. When Eritrea got its independence in 1993 the issue of territories was not raised and was in suspension when the war started in 1998 and is still not solved. In fact as described on the chapter on background, Ethiopia and Eritrea are in a state of “no peace no war” and no one knows where the situation might lead. The “agreement of marriage”= in this case the law that made Eritrea an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown= should be the point of reference and the basis to resolve any territorial disputes. The resolution should be interpreted according to international law in general and the Vienna Convention on the Law of Treaties in particular.

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<sup>137</sup> Id

<sup>138</sup> Belai Abbai, referring to the secession of Eritrea from Ethiopia. Interview in June 2007

Article 31(1) of the Vienna Convention on the Law of Treaties states that: “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The basic principles embodied in article 31(1) are the principles of good faith, ordinary meaning, context, and object and purpose. Article 31 and 32 of the convention were adopted virtually without change by the conference and are generally considered to reflect customary international law.<sup>139</sup> Malcolm Shaw asserts that these principles are interrelated and applied the same:

There are three basic approaches to treaty interpretation. The first centers on the actual text of the agreement and emphasizes the analysis of the word used. The second looks to the intention of the parties adopting the agreement as the solution to ambiguous provisions and can be termed the subjective approach in contradistinction to the objective approach of the previous schools. The third approach adopts a wider perspective than the other two and emphasizes the object and purpose of the treaty as the most important backdrop against which the meaning of any particular treaty should be measured. Nevertheless, any true interpretation of a treaty in international law will have to take into account all aspects of the agreement, from the words employed to the intention of the parties and the aims of particular documents. It is not possible to exclude completely any one of the components.<sup>140</sup>

Although all aspects of the agreement will have to be taken into account, the process of interpretation must begin with the analysis of the ordinary meaning of specific provisions of the treaty concerning the question in dispute.<sup>141</sup> The contention in this case is whether Eritrea should secede with the territorial boundary that it had before the invasion of Ethiopia by Italy which was made by the 1900, 1902, and 1908 treaties or whether that boundary should be modified according to Resolution 390 V. When Ethiopia incorporated Eritrea in 1952, the international boundary between Italian Eritrea and Ethiopia became “internalized” while the boundaries common to Eritrea on the other hand, and French Somali Land and the Sudan, on the other hand,

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<sup>139</sup> Sinclair I.M. *The Vienna Convention on the Law of the Treaties*, pp71 (1973), Manchester University Press

<sup>140</sup> Malcolm Shaw, *International Law*, 4<sup>th</sup> ed. (1997)

remained unaffected.<sup>142</sup> As discussed in Chapter 3, the 1900, 1902, and 1908 treaties between Ethiopia, and Italy had been declared null and void by Ethiopia because, of the breach of the treaties by Italy when it invaded Ethiopia. Moreover, the successors of the colonial rights of Italy, i.e. the Victorious Four Powers had replaced and made irrelevant the 1900s treaties of Ethiopia and Italy, when they accepted the recommendation of the General Assembly of the United Nations to federate Eritrea with Ethiopia.

The operative provisions of Resolution 390 V are, Article A (1), Eritrea shall constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown and Article A (2), which states that the Eritrean government shall possess legislative, executive and judicial powers in the field of domestic affairs. Other provisions are based on the above provisions and are standard clauses of federalism and human rights. Schwarzenberger asserts that judicial institutions have pronounced treaty clauses as 'Clear' as having in their context as a natural' or 'ordinary' meaning and cites the ICJ on the Advisory Opinion on the Competence of the UN Assembly regarding admission to the United Nations (1950) that the

[f]irst duty of a tribunal which is called upon to interpret and apply the provision of the treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context that is an end to the matter.<sup>143</sup>

There is no specific language regarding the territorial boundaries of the 'units' in the UN General Assembly Resolution. From these two provisions it is difficult to formulate how the resolution directs in case of secession by Eritrea. The resolution itself didn't envisage secession.

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<sup>141</sup> See note 67 pp 509

<sup>142</sup> Ian Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopedia*, p 9, (1979, University of California Press

<sup>143</sup> George Schwarzenberger, *A Manual of International Law*, pp 486-495 Ed 4th London: Stevens; New York; Praeger,

In fact it is an instrument of unity which federated a former colony of Italy to Ethiopia. The ordinary meaning doesn't mean the meaning to be given from the context of understanding at the time of interpretation but the meaning of the terms at the time the treaty was concluded. This is termed as the principle of contemporarily by Fitzmaurice and is a particular application of the doctrine of inters- temporal law.<sup>144</sup> In the case concerning the arbitral award of 31 July 1989, the tribunal noted that a treaty ' must be interpreted in the light in force at the date of its conclusion.<sup>145</sup> However there are some jurists who claim that ' a treaty... acquires a life of its own. Consequently in interpreting it we must have regard to the exigencies of contemporary life, rather than the intentions of those who framed it.<sup>146</sup> So, how is the Resolution of 1950 to be interpreted in different circumstances in the first decade of the 21 century?

It would be advisable to look at other principles of interpretation for international jurisprudence illustrates the necessity to go beyond a purely grammatical or linguistic interpretation of a particular work or phrase.<sup>147</sup> Of course principles of international law or customary international law like *Uti Possidetis*, and equity, may be utilized in the absence of solutions from the principles of treaty interpretation. If the ordinary meanings of the operative provisions do not resolve the dispute, the contextual approach should continue to search for the correct interpretation or conform the ordinary meaning in the operative provisions.

Article 31(2) Defines context as:

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text including its preamble and annexes. a) Any agreement relating to the treaty, which was made between all the parties in connection with the conclusion of the treaty. b) Any instrument, which was made by one or more

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<sup>144</sup> G. Fitzmaurice, "General principles and Sources of Law," BYIL, Vol.30, (1951-54), P.212

<sup>145</sup> Id 204-206

<sup>146</sup> Id 212

<sup>147</sup> Sir I. Sinclair, *The Vienna convention on the law of treaties*, p 112 (ed. 2<sup>nd</sup>, 1984),

parties in connection with the conclusion or the treaty and accepted by the other parties as an instrument related to the treaty.

According to article 31(2), in order to appreciate the context of a treaty the text of the treaty is the most important document. The text should be read as a whole. Simply concentrating on a paragraph an article a section, a chapter or a part will not allow one to comprehend the whole context.

Resorting to some matters extrinsic to the terms of the treaty, according to O'Connell, one of which is the preamble, where available, is the place where the general statements about the object and purpose of the treaty are stated it is the natural place to expound the principal object to the treaty and Sinclair cites Fitzmaurice in saying that

Although the objects of a treaty may be gathered from its operative clauses taken as a whole the preamble is the normal place in which to embody and to look for, an express or explicit general statement of the treaty is objects and purposes where these are stated in the preamble, the later will, to that extent govern the whole treaty.<sup>148</sup>

Although it is very difficult to deduce specific obligation from a statement or purpose from a preamble international tribunals have not hesitated to refer to it in order to discover the object. The agricultural labor and production case, United States nationals in Morocco case, and the Ambatiello case are some of cases where the purpose and object of the treaty were looked for in the preamble.<sup>149</sup>

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<sup>148</sup> Id pp 204

<sup>149</sup> Case Concerning Rights of nationals of the United States of America in Morocco in its decision declared that: "The purposes and objects of this Convention were stated in its Preamble in the following words" (France v. United States of America) Judgment of August 27th, 1952

In the Agriculture Labor Case: The Council of the League of Nations, requested the Court to give an Advisory Opinion: Does the competence of the International Labor Organization extend to the international regulation of the conditions of labor of persons employed in agriculture?" The Permanent Court of International Justice Court among other elements of the text had to rely on the preamble of the International Labor Conference to reach at the object and purpose of International Labor conference. Permanent Court of International Justice, August 1922

International Court of Justice, Ambatiello Case, (Greece v. United Kingdom) JULY 1952

The ‘preamble’ of Resolution 390 V states:

[t]aking into the consideration

(a) The wishes and welfare of the inhabitants of Eritrea including the views of the various racial, religious and political groups of the provinces of the territory and the capacity of the people for self-government

(b) The interests of peace and security in East Africa

(c) The rights and claims of Ethiopia based on geographical, historic, ethnic and economic reasons including in particular Ethiopia’s legitimate need for adequate access to the sea

Taking into account the importance of assuring the continuing collaboration of the foreign communities in the economic development of Eritrea

Recognizing that the disposal of Eritrea should be based on its close political and economic association with Ethiopia, and

Desiring that this association assure to the habitants of Eritrea the fullest respect and safe guards for their institutions, traditions, religions and languages, as well as the widest possible measure of self-government, while at the same time respecting the Constitution, institutions, traditions and the international status and identity of the Empire of Ethiopia.<sup>150</sup>

Preliminary conclusion must be tested in the light of the object and purpose of the treaty.

As mentioned above the cardinal and the first technique of interpretation is to look for the “Ordinary meaning” to be given to the terms of the treaty in their context. If the ordinary meaning cannot give sense or becomes unrealistic or absurd, and needs to be verified as a solid conclusion, then it had to be verified through / with the conformity of the object and purpose of the treaty.

There cannot be a treaty without an object and purpose. The assumption that most treaties have one and clear object and purpose is always to be questioned for most treaties might have many different objects and purposes and might have been constructed in a vague manner and

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<sup>150</sup> Res. 390 (V) 2 December 1950

some times conflicting objects and purposes. Sinclair in his book of Vienna convention asserts that " [a] number of a authors consider that the search for the object and purpose of a treaty is in reality a search for common intentions of the parties who drew up the treaty".<sup>151</sup> In order to come to a conclusion about the object and purpose of the resolution it is necessary to analyze the provisions of the text in light of the preamble, the preparation process and the practice of states after the Resolution was implemented.

Firstly the wishes and welfare of the inhabitants of Eritrea-- including the views of the various racial, religious and political groups of the provinces of the territory – were unclear. One report concluded that only minority favored independence.<sup>152</sup>The other report found that a majority were for independence.<sup>153</sup> The delegation of Norway in its proposal indicated the growing opposition to the union by declaring that if Eritrea and Ethiopia, after their liberation from Italian domination in 1941 had been united together; such a union would have met with no opposition but as of 1950 there was opposition.<sup>154</sup>If the wishes of the inhabitants of Eritrea was the main reason in the decision of the status of Eritrea, referendum could have been the best litmus rather than relying on conflicting reports. The representative of Iraq had suggested for referendum but attention was not given.<sup>155</sup> Antonio Cassese wrote:

Where the UN action can be faulted is in its failure to organize a referendum in 1950 to establish the wishes of Eritreans. Actually, the manner in which the five-member UN Commission ascertained the will of Eritreans is highly questionable. In short, it seems that political and strategic considerations took the upper hand, and self-determination-as the 'genuine and free expression of will' of the people—was set aside.<sup>156</sup>

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<sup>151</sup> See note 147 pp 207-208

<sup>152</sup> See note 111 pp 157

<sup>153</sup> Id 205

<sup>154</sup> Id 174

<sup>155</sup> Ambassador Zewdie Reta, *The Question of Eritrea (1941-1963)* I Amharic. Michela Wrong states that "It was, as the man chosen for the Commissioner's post himself acknowledged, 'essentially a middle-of-the-road formula...the best possible compromise' See note 1 pp169

<sup>156</sup> Antonio Cassese, *Self-determination of peoples: A legal reappraisal*, p222,(1995),Cambridge University Press.

The inhabitants of Eritrea were not asked about their wishes by way of referendum. Eritrea's political parties had campaigned passionately for union or independence, not one had ever called for federation."<sup>157</sup> Nevertheless, after months of intense behind-the-scenes negotiations between the foreign ministers and ambassadors of interested parties<sup>158</sup> the United Nations General Assembly ruled that Eritrea should become 'an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown.'

It may be difficult to assert that the wishes of the inhabitants of Eritrea were fully set aside, but from the fact that the United States, France and the United Kingdom from the Victorious Four Powers and Italy the former colonial power supported giving Ethiopia an outlet to the sea with out consulting the inhabitants of the colony of Eritrea, that political and strategic consideration took the upper hand in the disposition of Eritrea, that no Eritrean Party during that time ever called for federation, and that compromise was done within the General Assembly of the United Nations not the inhabitants of Eritrea, one can safely conclude that the right of Ethiopia to access to the sea was not tied up or dependent on the wishes of the then inhabitants of Eritrea.

Secondly, federation was not intended to work.

The proposals of the UN commission were submitted to the Interim Committee of the General Assembly as required and the federation formula as spelled out in the Burmese proposals served as basis for those behind-the-scenes discussions.<sup>159</sup> These talks developed into indirect negotiations with Italy with the president of the Interim Committee assisted by

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<sup>157</sup> See note 1 pp 169

<sup>158</sup> See note 108 pp 232-239

Ambassador Padilla Nervo of Mexico, and British and American delegates.<sup>160</sup> Aklilu the head of the Ethiopian delegation rejected the Burmese proposal and stated that:

Ethiopia, a sovereign and independent state for hundred of years was not about to surrender her sovereignty and disappear from the world scene in order to join in a federation with a territory and population one- twentieth her size which has never known independence. Unless Ethiopia could retain her historic and international existence there would be no federation and no solution whatever to the problem of Eritrea. If the attempt were made to activate the discredited Italian formula of independence, Ethiopia would consider that her national security was at stake; with Italy already back in Somaliland even before any trusteeship agreement was in existence, Ethiopia would stop at nothing to protect herself against a fresh Italian threat from Eritrea.<sup>161</sup>

The resolution actually ignored the suggestions of the delegation of Burma in agreement with delegation of the Union of South Africa that the governmental structure of the two states of Ethiopia and Eritrea should be federal and should consist of a federal government as well as separate governments of Ethiopia and Eritrea, with the Emperor of Ethiopia as constitutional head.<sup>162</sup> It also ignored the legal participation of Eritrea as a unit in law making and the executive in the federal government<sup>163</sup>. The recommendation didn't oblige Ethiopia to amend its Constitution and rearrange its institutions to fully accommodate the federation except for the creation of an Imperial Federal Council composed of equal numbers of Ethiopian and Eritrean representatives who were to meet at least once a year to advice upon the common affairs of the federation referred to in paragraph 3.<sup>164</sup>

A democratic system in Eritrea and an autocratic Sovereign was impossible to run. The

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<sup>159</sup> John H. Spencer, *Ethiopia at Bay: A Personal Account of the Haile Selassie Years*, pp232-233, Reference Publication, Inc.(1984). Spencer, an American by nationality was the legal adviser of the then Foreign Minister and the Emperor .

<sup>160</sup> Id

<sup>161</sup> Id

<sup>162</sup> See note 111 (171,1)

<sup>163</sup> Id

<sup>164</sup> Res. 390 V (5)

Federation's very foundations were built on shifting sands.<sup>165</sup> The notion of federating the Western-style democracy Britain had introduced in Eritrea, in which the rights to an independent press, trade union membership and freedom of association and freedom of religion were guaranteed, with an ancient empire in which all real power lay in one man's hands was innately problematic.<sup>166</sup>

Spencer, the legal adviser of the Ethiopian delegation notes that during consultation with the Interim Committee in New York the Ethiopian delegation was privately assured that the arrangement 'divested the United Nations of all further jurisdictions in the federation and if at some time in the future, the Eritrean Assembly and Ethiopia should agree to terminate that agreement, the federation itself would be automatically dissolved without any possible recourse or objection by the United Nations.'<sup>167</sup>

Thirdly, the United Nations kept silent when the federation was disbanded.

Article 31(3,b) of the Vienna Convention on the law of Treaties states that "there shall be taken into account, together with the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

The process of dissolution of the federation is the main practice that can show what the intentions of United Nations General Assembly recommendation regarding the disposition of Eritrea. According to Ambassador Zewdie Reta representatives of the major powers in Eritrea reported to their respective governments that the imperial government of Ethiopia was determined to dissolve the federation in its second year.<sup>168</sup> The then Foreign Minister, who represented Ethiopia during the negotiations to federate Eritrea, opposed dissolution of the

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<sup>165</sup> See note 1 pp 171

<sup>166</sup> Id

<sup>167</sup> See note 108 pp 236

federation that was being hatched in Addis Abeba and in fact he suggested that if the federation is to be dissolved it should be through the referendum of the people of Eritrea but the Emperor did not accept it.<sup>169</sup>

Michela Wrong writes that:

“Albert Reid, as head of the UN’s only remaining body in Asmara, reported on the growing rivalry between Federal and Eritrean law courts and that eventually the Eritrean question will again have to come before the General Assembly. Andrew Cordier, assistant to the UN Secretary General replied “you should scrupulously avoid creating any impression whatsoever that the United Nations has any interest in the political situation within the Federation” he warned. “There now exist no basis on which the United Nations can show any interest in the political problems of Eritrea and the Union. Although the United Nations played the decisive role in the drafting of the Eritrean Constitution...that job has been completed to the satisfaction of the General Assembly, and that item has been removed from the agenda”.<sup>170</sup>

In 1955 Political parties were banned, trade unions were banned in 1958, in 1959 the name Eritrean Government was changed to “Eritrean Administration” and Ethiopian law was imposed. The federation was already dead when, on November 14, 1962, the Ethiopian parliament and Eritrean Assembly voted ‘unanimously’ for the abolition of Eritrea's federal status, making Eritrea a simple province of the Ethiopian empire.<sup>171</sup>

Had the system of federation been adopted with the primary objective of reflecting the wishes of the inhabitants, the United Nations would have objected to the breach of its decision by Ethiopia and might have tried to determine whether Ethiopia’s dissolution of the federation was done according to the wishes of the inhabitants of Eritrea. One can deduce from the terms of reference given to Commission of Eritrea and the factors that it considered in making during

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<sup>168</sup> Ambassador Zewdie Reta, *The Question of Eritrea, (1941-1963)* pp416 in Amharic,

<sup>169</sup> Id

<sup>170</sup> See note 1 pp 190

<sup>171</sup> Id pp 180

its recommendation, and the silence of the United Nations and the Four Powers when the federation was disbanded, that main object and purpose of the Resolution was not to implement the wishes of the inhabitants of Eritrea instead the decision was intended to make Eritrea part of Ethiopia but to do so in a manner that would have the support of two-thirds majority of the UN General Assembly.<sup>172</sup>

Also, the consideration of the security of East Africa was in essence the security of Ethiopia. What the security of East Africa meant was not addressed in detail and countries had to decipher it. British Sudan and French Somali land (Djibouti) which border Eritrea in East Africa had their own sea outlets. Djibouti has a small strip of land that joins it with Eritrea. A major security threat to these countries cannot emanate through Eritrea. They were under the protection of powerful nations and the primary threat they faced concerned their relatively extended Coastlines. The delegations of Guatemala and Pakistan which were in minority fully understood what the consideration of security of East Africa meant and tried to address it head on. In their memorandum they stated that:

It has often been reported that Ethiopia needs the control of Eritrean territory for reasons of security against possible aggression from outside. Such a possibility does not exist.....<sup>173</sup> An independent Eritrea- which can never become a military stronghold- could never constitute a threat to Ethiopia.<sup>174</sup> The delegations stressed that a hypothetical future aggression would be guaranteed by the United Nations and if the United Nations cannot assure it, the control of the territory of Eritrea by Ethiopia may not safeguard it.<sup>175</sup>

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<sup>172</sup> See note 1 pp170, “In December, 1950, wrong cited the Ethiopian Emperor in his address to his nation “ The formula as adopted by the General Assembly does not entirely satisfy the wishes of the vast majority of the Eritreans who seek union with out condition, nor does it satisfy all the legitimate claims of Ethiopia. But it have become obvious that the formula was the only one that could obtain a two-thirds majority at the UN- better this, than an even longer wait for justice.”

<sup>173</sup> See note 111 pp 214

<sup>174</sup> Id 216

<sup>175</sup> Id 217

There were no major aggressions that affected the Sudan and Djibouti through Eritrea. But through out its history, Ethiopia faced most of the major aggression through Eritrea. Italy and Egypt made several attempts to invade Ethiopia from what is now called Eritrea. The Turks and Arabs by controlling the ports of the Red Sea have been instrumental to the downfall of the early Ethiopian civilizations. But even without a major aggression the security of a land locked country is always at risk. As discussed above the geopolitics of the region may drastically affect economic development because of obstacles in international trade. Poverty is an internal security threat in countries like Ethiopia and most of the times it is the main danger to their existence.

The security of Ethiopia drastically affects the Sudan, Kenya, Somalia, Eritrea and Djibouti. That is why in the context of the United Nations Resolution the Consideration of the security of East Africa is in essence the security of Ethiopia.

The recommendation of the United Nations Resolution recognized Ethiopia's legitimate need for adequate access to the sea. As discussed above these rights were not dependent on the wishes of the then inhabitants of Eritrea and do not depend on the attitudes of the new state of Eritrea. Ethiopia has recognized the right of self-determination of Eritreans however; controversial this right may be, for the sake of peace and stability of this region. Conversely Eritrea has to recognize Ethiopia's right of access to the sea and be ready to solve the dispute by peaceful means.

From the beginning of the process of disposition of the colony of Eritrea up to Resolution 390 V, i.e. navigating through the *travaux preparatoires*, the negotiations of the Four Power Council of Ministers and their deputies discussed above, the fact finding commission of the Four

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Powers and finally the report of the United Nations Commission for Eritrea one can observe that the right of Ethiopia to have an outlet to the sea was at the center of the discussions. From the operative provisions, the preamble and the *travaux preparatoires* one can only conclude that the main object and purpose of Resolution 390 V was granting Ethiopia the right access to the sea and a process of minimizing security threat.

According to Spencer, “The crux of the matter for Ethiopia in arguing her claim to Eritrea was access to the sea; but the argument presented to the delegations at the Peace Conference was that of historic, ethnic, cultural, religious and linguistic ties and the economic interdependency of Eritrea and Ethiopia”<sup>176</sup> As early as November 1947, before the council of the deputies of foreign ministers, the Soviet delegate asked the Ethiopian delegation “Is Ethiopia prepared to surrender the Ogaden in order to obtain Eritrea?” which shows the center of the discussion was Ethiopia’s claim to access to the sea but it had to exchange some of its rights in the south east of Ethiopia. The General Assembly, at its 143<sup>rd</sup> meeting on 24 September 1948, referred the question to the first committee. At the first meeting of the committee:

Opinions advanced at the 238<sup>th</sup> to 272<sup>nd</sup> meeting of the first committee, from 6 April to 13 May 1949, were predominately in favor of incorporating part of Eritrea in Ethiopia, but there was wide disagreement as to the exact regions involved. (a) The eastern part of Eritrea to be incorporated in Ethiopia, and a separate solution to be found for the west part (United Kingdom, United States). The speedy transfer of all Eritrea to Ethiopia (Liberia, Ethiopia). (c) United Nations Trusteeship with an Administration appointed by the Trusteeship Council and to be assisted by an Advisory Committee. Territorial concessions to Ethiopia to provide access to the sea through the port of Assab (USSR, Yugoslavia, Czechoslovakia, Poland, Byelorussian SSR, Ukrainian SSR) (d) The northern part to be placed under United Trusteeship, with Italy as Administrating Authority. The southern part of the region to be annexed to Ethiopia (Argentina, Turkey). (f) Part of Eritrea to be annexed to Ethiopia on the basis of ethnic and religious

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<sup>176</sup> See note 108 pp 181, Spencer, the Ethiopian adviser, explains that argument: “At the Paris Peace Conference, France was Ethiopia’s principal opponent on Eritrea. It was important to avoid French opposition to the vital articles 33-38 of the peace treaty. It was therefore thought best in our argument for Ethiopian ports to avoid references to France’s decision to cut off Djibouti during the Italy-Ethiopia War, hoping that some delegates might remember one of the chief reasons Ethiopia had fallen before Fascist aggression.” 181, Spencer

factors with provision for an outlet to the sea. The remainder of the country to be placed under United Nations Trusteeship, with Italy as the Administrating Authority (Belgium, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Panama, Paraguay, Peru, Union of South Africa, Venezuela) .....(I) Eritrea, subject to the just claims of Ethiopia, to be granted independence after an interim period of advice and assistance under the International Trusteeship System (eighteen Latin-American States)....<sup>177</sup>

With the exception of China, India, and South Arabia, all other counties recognized the Ethiopian claim access to the sea. An Iraqi resolution (A/C.1/457) suggested that the General Assembly appoint a five-member Commission for the purpose of ascertaining the real wishes and desires of the inhabitants as to their future political status. It was rejected by 12 votes in favor to 35 against, with 12 abstentions<sup>178</sup> India had also demanded a plebiscite to be conducted.<sup>179</sup> As discussed above, during the second half of the third session of the General Assembly in April 1949, the Bevin-Sforza formula which incorporated Eritrea into Ethiopia except for the Western Province was supported by all including the Latin American and Soviet blocs.<sup>180</sup>

At its Fourth regular session the General Assembly of the United Nations adopted Resolution 289 A (IV) on November 21, 1949, established a commission made up of Burma, Guatemala, Norway, Pakistan and the Union of South Africa due to the fact that the available information was considered insufficient by several delegates.<sup>181</sup> And despite the report of the minority of the Commission<sup>182</sup> and no Eritrean Party demanded federation and despite the

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<sup>177</sup> Year Book of the United Nations, (1950) PP 259 -260

<sup>178</sup> Id

<sup>179</sup> Id

<sup>180</sup> See note 108 pp 209

<sup>181</sup> Report of the United Nations Commission for Eritrea, official records: Fifth Session, 1950

<sup>182</sup> Id

recommendation of Burma and Union of South Africa on the type of federation<sup>183</sup> Eritrea was federated to Ethiopia. 'Ethiopia was not to be federated with Eritrea but the converse, that Eritrea was to be federated to Ethiopia under the sovereignty of the Ethiopian Crown'<sup>184</sup>The arrangement was made so that Ethiopia's access to the sea was ensured. Massawa and Asseb the two 'Eritrean' main ports were made to fall under exclusive federal (Ethiopian) jurisdiction.<sup>185</sup>

As discussed above, following a vote to that effect by the Eritrean Assembly, the federation was declared terminated and Eritrea formally emerged with Ethiopia. The vote by the Assembly had certainly been engineered.<sup>186</sup> But the United Nations General Assembly nor the Victorious Four Powers did attempt to verify that it was the wishes of the Eritrean inhabitants nor tried to control it. And according to Shaw, Subsequent practice may act as an instrument of interpretation<sup>187</sup> In conjunction with the process of the making of the federation, the fact that the United States, France and the United Kingdom from the Victorious Four Powers and Italy the former colonial power supported giving Ethiopia an outlet to the sea with out consulting the inhabitants of the colony of Eritrea and before the issue of disposition of the whole Eritrea, and that almost all countries, even those who were supporting the independence of Eritrea, supported the claim of outlet by Ethiopia indicates that the right of access to sea was the main object and purpose of the 'treaty' between Ethiopia and the Four Victorious Powers.

The right of the Eritrean people to self- determination and independence does not basically contradict Ethiopia's right to access to the sea because these rights co-existed during the development of Eritrea as a state and demand only territorial adjustments and compromises.

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<sup>183</sup> Id

<sup>184</sup> See note 108 pp 235

<sup>185</sup> Id 236

<sup>186</sup> Id 319

<sup>187</sup> Malcolm Shaw, *International Law*, Fifth Edition, pp 848, Cambridge University Press (2003).

The two rights are not mutually exclusive because Eritrea can exist as an independent state even if Ethiopia gets back its coast of the Red Sea Afar (Asseb). As discussed above there have been territorial settlements after wars or even by negotiations and compromises and modern states continued to survive and in fact most of them flourished as states. Germany lost many adjacent areas that it claimed were German to Czechoslovakia and Poland after the Second World War. But it is one of the strongest economies even if it was forced to start from the ruins. Italy conceded some territory to the former Yugoslavia and France after the Second World War but its integrity is intact. By the same token Eritrea's recognition of Ethiopia's right of access to the sea cannot affect its integrity or its independence. The maintenance of peace in the region supported by viable policies can create a condition by which the wishes of the peoples of Ethiopia and Eritrea could be fulfilled.

Resolution 390 V eliminated the international boundary between the colony of Eritrea and Ethiopia by making Eritrea part of Ethiopia. This resolution is too broad to make clear the boundary lines that should now exist between the independent states of Eritrea and Ethiopia. Although in some places, the territorial lines have to be redrawn again at least in some places, since there are no concrete delimitation agreements or maps to show the exact boundaries. Most of the boundary lines are clear, and correspond to the boundaries of the province of Eritrea when it was part of Ethiopia. But some redrawing of the boundary will be necessary in order to effectuate Ethiopia's right access to the sea and will require negotiations and compromises as described by Jennings:

If a treaty's terms are such as to impose on a party obligations which are very wide and expressed in very general terms, those terms nevertheless be applied as they stand and if necessary the parties will be called upon to negotiate a solution for the matters left

undecided by the broad commitment undertaken in the treaty: Islamic Republic of Iran V. United States of America.<sup>188</sup>

Redrawing could mean a large chunk of coastal land that is being controlled by Eritrea to return to Ethiopia. During the discussions of the Victorious Four Powers before they submitted the case of Eritrea to the General Assembly, there were different suggestions when they wanted to implement Ethiopia's right access to sea. Some of the suggestions could affect the integrity of Eritrea as a state, while others may still create resentments on the part of Eritrea. France suggested that "[t]he territories situated between the Gulf of Zula and French Somaliland should be assigned to Ethiopia in full sovereignty."<sup>189</sup> The United States recommended the cession to Ethiopia of the southern section of Eritrea (including the Danakil Coast, and the districts of Akkele Guzai and Serai, the new frontier to start at the Gulf of Zula, following the northern borders Akkele Guzai and Serai Districts to the Ethiopian frontier. The United Kingdom's later opinion was not much different than that of the United States. If the proposals of United Kingdom and the United States are implemented they may destroy the integrity of the Eritrean State for the territories would go deep into Eritrea. The obligations of Eritrea are very wide and the implementation of the spirit of the Resolution in guarantying Ethiopia's right access to the sea is so general that it is only through negotiation and compromises that a lasting peace can be achieved.

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<sup>188</sup> See note 73 pp 1279

<sup>189</sup> see the Map

## CHAPTER 5

## ETHIOPIA SHOULD BE READY TO DEFEND ITS RIGHT OF ACCESS TO THE SEA

## An Opportunity Missed

In 1991 as a joint venture between two rebel forces, the Ethiopian People's Revolutionary Democratic Front (EPRDF) in Ethiopia and the Eritrean People's Liberation Front (EPLF) in Eritrea the Military Dictatorship in Ethiopia was overthrown. Initially, the two governments had relations which were admired by many as exemplary, although many Ethiopian had resentments about the relationship alleging that it was to the advantage of Eritrea. The honey moon didn't last long, however. In 1996 and early 1997 Ethiopia tried to tighten the uncontrolled economic relationships between the states. Eritrea was frustrated and relations deteriorated

In May 1998 Eritrean forces invaded Ethiopia using mechanized units and occupied Badme town in the north west of Ethiopia. Ethiopia demanded the withdrawal of Eritrean forces from occupied places and restoration of the '*status qua ante*'. Eritrea rejected this demand. Many foreigners, who do not know the EPLF, led Eritrean elite, think that a minor boundary skirmishes went out of control and developed into a full fledged war. Sally Healy and Martin Plaut share this opinion and wrote "[i]t was against this background, in May 1998 that a small border incident was mishandled and erupted out of control— neither side had planned it."<sup>190</sup> Ethiopia was unprepared for this war and Eritrea might not have planned for a full fledged war, for the Eritreans might have thought that the Ethiopian government would kneel dawn to their pressure and reverse its economic policies that tried to protect abuse by the Eritrean government.

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<sup>190</sup> Sally Healy and Martin Plaut, Ethiopia and Eritrea: Allergic to Persuasion, January 2007,

But, the Eritrean government was adamant and ignored different mediations and refused to restore the '*status qua ante*'. Ethiopia needed two years to prepare. The fighting ended in June 2000 after Ethiopian forces dislodged Eritrean forces from border positions and the Eritrean Forces were practically annihilated.

For the second time in its history Ethiopia won the war but lost territories by a peace treaty. Christopher Clapham has drawn attention to the striking flaw at heart of the Boundary Commission ruling, namely that it flew in the face of the result of the fighting –literally requiring Ethiopia to snatch defeat from the jaws of victory”.<sup>191</sup> It has lost (even if temporarily) its sovereign right of access to the sea and some inland territories.

Ethiopia was the victim of aggression and given the political, economic, historical, and security considerations discussed above its claim for an out let to the sea as a condition of peace treaty cannot be seen as unlawful. Most wars, until the middle of the twentieth century, concerned the acquisition of territory, and most of these wars led to exchange of territories. 80 percent of territorial wars led to re-distribution of territory for all periods prior to 1945 and 30 percent after 1945.<sup>192</sup> After the upheaval of a major world war there follows a period of “settlements,” or at least a period of “taking account” of what has happen. Territorial settlements are one aspect of such a period.<sup>193</sup> An historic procedure used to precipitate a territorial change has been military seizure of territory, followed by a bipartite treaty of cession. Examples of variations of this procedure were, military seizure of the entire territory of a state, followed by a

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<sup>191</sup> Christopher Clapham, 'Notes on the Ethio-Eritrean Boundary Demarcation', 16 October 2003, East Africa Forum. <http://www.cfeefces.org/code/claph.htm>.

<sup>192</sup> Mark w. Zacher, The territorial integrity norm: International boundaries and the use of force, International Organization 55,2, Spring 2001 pp 217

“request” for its incorporation, expression of sentiment for annexation by some of the inhabitants of a part of a state, followed by a bipartite treaty of cession, or military seizure of territory, followed by confirmation by a multipartite peace treaty of the fruits of that seizure.<sup>194</sup>

Germany, Japan, Italy, and the other Axis collaborators were punished for leading and participation of the war. For these countries to reassume their responsibilities as sovereign states in international affairs and to qualify for membership in the United Nations they were made to sign treaties that made them to renounce their rights as sovereign states and pay reparations. The settlement elaborated in the peace treaties included issues of payment of war reparations, territorial adjustments, War criminals, Naval, Military and Air Clause, claims arising out of the war and settlement of disputes.<sup>195</sup>

After the Armistice, the Italian armed forces, both of the Government and of the Resistance Movement, took an active part in the war against Germany, and Italy declared war on Germany as from October 13, 1943, and thereby become a co-belligerent against Germany,<sup>196</sup> Despite all this, Italy lost territories to France, Yugoslavia,.....and its ‘sovereign rights’ over its African colonies. It was made to pay reparations, and renounce agreements that were to its advantage.<sup>197</sup>

Germany was forced to unconditionally surrender. On February 22, 1944 British Prime Minister Churchill stated in the House of Commons that:

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<sup>193</sup> WHITEMAN, DIGEST OF INTERNATIONAL LAW, VOLUME 3, DEPARTMENT OF STATE WASHINGTON (1964).

<sup>194</sup> WHITEMAN, DIGEST OF INTERNATIONAL LAW, VOLUME 3, DEPARTMENT OF STATE WASHINGTON (1964)

<sup>195</sup> Paris peace conference, 1946, Selected Documents, Department of State, Publication 2868, Conference series 103. U.S Government printing Office, Washington, D.C Treaty with Italy.

<sup>196</sup> Preamble of the Paris Peace Treaty, p, 613

<sup>197</sup> Id

Here I may point out that the term ‘unconditional surrender’ does not mean that the German people will be enslaved or destroyed. It means, however, that the allies will not be bound to them at the moment of surrender by any pact or obligation. There will be, for instance, no question of the Atlantic Charter applying to Germany as a matter of right and barring territorial transfers or adjustments in enemy countries. No such arguments will be admitted by us as were used by Germany after the last war, saying that they surrendered in consequence of President Wilson’s 14 points. Unconditional surrender means that the victors have a free hand. It does not mean they are entitled to behave in a barbarous manner nor that they wish to blot out Germany among the nations of Europe. If we are bound, we are bound to by our consciences to civilization. We are not to be bound to the Germans as a result of a bargain struck. That is the meaning of ‘unconditional surrender.’<sup>198</sup>

Prior to its war with Eritrea, Ethiopia’s right to access to the sea was clear as was recognized by the United Nations General Assembly recommendation and the guarantee that was given by the Four Powers to implement it. Even if the right was vague, it is the practice of victors to impose conditions of surrender so that they are compensated for what they have lost and aggression is not repeated. Eritrean government should have been “punished’ and the right of Ethiopia access to the sea restored ones and for all. For tens of thousands of beloved sons and daughters of Ethiopians that lost their lives in defending their nation, for the hundreds of thousand of its people displaced, for the diversion and dragging of its economic and social development, and for the loss of private and public properties Eritrea should have been made to pay. The agreement should have been made to assert Ethiopia’s legitimate right of access to the sea and reparation for at least instigating the war.

The Algiers Agreement gave the aggressor and the victim on equal standing as far as responsibility for the war and for the mistakes done by the armed forces. It put the victor and the defeated on equal footing. Violation of international humanitarian law, if any, by Ethiopian Armed Forces should be accounted for but, only after the Eritrean Government which instigated

the war and refused to solve the dispute peacefully after the war started has been made responsible. The “Nuremberg Trail’ was established to prosecute the German Criminals but that doesn’t mean that there were no atrocities by the victors.<sup>199</sup>

The lame and futile exercise of the Algiers Agreement had two articles regarding responsibility for the instigation of the war and for reparation:

### Article 3

In order to determine the origins of the conflict, an investigation will be carried out on the incidents of 6 May 1998 and on any other incident prior to that date which could have contributed to a misunderstanding between the parties regarding their common border, including the incidents of July and August 1997.

- 1 The investigation will be carried out by an independent, impartial body appointed by the Secretary General of the OAU, in consultation with the Secretary General of the United Nations and the two parties.
2. The independent body will endeavor to submit its report to the Secretary General of the OAU in a timely fashion.
3. The parties shall cooperate fully with the independent body.
4. The Secretary General of the OAU will communicate a copy of the report to each of the two parties, which shall consider it in accordance with the letter and spirit of the Framework Agreement and the Modalities.

### Article 5

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

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<sup>198</sup> 397 H.C Deb. (5<sup>th</sup> ser.) cols. 697 699(Feb.22, 1944) as written in Whiteman, Digest of International Law Vol. 3 pp. 234\*\*

<sup>199</sup>Nuremberg Trail’

result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law. The Commission shall not hear claims arising from the cost of military operations, preparing for military operations, or the use of force, except to the extent those claims involve violations of international humanitarian law.<sup>200</sup>

The invader was not made responsible for the war. No body can tell Ethiopia that Eritrea was not the igniter of the war and responsible for what happen during the war by invading its territories and refusing to resolve the dispute by peaceful means. The African Committee of Diplomats<sup>201</sup> did prove that Eritrea was the aggressor before the major offensive started. The Eritrea-Ethiopia Claims Commission was forced to determine the origin of the conflict even though the task was supposed to be given to another body to be established according to Article 3. Eritrea argued that the Commission did not have jurisdiction to consider the origins of the conflict, but the Commission, controversially assumed jurisdiction and decided that Eritrea was responsible for instigating the war. The Commission has ruled that Eritrea triggered the 1998 - 2000 war against Ethiopia. "[g]iven the absence of an armed attack against Eritrea, the attack that began on May 12 cannot be justified as lawful self-defense under the UN Charter,". In finding Eritrea responsible for the outbreak of hostilities between the two countries in 1998, the Commission stated that Eritrea had violated international law.<sup>202</sup> An important implication of this finding is that Eritrea will have to pay all the costs arising from the attack and the initial phase of the war, although it will not have to pay the full costs. So far, the Claims Commission has held Eritrea and Ethiopia responsible for different accounts and has given partial awards

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<sup>200</sup> Algiers Peace Agreement

<sup>201</sup> African Committee of Diplomats

<sup>202</sup> Eritrea Ethiopia Claims Commission, Partial Award, *Jus Ad Bellum*, December, 19, 2005, <http://www.pcacpa.org/ENGLISH/RPC/>.

regarding claims arising from the treatment of prisoners of war, damages, and injuries caused to the other state as a result of the conduct of war.<sup>203</sup>

The violations of Eritrea may be greater than Ethiopia but Ethiopia cannot be compensated by this process. The endeavor is a very expensive process and the end result may only be an account for history. Ethiopia is too poor to pay. If individuals and communities are to be fully compensated, Eritrea's economy may be drained..

Eritrea should have admitted that it had instigated the war and should have taken full responsibility regarding the consequences of the war in the Algiers Agreement. The Claim Commission was necessary but its primary mandate should have been to decide on the compensation to be awarded to Ethiopia as a result of Eritrea's acceptance of responsibility. The commission might also have had the mandate to investigate whether Ethiopia's response to the Eritrean invasion was disproportionate and whether there were violations of international humanitarian law.

#### Ethiopia Should be Ready to Defend Its Right of Access to the Sea

Despite the Algiers Agreement of December 2000, Ethiopia and Eritrea are neither at peace nor at war. In fact they are waging a proxy war in Somalia. Ethiopia has a legitimate concern in Somalia. Eritrea and Somalia do not have any border relations. Many people believe that Eritrea is involved in Somalia to attack Ethiopia with the collaboration of other states who want to destabilize Ethiopia. Eritrea within its 15 years of its existence have fought two major wars with its neighbors Yemen and Ethiopia, and is in constant friction with the other remaining bordering countries, Sudan and Djibouti . The final report of the United Nations Monitoring

Group on Somalia pursuant to Security Council resolution 1676 (2006) stated among other things that:

Djibouti, Egypt, Eritrea Libya and certain Middle East Countries are arming the Islamic Courts Union with anti tank and, anti aircraft and other weapons and supporting them logistical materials and advisors. Eritrea is being used as a conduit and a platform for, as well as a coordinator of, support for the Somalia ICU. The support is also for Ethiopian opposition Oromo Liberation Front and Ogaden National Liberation Front which are also operating from Territories controlled by ICU. 2000 troops from Eritrea are inside Somalia supporting the Islamic Courts.<sup>204</sup>

Jendayi Frazer, the US assistant secretary of state for African affairs, reported that: “Eritrea is fuelling the insurgency in Somalia in order to wage a proxy war against its arch-foe Ethiopia. Eritrea was the largest foreign backer of guerrillas who are fiercely resisting attempts by Ethiopia and the Somali government to pacify Mogadishu.”<sup>205</sup>

Eritrea is arming, training and supporting armed Ethiopian opposition groups and ‘liberation fronts’ and it is almost official. The Ethiopian government alleges that Eritrea masterminded the attempted bombings in Addis Abeba during the last African Union Summit. Many people wonder what the Ethiopian government is doing in handling the case of Eritrea. The Prime Minister said that, Ethiopia is following a ‘strategy of containment’ meaning that Ethiopia is ready to destroy agents of Eritrea sent to attach Ethiopia and to make Eritrea understand that it is impossible to destabilize Ethiopia<sup>206</sup>

The recognition of Eritrean independence was a courageous and principled one, but the handling of the succession and especially the territorial disputes, was a disaster and lacked

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<sup>203</sup> Eritrea Ethiopia Claim Commission <http://www.pcacpa.org/ENGLISH/RPC/>

<sup>204</sup> (S/RES/1724 (2006),S/2006/913 Security Council

<sup>205</sup> April 9, 2007, The Guardian

<sup>206</sup> Prime Minister Meles Zenawi's Speech to the Parliament January 2 ,2006,

[http://www.mfa.gov.et/Press\\_Section/publication.php?Main\\_Page\\_Number=3311](http://www.mfa.gov.et/Press_Section/publication.php?Main_Page_Number=3311)

statesmanship-. I wrote in my LLB thesis: “[t]he author is unaware of Ethiopia’s preparation to solve the imminent border issue to be raised by Eritrea. As the result shows institutions like the Foreign Ministry and Ethiopian Mapping Agency were ill prepared for the border dispute.”<sup>207</sup>

Many people thought that Ethiopia would demand the restoration of its right access to the sea but the Algiers Agreement on the contrary revived the defunct colonial treaties and made Ethiopia a land lock country. The Algiers Agreement neither brought peace nor guaranteed the legitimate rights of Ethiopia. Also it is important to note that the Ethiopian peoples were told that the self-determination and independence of Eritrea means perpetual peace for Ethiopia.

The operative provision directly related to territorial disputes is article 4, which states:

#### Article 4

1 Consistent with the provisions of the Framework Agreement and the Agreement on Cessation of Hostilities, the parties reaffirm the principle of respect for the borders existing at independence as stated in resolution AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964, and, in this regard, that they shall be determined on the basis of pertinent colonial treaties and applicable international law.

2. The parties agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law. The Commission shall not have the power to make decisions *ex aequo et bono*.<sup>208</sup>

Eritrea was a province of Ethiopia during the Cairo Declaration. As far as Ethiopia is concerned pertinent colonial treaties could only mean international treaties between Ethiopia and the colonial powers surrounding it and most probably treaties between Italy and other colonizers

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<sup>207</sup> The Validity of the Decision of the Ethiopia – Eritrea Boundary Commission regarding the Western Sector. By Abebe Teklehaimanot Kahsay (Major General) Submitted in Partial Fulfillment For the Requirement of LLB\*\*

<sup>208</sup> Algiers Peace Agreement 2000

that are related to Eritrea. Sub-article 2 is meant to revive the obsolete treaties.<sup>209</sup> The Algiers Agreement did not bring peace and stability. The very governments that signed it are the ones who have refused to implement it more or less from the beginning. The Eritrean government has violated the Algiers Agreement almost from the start. The agreement was for cessation of hostilities, but Eritrea instead started organizing and arming Ethiopian armed groups. It had violated the “Transitional Security Zone” a buffer Zone inside Eritrea which was agreed upon. It has created obstacles and restricted the movements of the United Nations Mission for Ethiopia and Eritrea (UNMEE). The Ethiopian government initially wavered about whether to accept the decision of the Boundary Commission but because of public pressure it is not implementing it. The Agreement is flawed and unless it is rectified the crisis will persist in one way or another.

The policy objective of any territorial agreement should be to render “stability and finality”. This can be achieved if the treaty is based not only the acceptance of incumbent governments but also the agreement of the concerned populations with less resentment. Yet, the resentment is increasing among the population of Ethiopia including the cadres of the ruling party. An agreement that is devoid of its inherent character of conflict management cannot bring stability and finality. Stability can be achieved only if there is a condition to implement it. Implementation pre-supposes actors who possess both the capability and the willingness to ensure that the proposed arrangement can actually be put into effect. The balance of power at both the regional and international levels matters a lot. Ethiopia Won on the battle field but lost at the negotiation table. Ethiopia should have asserted its legitimate rights, especially the right to

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<sup>209</sup> At around the end of the war, the Chief of Staff of the Ethiopian Defense Forces, Lieutenant General Tsadkan had raised the issue of access to the sea during the meeting of the Central Command ( the highest war command chaired by the Prime Minister) and a general consensus for a ‘fait accompli’ was developing, but it was too little too late to change the situations.

access to the sea. It is now paying for what it failed to do in December 2000. The government is sandwiched between the stamp pressed in Algiers and the popular will. The winner is necessarily in a stronger position than the loser. If Ethiopia, the stronger refuses to implement the unjust agreement then stability cannot be achieved. Eritrea cannot implement the agreement unilaterally because it doesn't have the resources both human and material and is not capable of carrying this burden. The international community and the Security Council are not willing to press Eritrea or Ethiopia to implement it for reasons that they themselves know.

Ethiopia has to initiate a territorial dispute settlement process by which the rights and claims of both Ethiopia and Eritrea are addressed so that peace stability and finality are achieved. There are no ready made answers for the complex legal relationship of Ethiopia and Eritrea. Integrated principles of law should be employed in order to achieve a balanced, fair solution. An integrated use of the interpretation of the UN Resolution, the doctrine of *Uti Possidetis Juris* and the principle of self-determination with a willingness to make fair compromises may bring lasting peace

#### A) The UN Resolution

A new *compromis* based on the recognition of the UN General Assembly Resolution should be agreed upon which recognizes, the just rights of Eritrea, Peace and security of East Africa and the Sovereignty right of Ethiopia to access to the sea. Mechanisms of compromise to address the legitimate interests of both countries should be in place. The territories of the two states should be delimited anew in the South East tip of Eritrea: Principles of equity as a means of interpretation of the UN resolution used should be used. The Frontier Dispute/Burkina Faso Mali case provides an illustration of the approach that should be used. In that case, the International

Court of Justice essentially divided the dispute territory in half when there were inconsistencies and gaps in the record. Although the court was barred from deciding the case *ex aequo et bono* because the parties had not consented to this, it employed *equity infra legem*—equity used as a “method of interpreting...the law in force.”<sup>210</sup>

#### B) Uti Possidetis Juris

As an alternative and in conjunction with the treaty right the legal principle of Uti Possidetis Juris which is regarded as customary international law should be invoked as a means of asserting the right of access to the sea. The Cairo declaration of the Organization of African Unity has also endorsed this principle. Uti Possidetis Juris is a doctrine under which newly independent states inherit the pre independence administrative boundaries set by the former colonial power. Eritrea as a province of Ethiopia had definite administrative boundary before secession. These internal administrative boundaries could be the basis for the international boundary between Ethiopia and Eritrea. These boundaries are definite and at the same time address the outlet right of Ethiopia. This would be **an** alternative means of solving the territorial dispute, and would be similar to the approach used for the newly formed former Yugoslavia States.

#### C) Self determination of the Red Sea Afar

The Afar peoples of Ethiopia were denied the self preservation of their ethnic group when they were struggling to retain their people in the Asseb Administration Area and to keep it from being incorporated into Eritrea because of the obsolete colonial treaties. They had the right to remain in Ethiopia as a matter of both international law and the constitution of Ethiopia. Sharma states that

there can be situation where a sub group of a parent group might demand territorial separation and invoke a wide variety of justification including linguistic, ethnic, and religious and so on.<sup>211</sup> He gives such examples as, the British on the Falkland Islands and Gibraltar. By the same notion Spain argues that the true and indigenous population of the disputed enclaves was of Spaniard origin.<sup>212</sup> Sharma is of the opinion that the legitimization of secession solely based on religious, linguistic, ethnic, historical, and cultural considerations is impermissible under international law as long as the government of the country is fully representative. Cassese has also supported that notion by asserting that Self- Determination has also been used in the sense of rearranging the territorial order of sovereign states with a meeting the demands of particular groups and communities (for instance ethnic)<sup>213</sup>

In the case at hand, Eritrea is most probably the only country with out a constitution, no formal check and balance and one of the most repressive regimes and the Afar in Asseb area are second class citizens.<sup>214</sup> In addition to the right to access to the Ethiopia can invoke the right of the Afar people around Asseb to self determination and to join the majority of the Afar in Ethiopia.

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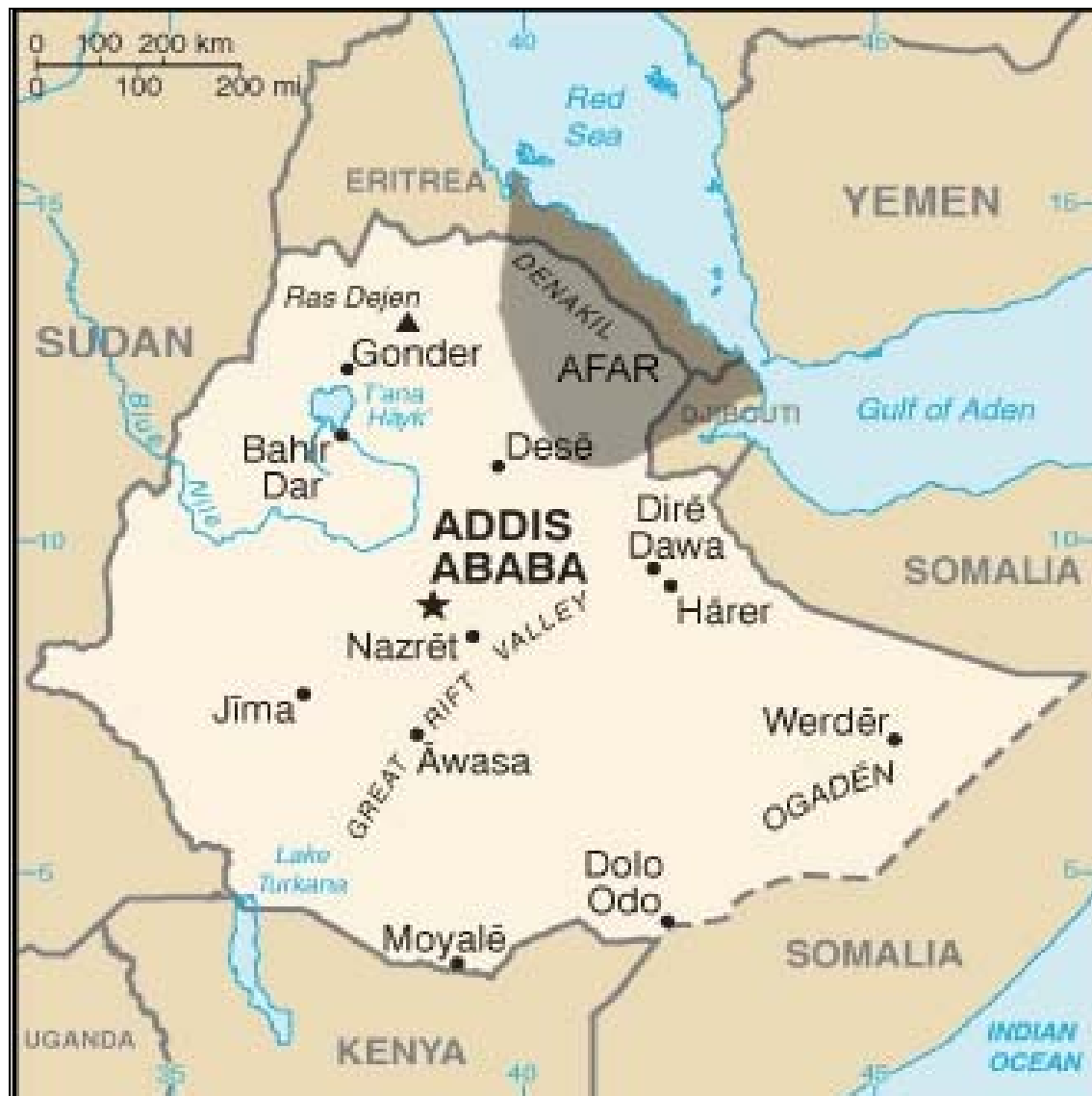
<sup>210</sup> John B. Allock, et and al Border and Territorial Disputes, 3<sup>rd</sup> Edition 1992 and Sharma, 125 see also Masahiro Miyoshi, Consideration of Equity in the Settlement of Territorial and Boundary disputes)

<sup>211</sup> Sharma, Territorial Acquisition, Disputes and International Law, pp 213 (1997)

<sup>212</sup> Id 310- 313

<sup>213</sup> Antonio Cassese, international law in a divide world, 135 (1986).

<sup>214</sup> See note 1 pp 382 Wrong states that, “Those who once marveled at plucky little Eritrea’s iconoclasm now shrug it off as a ‘Pariah state’.”



The Afars cover the area highlighted in Ethiopia, Djibouti and Eritrea. The big majority are in Ethiopia. France suggested the highlighted area south east of Eritrea starting from the Gulf of Zula up to Djibouti which is goes 60 kilometers parallel to the coastline.

In 2005, the International Crises Group stated that:

The Temporary Security Zone does not practically exist and the activities of the United Nations Mission to Ethiopia and Eritrea have been restricted by Eritrea. Ethiopia is not ready to implement the decision of Ethiopia- Eritrea Boundary Commission as it is. The fragile peace maintained by Ethiopia and Eritrea since they signed a comprehensive agreement at Algiers in December 2000 is fraying dangerously. With a costly two-year war now followed by nearly five years of stalemate, patience on both sides of the border has worn thin, and there are worrying signs that the countdown to renewed conflict may have begun. Neither side appears eager for war, but to dismiss the tensions as mere sabre-rattling could mean missing the last chance to preserve peace in the Horn of Africa.<sup>215</sup>

The situation has not improved and on June 27, 2007, the Prime Minister of Ethiopia reported to the Parliament that:

With regard to Ethio-Eritrea case, the Ethiopian gov't is always ready to solve the dispute through dialogue. It is also mandatory to carry out activities such as building the capacity of the defense force to reverse the aggression which may be attempted by the government of Eritrea. The Eritrean government and its allies are attempting to impede the upcoming millennium celebration and thus further called upon the public to expose those forces. The strategy pursued by the Eritrean government presently is a strategy of wrecking havoc by organizing and training various anti-peace forces.<sup>216</sup>

Ethiopia's sovereign right of access to the sea is still alive and the possibility of reversing the missed opportunity may exist!!

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<sup>215</sup> The International Crisis Group December, 2005

<http://www.crisisgroup.org/home/index.cfm?l=1&id=3850>

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