

## COMMENT

## River Maiteb's Location in the Ethio-Eritrean Western Border : Critical Reflections

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### Background

The boundary decision rendered by the Eritrea-Ethiopia Border Commission on April 13<sup>th</sup> 2002 involves three sectors of the border in dispute namely the *western sector* where Badme is located, the *central sector* (the Zalambesa-Tsorona Front) and the *eastern sector* (i.e. the Bada Front). This comment examines the decision of the Border Commission regarding the *western sector* of the disputed Ethio-Eritrean border and the grounds thereof, after which brief critical reflections are forwarded.

The Boundary Commission was established in accordance with the agreement signed by Ethiopia and Eritrea on 12 December 2000, hereinafter referred to as the December Agreement. The Commission's decision has eight chapters and three appendices. Chapter I entitled "*Procedural Introduction*" states the agreement of the parties regarding the laws applicable in the settlement of the disputed boundary and deals with pertinent procedural issues including appointment of commissioners, rules of procedure, submission of memorials (June 2001) and counter memorials (September 2001), and hearings (December 2001).

In the submissions presented by the parties, Ethiopia and Eritrea had submitted maps in which both forwarded arguments based on the 1900, 1902 and 1908 colonial treaties. Neither party did contest the validity of the treaties, but merely submitted arguments that its claims are in accordance with these treaties.

Chapter II of the Decision embodies *Substantive Introduction*. Paragraphs 2.6 to 2.9 of Chapter II/A forward introductory background on brief history of the parties, colonial presence of Italy at Assab and Massawa since 1885

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and its subsequent inland expansion, the historical setting in which the 1900, 1902 and 1908 treaties were signed between Emperor Menelik II and Italy, Italian occupation of Ethiopia (1935-1941), Post-1941 British Military Administration in Ethiopia and Eritrea and the 1950 UN General Assembly Resolution 390A(V) which brought about Federation of Eritrea to Ethiopia. The substantive introduction gives a brief profile of the setting that surrounded the border dispute despite its apparent imbalance in historical narration that presents Eritrea as historically affiliated to Egypt and the Ottoman Empire before the 1880s<sup>1</sup> thereby undermining the historic bond between the two sides of the border since Axumite civilization.

The decision states that “On 11 September 1962, *Ethiopia declared null and void the Treaties of 1900, 1902 and 1908*”<sup>2</sup> by enacting Order No 6 of 1962 which led to the incorporation of Eritrea in Ethiopia as a province by ending its federal status. It then briefly narrates the armed resistance in Eritrea, the eventual independence of Eritrea on 27 April 1993, the hostilities that broke out in May 1998 and the agreement signed on 12 December 2000 to provide for the permanent termination of military hostilities between the states.<sup>3</sup> It is on the basis of Article 4 of the December Agreement that the Border Commission was established. This comment limits itself to the dispute over the western border, and in particular will focus on the reasoning and findings of the Border Commission regarding the location of River Maiteb and with regard to what the Commission considered as subsequent state practice.

#### *Subject Matter of the Dispute in the Western Sector*

The decision of the Border Commission states that the 1902, 1900 and 1908 treaties respectively lay down the western, central and eastern sectors of the boundary although they “have never been implemented by demarcation.” According to the 1902 Treaty, the boundary shall run eastwards along the Setit to the point where it is met by River Maiteb (English and Italian versions) referred to as Maiten (in the Amharic version) after which the boundary runs in a generally northeastwards direction to the confluence of the Mareb and the Mai Ambessa rivers. However, “Ethiopia contends that the boundary runs first to the headwaters of the Maiteb and only from there does the boundary run in a straight line to the Northeast.”<sup>4</sup>

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<sup>1</sup> Eritrea-Ethiopia Border Commission Decision Regarding Delimitation of the Border between The State of Eritrea and The Democratic Republic of Ethiopia (13 April 2002) Paragraph 2.7

<sup>2</sup> *Ibid*, Paragraph 2.10

<sup>3</sup> *Ibid*, Paragraph 11 *ff*

<sup>4</sup> *Ibid*, Paragraph 2.21

The dispute in the western sector of the boundary dispute thus depended on which river is referred to in the 1902 Treaty as Maiteb and Maiten. The different *claim lines* of Ethiopia and Eritrea regarding the point at which the river stated in the 1902 Treaty joins the Setit River have been pointed in the map presented as Map 2 in the Decision.

## 1. The Commission's Perception of the December Agreement

Article 4, Paragraph 1 of the December Agreement<sup>5</sup> provides the following:

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.

Paragraph 2 of Article 4 further provides:

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*.

The Commission stated the need to address three core elements of Article 4 of the December Agreement, namely:

- a) the treaties specified
- b) applicable international law, and
- c) the significance of the reference made to the 1964 OAU Summit Resolution.<sup>6</sup>

### 1.1- Treaty Interpretation

The reasoning of the Commission starts with the statement that “Both Parties agree that the three treaties cover the whole of the boundary between them. The 1900 Treaty covers the central sector, the 1902 Treaty covers the western sector, and the 1908 Treaty covers the eastern sector.”<sup>7</sup> The Commission then proceeded to the meaning of these treaties which it considered as the central feature of the dispute.

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<sup>5</sup> Agreement between the Government of the Federal Democratic Republic of Ethiopian and the Government of the State of Eritrea, December 12, 2000

<sup>6</sup> *Supra* note 1, Paragraph 3.2

<sup>7</sup> *Ibid*, Paragraph 3.3

According to the reasoning of the Commission, interpreter of treaties should be able to establish the ‘common will’ based on an interpretation “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.”<sup>8</sup> The Commission states to have considered the following in construing the treaties:

- a) The doctrine of “*contemporaneity*”, i.e interpretation of a treaty ‘by reference to the circumstances prevailing when the treaty was concluded’ by, *inter alia*, ‘giving expressions (including names) used in the treaty the meaning that they would have possessed at that time;’<sup>9</sup>
- b) The present day state of scientific knowledge as reflected in the documentary material submitted by the Parties in order to illuminate the meaning of words embodied in treaties;<sup>10</sup>
- c) Ascertainment of ‘the common will’<sup>11</sup> in preparatory documents or even subsequent action of the Parties.<sup>12</sup>

Although the Border Commission accepted the doctrines of *contemporaneity* and *subsequent action* of the Parties, it expressed the requisite precaution that it would take in considering the latter factor, i.e. *subsequent practice or conduct*. The Commission pursued the reasoning in the *Serbian Loans* case<sup>13</sup> in which it was decided that:

If the subsequent conduct of the Parties is to be considered, it must be not to ascertain the terms of the (treaty), but whether the Parties by their conduct have altered or impaired their rights.<sup>14</sup>

The Commission made further reference to various cases<sup>15</sup> and stated that: “the effect of subsequent conduct may be so clear in relation to matters that appear to be the subject to a given treaty that the application of an otherwise pertinent treaty provision may be varied, or may even cease to control the situation, regardless of its original meaning.”<sup>16</sup> The Commission noted that the “nature and extent of the conduct effective to produce a variation of the treaty” depend on each case,<sup>17</sup> and it usually involves a Party’s being *estopped*

<sup>8</sup> *Ibid*, Paragraph 3.4

<sup>9</sup> *Ibid*

<sup>10</sup> *Ibid*, Paragraph 3.12

<sup>11</sup> *Ibid*, Paragraph 3.13

<sup>12</sup> Palena, 38 ILR 10, at p.89 (1969).

<sup>13</sup> *Supra* note 1, Paragraph 3.6

<sup>14</sup> *Serbian Loans, PCIJ Series A. Nos. 20/21, p.5, at p. 38 (July 1929)*

<sup>15</sup> The Namibia Advisory Opinion of the International Court of Justice, 1971, The

Temple of Preah Vihear (Cambodia v. Thailand, Merits) ICJ Reports 1962. P.s) and Arbitral Award in the Dispute concerning certain Boundary Pillars between the Arab Republic of Egypt and the State of Israel, 80 ILR 226 (1988), 27 ILM 1421 (1988)

<sup>16</sup> *Supra* note 1, Paragraph 3.8

<sup>17</sup> *Ibid*, Paragraph 3.9

or *precluded* from challenging the validity and effect of conduct of the other Party after implied or tacit agreement (acquiescence) which is presumed owing to failure to reject (or dissociate from) the conduct under consideration within a reasonable time.

### 1.2- Applicable International Law

The Border Commission referred to the Kasikili/ Sedudu case<sup>18</sup> and it came up with the conclusion that the stipulation (in Article 4/1 of the December Agreement) that provides for “the determination of the border on the basis of pertinent colonial treaties *and applicable international law*” envisages the application (in addition to treaties) of “*any rules of customary international law that might have a bearing on the case*, for example, prescription and acquiescence *even if such rules might involve departure from the position prescribed by the relevant treaty provisions.*”

Ethiopia had argued that the boundary must be determined “exclusively on the basis of the *three specified Treaties as interpreted in accordance with the rules of International Law* governing treaty interpretation.” However, the Commission did not accept Ethiopia’s contention and it instead gave a wider interpretation to the words “*applicable international law*” under Article 4/1 of the December Agreement. According to the Commission, “it is required also to apply those rules of international law applicable generally to the determination of disputed borders including, in particular, the rules relating to the effect of the conduct of the parties.”<sup>19</sup>

### 1.3- Subsequent Conduct of the Parties

The Border Commission took three factors in the examination of the conduct of the parties, namely: *maps*, *effectivités*, and *diplomatic and other similar exchanges and records* including *admissions* before the Commission. The latter factor has not been discussed in detail in the Commission’s decision<sup>20</sup> and the decision states the following regarding maps and *effectivités*.

#### a) Maps

The Commission expressed its awareness “of the caution with which international tribunals view maps”, and stated that authoritative maps are those such as the ones that are attached to treaties. According to the Border Commission “The Treaty map annexed to the 1900 Treaty is such a map.”<sup>21</sup>

With regard to maps that are not part of a treaty, the Commission has held the following:

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<sup>18</sup> Palena, *Supra*, note 12, at 89

<sup>19</sup> *Supra* note 1, Paragraphs 3.14, 3.16

<sup>20</sup> *Ibid*, Paragraph 3.30

<sup>21</sup> *Ibid*, Paragraph 3.18

The effect of a map that is not part of a treaty will vary according to its provenance, its scale and cartographic quality, its consistency with other maps the use made of it by the parties, the degree of publicity accorded to it and the extent to which, if at all, it was adopted or acquiesced in by the parties adversely affected by it, or the extent to which it is contrary to the interests of the party that produced it. A map that is known to have been used in negotiations may have a special importance. ...<sup>22</sup>

The Commission made reference to the Chamber of the International Court of Justice in the Frontier Dispute Case<sup>23</sup> and it stated that “it is not the maps ‘*in themselves alone*’ which produce legally significant effects, but rather the maps in association with other circumstances.”<sup>24</sup> It added, “A map per se may have little legal weight: but if the map is cartographically satisfactory in relevant respects, it may, as the material basis for, e.g., acquiescent behavior, be of great legal significance.”

The Commission further addressed the issue of *signature*, i.e. the general shape, silhouette, contour or outline on maps, as distinct ... from its particular details.<sup>25</sup> The Commission did not reject reference to *signature* but noted that it ought to be approached with caution. The Border Commission finally examined the impact of disclaimers of maps<sup>26</sup> and stated that they “may influence the decision about the weight to be assigned to the map” without excluding admissibility.

#### b) *Effectivités*

Effective assertion of legislative, administrative and judicial authority over a disputed area can, according to the Commission, play a role “either as assertive of that state’s position or, expressly or impliedly, contradictory of the conduct of the opposing state.”<sup>27</sup> The Commission’s position on the nature and impact of *effectivités* is the following:

... There is no set standard of duration and intensity of such (effective assertion of authority). Its effect depends on the nature of the terrain and the extent of its population, the period during which it has been carried on and the extent of any contradictory conduct (including protests) of the opposing State. It is also important to bear in mind that conduct does not by itself produce an absolute and indefeasible title, but only a title relative to that of the competing State. The conduct of one Party must be measured against that of the other. Eventually, but not necessarily, so, the legal result may be to vary a boundary established by a treaty.<sup>28</sup>

<sup>22</sup> *Ibid*, Paragraph 3.21

<sup>23</sup> Case concerning the Frontier Dispute (Burkina Faso v. Mali), ICJ Reports 1986, at p.583, para. 56)

<sup>24</sup> *Supra* note 1, Paragraph 3.22

<sup>25</sup> *Ibid*, Paragraphs 3.23 to 3.25

<sup>26</sup> *Ibid*, Paragraphs 3.26 to 3.28

<sup>27</sup> *Ibid*, Paragraph 3.29; <sup>28</sup> *Ibid*

### 1.4- Relevance of the 1964 OAU Summit Declaration

The last parts of Chapter III of the Border Commission's Decision deal with the relevance of the reference made by the December Agreement to the 1964 OAU Summit Declaration, and the scope of the Decision. The Border Commission stated that the reference made to the 1964 OAU Summit Declaration doesn't have a particular consequence, other than the inference that "the Parties have thereby accepted that the date as at which the borders between them are to be determined is that of the independence of Eritrea, that is to say, on 27 April 1993."

### 1.5- Scope of the Border Commission Decision

And finally, the last paragraph of Chapter III of the Border Commission Decision expresses the scope of the decision. It reads:

The task of the Commission extends both to delimitation and to the making of arrangements for the expeditious demarcation of the boundary (Article 4 paragraphs 2 and 13). The latter aspect of the Commission's work is not covered by the present decision and will be the subject of the next phase of its activities."<sup>29</sup>

## 2. The Commission's interpretation of Maiteb as Sittona

Chapter VIII of the decision embodies the conclusion of the Border Commission regarding the western sector of the disputed border according to which:

- i. "The boundary begins at the tripoint between Eritrea and Ethiopia and the Sudan and then runs into the center of the Setit opposite the (the tripoint, indicated as point 1 in the map annexed)
- ii. The boundary then follows the Setit eastwards to its confluence with the *Tomsa* (at point 6)
- iii. At that point the boundary turns to the northeast and runs in a straight line to the confluence of the Mareb and the Mai Anbessa (Point 9)."<sup>30</sup>

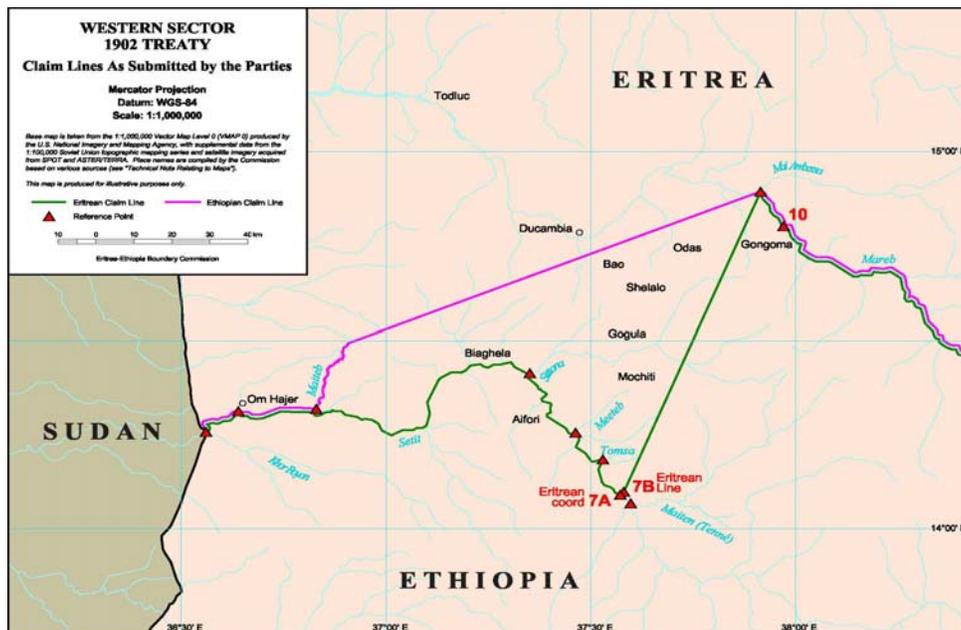
River *Tomsa* has not been stated in the Treaty. Nevertheless, the Commission arrived at the conclusion that the term River *Maiteb* actually referred to the western *Maiteb* (Point 3)<sup>31</sup> indicated in the Ethiopian claim line, while in fact the Parties had River *Sittona* (Point 4) in mind. The Commission further pushed the line even eastwards to River *Tomsa* (Point 6) on the ground that subsequent practice has moved the border towards *Tomsa*.

<sup>29</sup> *Ibid*, Paragraph 3.37

<sup>30</sup> *Ibid*, Ch VIII Paragraph 8.1

<sup>31</sup> Point 1 is the tripoint between Eritrea, Ethiopia and the Sudan while Point 2 is

Om Hajer. As we move eastwards we get Point 3 (River *Maiteb*), Point 4 (River *Sittona*), Point 5 (River *Meeteb*), Point 6 (River *Tomsa*).



## 2.1- The river referred to as ‘Maiteb’ in the 1902 Treaty

The second paragraph of Article 1 of the 1902 Treaty provides that:

Commencing from the junction of the khor Um Hagar with the Setit, the new frontier follows this river to its junction with the Maiteb following the latter’s course so as to leave Mount Ala Tacura to Eritrea, and joins the Mareb at its junction with the Mai Ambessa.

The last paragraph of the same treaty provision reads:

The line from the junction of the Setit and Maiteb to the junction of the Mareb and Mai Ambessa shall be delimited by Italian and Ethiopian delegates, so that Cunama tribe belong to Eritrea.

### a) Claim lines of Ethiopia and Eritrea

The Amharic version uses “Maiten” instead of ‘Maiteb.’ The 1902 Treaty was signed in Italian, English and Amharic, and “Ethiopia has not sought to invoke the Amharic version while Eritrea has.”<sup>32</sup> Ethiopia contended that “as used in the Treaty, ‘Maiteb’ refers to the river of that name that reaches the Setit from the northwest at Point 3, from the source of which a straight line is drawn to (the junction of Mereb and Mai Ambessa) Point 9.”<sup>33</sup>

<sup>32</sup> *Supra* note 1, Paragraphs 5.5, 5.1533

| <sup>33</sup> *Ibid*, Paragraph 5.13

As stated in the Commission's Decision:

Eritrea initially maintained that the river designated in the equally authoritative Amharic version of the Treaty is named the Maiten. A river of similar name, the Mai Tenné, joins the Setit at point 8, some 87 kilometers further east than the western Maiteb. ... Eritrea later submitted that the boundary line subsequently established and maintained by the Parties was a straight line running from the confluence of the Setit and the Tomsa (Point 6) to Mai Anbessa (Point 9). ... Eritrea also suggested that the original Treaty reference to the 'Maiteb' was actually to the Sittona (River, Point 4).<sup>34</sup>

### **b) The Commission's understanding of River "Maiteb"**

The Commission cites various authoritative and reliable maps:

One contemporary map in particular, the Sketch Map illustrating Article 1 of the Treaty between Great Britain and Ethiopia relating to the Sudan border signed on the same day as the 1902 Treaty involved in the present case, shows clearly in its top right corner the northern terminus of that boundary ending at the Setit and then indicates a short eastward-extending stretch of the Setit, which in its turn, ends at a tributary that the Sketch Map calls the "Maiteb". The same is shown on a map of the Anglo-Egyptian Sudan of 1901 and even more clearly on the so-called Talbot-Colli map of the same year. These maps extend no further east than the Maiten as there presented. Nor is there any evidence that the possession on 15 May 1902 of any map showing a river Maiten (or Mai Tenne) ... even further east.<sup>35</sup>

The Commission also cited other maps that locate Maiteb at the point indicated in the Ethiopian claim line. These include:

- a. Carta Dimostrativa produced by the Istituto Geografico Militare in 1903 (paragraph 5.49),
- b. the Captan Miani Map (1905) stated in Paragraph 5.58,
- c. Comando del Corpo di Stato Maggiore map (1905), Paragraph 5.59
- d. The 1923 Official Map of Ethiopia by Kh. B. Papazian (usually referred to as Haile Selassie Map) Paragraph 5.65,
- e. the map accompanied by Governor of Eritrea (Zoli)'s report to the Minister of Colonies in (1929), Paragraphs 5.68 and 5.71.

The Commission admits that the first map on which a river with the name 'Maiten or Mai-Tenne' (Point 8) appeared was in the 1904 Italian Carta Dimostrativa.<sup>36</sup> In spite of all this evidence, the Commission didn't come up with a strong and assertive conclusion. Yet it stated that the term "Maiteb" in the 1902 Treaty refers to River Maiteb as indicated in the Ethiopian claim

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<sup>34</sup> *Ibid*, Paragraph 5.15

| <sup>35</sup> *Ibid*, Paragraph 5.18

| <sup>36</sup> *Ibid*

line. Despite its hesitant tone, however, the Border Commission has arrived at the following conclusion regarding “River Maiteb”:

... On the basis of these maps, therefore, it is arguable that the river identified by Ethiopia as the Maiteb (the confluence of which with the Setit is shown at Point 3) is the Maiteb to which the Treaty refers.

## 2.2- “Maiteb” in words while having Sittona in mind?!

After having admitted that the 1902 Treaty refers to River Maitem and not River Mai-tenne, the Commission refrains from upholding Ethiopia’s claim on the ground that the Parties had another river in mind:

As against this (i.e. the reference made to Maiteb), however, there is more convincing evidence that the Maiteb is not the river which the Parties had in mind. The maps just referred to were not the only ones to likely to have been familiar to the negotiators who were, on the Ethiopian side, the Emperor Menelik and, on the Italian side, Major Ciccodicola. Nor were these maps used in the negotiations.<sup>37</sup>

The Commission stated that the map used during the negotiations could only be the Mai Daro Map (1900) and it stated four reasons<sup>38</sup> to that end, based on which the Commission concluded that “the river named ‘Meeteb’ and the mountain called ‘Ala Tacura’ shown on this map could not actually have been situated in the proximity of the western Maiteb. The Commission further substantiated the significance and evidentiary weight of the Mai Daro Map by its similarity with the de Chaurand map of 1894<sup>39</sup> which is the map “expressly stated to have been the basis for the 1900 Treaty”, and which “does not show any Maiteb or Meeteb remotely near the confluence of the western Maiteb and the Setit (Point 3).” The Commission gave credibility to these two maps and explained their difference in naming the same river:

(The Chaurand map of 1894) also shows a ‘Mount Ala Tacura’ just north of the river. In these major respects, it is almost identical with the Mai Daro map. The only respect in which both the Mai Daro map and the de Chaurand map differ significantly from later maps is in the name given to the river. What is called in them ‘Maitebe’ or ‘Meeteb’ was known even at the time by some as Sittona and was so called on other maps soon afterwards.<sup>40</sup>

The letter written by Martini (Governor of Eritrea) to Ciccodicola (on August 3<sup>rd</sup> 1902) states the misunderstanding in river names and bears the following conclusion: stated in paragraph :

In any event, it must be kept in mind that the boundary described in Article 1 of the Convention of 15 May 1902 is in open contradiction with the attri-

<sup>37</sup> *Ibid*, Paragraph 5.19

<sup>38</sup> *Ibid*, Paragraph 5.25

<sup>39</sup> *Ibid*, Paragraph 5.26

<sup>40</sup> *Ibid*

bution of the Cunama to Italy which is the basis of that Convention and which is explicitly wanted, as essential condition for the modifications of the boundary with England, also by the secret agreement of 22 November of last year. The designation of the boundary in the May Convention cannot, in my opinion, be considered if not as subordinated to the conditions that that boundary be such as to be in harmony with the main stipulation, which is the transfer of the Cunama to Italy. I have to insist particularly on our right to have all the Cunama up to the Sittona.<sup>41</sup>

### 2.3- Further Italian desire towards Tomsa

In a letter dated 10 January 1906, Martini, Governor of Eritrea, sent the following report to the Italian Ministry of Foreign Affairs:

(T)he border towards Adiabo is still to be defined on the ground following Article 1 of the ... May 1902 (Treaty). Following the intention of the last sentences of the mentioned article and following the present de facto possession, the border can be marked with the line that goes from the confluence Mareb-MaiAmbessa and meets the Setit at the confluence with the torrent Tomsa, which is about thirty kilometers (upstream) to the confluence of the torrent Sittona, erroneously called Maiteb in the Dechaurand [sic] used as the basis for the treaty. ...<sup>42</sup>

The Governor of Italy, Martini, had initially harboured the intention to request for extension of the boundary juncture (87 kilometers eastwards) from Setit-Maiteb to Setit-Sittona. Three years later, however, he had his eyes on River Tomsa (located about 30 kms further east). Nevertheless, the various clashes throughout this period in the area clearly show that there was no Italian *effectivités* in the disputed region (accompanied by Ethiopia's acquiescence) that would imply variation of the 1902 Treaty provision. Ethiopia's claim as shown in its 1923 Official Map indicated western Maiteb as its boundary juncture. A case in point is the Governor of Eritrea (Zoli's ) 1929 Report<sup>43</sup> which stated doubts "whether 'Maiteb' 30 kms east of Ombrega, or the 'Meeteb' a further 100 km east, should be regarded as the river mentioned in the 1902 Treaty. Zoli's report included lines based on the respective claims of both parties.

After having reinterpreted the word "Maiteb" into "Sittona" the Commission went further towards what it considered as the object and purpose of the 1902 Treaty.<sup>44</sup> According to the Commission, the 1902 Treaty was yet to be followed by delimitation that would ensure that the Cunama people would be on the Eritrean side of the border.<sup>45</sup>

<sup>41</sup> *Ibid*, Paragraph 5.46

<sup>42</sup> *Ibid*, Paragraph 5.60

<sup>43</sup> *Ibid*, Paragraphs 5.68 to 5.71

<sup>44</sup> *Ibid*, Paragraphs 5.29 ff

<sup>45</sup> *Ibid*, Paragraph 5.34

### 3. Findings of the Commission

The findings of the Commission regarding the western sector have been stated in paragraphs 5.83 to 5.95. The conclusions of the Border commission include the following:

Although Article 1 of the 1902 Treaty refers to a river called the Maiteb, the explicit object and purpose of the Treaty, namely, the assignment to Eritrea of the Cunama tribe, clearly indicates the intention and ‘common will’ of the Parties that the boundary river should not be the western Maiteb.<sup>46</sup>

...

The Commission considers that the river named “Meeteb” in the Mai Daro map is really the Sittona, which flows into the Setit from the northeast at Point 4 along a primarily east-west course and that the name “Meeteb” was wrongly attached to it. The Commission therefore interprets the name “Maiteb” in the 1902 Treaty as being the present-day Sittona.<sup>47</sup>

The Commission has observed that the term “Maiteb” in the 1902 Treaty refers to the western Maiteb stated in the Ethiopian claim line. However, it has considered it incompatible with the object and purpose of the Treaty that assigns the Cunama into the Eritrean territory. It then reached to the conclusion that the river referred to as River Maiteb in the 1902 Treaty is in fact River Sittona.

Nor is this all. The Border Commission pushed the disputed point further eastwards to Tomsa on the following grounds:

The Commission has taken into account the many maps presented to it in evidence, but has only given weight in relation to this sector to maps produced by the Parties themselves in the period prior to 1935. It has noted that three early Italian maps show the Ethiopian claim line, as does one Ethiopian map of 1923. However, all the other relevant maps show the Eritrean claim line in accordance with what has, in the present proceedings, come to be called the ‘classical’ or ‘traditional’ signature characterized by a straight line from the confluence of the Tomsa with the Setit (Point 6) to Point 9 at an angle of about 28<sup>0</sup> from true north. There is no record of Ethiopian objection to these maps and there is, moreover, a consistent record of Ethiopian maps showing the same boundary. These maps amount to subsequent conduct of practice of the Parties evidencing their mutual acceptance of a boundary corresponding to the Eritrean claim line.<sup>48</sup>

The Commission admits that the classical line drawn from the confluence of River Tomsa and River Setit (Point 6) to the juncture where Rivers Mereb and Mai Ambessa meet “accords more territory to Eritrea than the Cunama actually occupied”. However, the Commission attempts to balance this with

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<sup>46</sup> *Ibid*, Paragraph 5.83

| <sup>47</sup> *Ibid*, Paragraph 5.85

| <sup>48</sup> *Ibid*, Paragraph 5.88

the Cunama territory left in Ethiopia by this “classical” line.<sup>49</sup> The Commission then sums up its conclusion:

In short, the Commission concludes that as at 1935, the boundary between the Setit and the Mareb had crystallized and was binding on the Parties along line from Point 6 to Point 9.<sup>50</sup>

The Border Commission finally raised the issue whether developments since 1935 have affected this conclusion. It stated the events from 1935 to 1941 (Italy’s Occupation of Ethiopia), the federation between Ethiopia and Eritrea and the events thereafter, and then arrived at the conclusion that nothing in this chain of developments has altered the boundary between the Parties.<sup>51</sup> It further stated the evidence submitted by Ethiopia regarding the friction at Achua Morchiti (1929-32) and Ethiopia’s authority exercised over the area as manifested by various activities west of Eritrea’s claim line (at Shelalo, Afra, Sheshebit, from Jerba up to Tokomlia, Dembe Dina and Dembe Gunagul and Badme Woreda).<sup>52</sup> However, the Border Commission has not accepted Ethiopia’s contention in this regard:

These references represent the bulk of the items adduced by Ethiopia in support of its claim to have exercised administrative authority west of the Eritrean claim line. The Commission does not find in them evidence of administration of the area sufficiently clear in location, substantial in scope or extensive in time to displace the title of Eritrea that had crystallized as of 1935.<sup>53</sup>

## 4. Critical Reflections

### 4.1-Hierarchy between treaties and customary international law

Treaties are among the primary sources of international law enumerated under Article 38 of the ICJ Statute. Article 38/1 (a/b) states treaties and custom as sources that shall be resorted to for international disputes. However the provision doesn’t expressly deal with hierarchy in cases of inconsistency between treaty and principle of customary international law.

According to Starke the order stated under Article 38/1 of the ICJ Statute is generally followed:

(So far as treaties, custom and general principles recognized by modern legal systems are concerned) “priority would normally be attributed to treaties and conventions expressly recognized by the states concerned provided that the treaty or convention is not in conflict with *jus cogens*. i.e. applicable peremptory norms of international law. If there were no treaties or conven-

<sup>49</sup> *Ibid*, Paragraph 5.89

<sup>50</sup> *Ibid*, Paragraph 5.90

<sup>51</sup> *Ibid*, Paragraph 5.91

<sup>52</sup> *Ibid*, Paragraphs 5.92,

5.94, 5.94

<sup>53</sup> *Ibid*, Paragraph 5.95

tions applicable, preference would be accorded to established customary rule, while if there were no such rules, recourse could be had to general principles of law recognized by civilized nations.<sup>54</sup>

S. K. Verma holds a similar view that treaty provisions should prevail over customary norms “though there are always attempts to give a harmonious construction, unless the language of the relevant provision or the treaty is unambiguous and the intention is clear.”<sup>55</sup> The decision of the Permanent Court of International Justice in the *S.S Wimbledon case* supports this view:

In the *S.S Wimbledon case* Article 380 of the Treaty of Versailles, by which Kiel Canal was made ‘free and open’ to vessels of all nations at peace with Germany, was in issue before the Permanent Court of International Justice. In a war between Poland and Russia, German officials stopped the *Wimbledon*, a British ship carrying munition through the canal to Poland on the ground that by allowing the passage of munition through its territory to a belligerent State, Germany would be compromising its neutrality under customary international law. The court while accepting the obligatory force of this rule, nevertheless held that Article 380 of the Treaty must take precedence over such a rule. The stopping of the vessel of a State, at peace with Germany, amounted to a breach of Germany’s obligation under the Treaty of Versailles.<sup>56</sup>

On the other hand, Hugh Thirlway argues that the text of Article 38 of the ICJ Statute does not indicate the existence of hierarchy between custom and treaty, and added, “a proposed provision, indicating specifically that the Court should apply the sources in the order in which they were mentioned in that Article, was rejected during the drafting.”<sup>57</sup> Nevertheless, Thirlway noted that “treaty is *lex specialis*, and as such prevails over any inconsistent rules of customary international law.”<sup>58</sup>

Hirlway then deals with the issue whether new customary rule to whose formation the parties have contributed overrides treaty provisions:

If the parties to the treaty have themselves contributed to the development of the new customary rule by acting inconsistently with the treaty, or have adopted the customary proactive in their relations after the rule has become established, then the situation may be analyzed as in effect a modification (or even interpretation) of the treaty.<sup>59</sup>

<sup>54</sup> J. G. Starke (1989) *Introduction to International Law* (10<sup>th</sup> Edition), Butterworths, Singapore p. 54

<sup>55</sup> S. K. Verma (1998) *An introduction to Public International Law*, Prentice-Hall, New Delhi p. 35

<sup>56</sup> *Ibid*

<sup>57</sup> Hugh Thirlway (2003) *The Sources of International Law*, in Malcolm D. Evans (ed), *International Law* (Oxford University Press, p. 136

<sup>58</sup> *Ibid*, 137 <sup>59</sup> *Ibid*

Malcolm Shaw's interpretation leans towards giving relatively equal status to treaties and custom. "The question of priority as between custom and treaty law is ... complex. As a general rule, the latter in time will have priority. Treaties are usually formulated to replace or codify existing custom, while treaties in turn may themselves fall out of use and be replaced by new customary rules."<sup>60</sup>

As stated earlier under Section 1.2, The Eritrea-Ethiopia Border Commission has resorted to a wider interpretation of the words "applicable international law" under Article 4/1 of the December Agreement. According to the Commission the phrase allows the application of "*any rules of customary international law that might have a bearing on the case, for example, prescription and acquiescence even if such rules might involve departure from the position prescribed by the relevant treaty provisions.*"

Articles 31, 32 and 33 of the 1969 Vienna Convention on the Law of Treaties lay down general rules of interpretation of treaties. The first question that comes to one's mind in light of these provisions pertains to the validity of the Border Commission's decision which declared that "River Maiteb" in the 1902 Agreement must be interpreted as "River Sittona." Does this amount to changing the content of the Treaty? If mistake is to be invoked, does an arbitration organ have the mandate to vary terms of a treaty?

As indicated earlier, the Commission admits that "three early Italian maps show the Ethiopian claim line, as does one Ethiopian map of 1923." However, it relies on what it called "'classical' or 'traditional' signature characterized by a straight line from the confluence of the Tomsa with the Setit (Point 6) to Point 9 at an angle of about 28° from true north" and it stated that "there is no record of Ethiopian objection to these maps and there is, moreover, a consistent record of Ethiopian maps showing the same boundary." The Commission then proceeds to the conclusion that "*these maps amount to subsequent conduct of practice of the Parties evidencing their mutual acceptance of a boundary corresponding to the Eritrean claim line.*"<sup>61</sup> And finally, "the Commission concludes that as at 1935, the boundary between the Setit and the Mareb had crystallized and was binding on the Parties along line from Point 6 to Point 9."<sup>62</sup>

This conclusion raises queries regarding the peripheral value given to treaties and the excessive weight that has been accorded to maps as "evidence of subsequent state practice." Even further, the decision evokes interest for closer scrutiny whether the elements of custom have been fulfilled in what

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<sup>60</sup> Malcolm Shaw (2003) *International Law*, 5<sup>th</sup> Ed., (Cambridge Univ. Press) p. 116 | <sup>61</sup> *Supra* note 1, Paragraph 5.88  
<sup>62</sup> *Ibid*, Paragraph 5.90

the Commission regarded as “subsequent conduct of state practice evidencing mutual acceptance of the *Tomsa-Setit* juncture.

#### 4.2- State practice and *opinio juris*

Article 38/1 (b) of the ICJ statute that reads “International custom, as evidence of *general practice accepted as law*” clearly bears the *material element* of ‘state practice’ which ought to be general and consistent, and secondly, the *mental element* (*opinio juris sive necessitatis* i.e. the intention to be bound) if a given conduct is to be regarded as customary norm of international law. Accordingly, the Border Commission’s general statement that considers the so-called “classical” or “traditional” signature as evidence of state practice needs closer examination. Various questions can be reflected upon. Could the concept of Ethio-Eritrean boundary be envisaged under the Italian Occupation (1935-41)? Does internal boundary between provinces or regions of a country (1952-1993) constitute boundary under international law? If not, how can the so-called “traditional signature” apply to the post-1935 period? Was there consistent state practice between Eritrea and Ethiopia that proves mutual acceptance of the *Tomsa-Setit* juncture? Has there ever been intention (on the part of Ethiopia) to be bound by the *Tomaso-Setit* confluence from 1902 to 1935? Can the concept of binding (subsequent) state practice be perceived in isolation from *opinio juris*?

Another pertinent question would be whether the *Cunama* population remained constant and whether the area inhabited by them remained unchanged for a century throughout the period from 1902 until the Border Commission’s decision in 2002. One may also validly raise the question why the earliest Italian and English maps consistently indicated western *Maiteb* instead of *Sittona* as the border juncture if the latter was the river which the Parties had in mind while concluding the 1902 Treaty.

#### 4.3- Acquiescence and Estoppel

According to the Border Commission, “there is no record of Ethiopian objection” to the “traditional (classical)” signature<sup>63</sup> and the “maps amount to subsequent conduct of parties evidencing their mutual acceptance of a boundary” that corresponds to the Eritrean claim line. The issue pertaining to “absence of objection” is related to acquiescence. In the *Gulf of Marine case*, the Chamber of the International Court defined acquiescence as “equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent’ and as founded upon the principles of good faith and equity.”<sup>64</sup>

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<sup>63</sup> *Ibid*, Paragraph 5.88

<sup>64</sup> ICJ Reports, 1984, pp. 246, 305; ILR, p.74

Shaw noted that “Generally, where states are seen to acquiesce in the behaviour of other states without protesting against them, the assumption must be that such behaviour is accepted as legitimate.”<sup>65</sup> Shaw highlights opinions of scholars in this regard:

Some writers have maintained that acquiescence can amount to consent to a customary rule and that the absence of protest implies agreement. In other words, where a state or states take action which they declare to be legal, the silence of other states can be used as an expression of *opinio juris* or concurrence in the new legal rule. This means that actual protests are called for to break the legitimizing process.<sup>66</sup>

*Preah Vihear* is a leading case on *estoppel*. The frontier between Cambodia and Thailand which was agreed upon under a 1904 Treaty was found to be ambiguous regarding the location of the *Preah Vihear* temple area. After the Thailand Government received copies of maps from French authorities it accepted and requested for further maps. Various incidents including official visit of the temple by Thai prince while French flags were flown were considered by the ICJ as tacit acceptance of the temple’s location in Cambodia. In effect Thailand was *estopped* from contesting the frontier that puts the temple in Cambodia.<sup>67</sup>

Although the doctrines of *acquiescence* and *estoppel* seem to be of use in situations of uncertainty and ambiguity, “it would not appear correct to refer to *estoppel* as a rule of substantive law.”<sup>68</sup> A very important issue to reflect upon at this juncture is therefore whether the Border Commission has used these principles in the absence of a treaty provision that deals with issues in dispute? If acquiescence is to be perceived as tacit acceptance of the Tomsa juncture as at 1935, the question remains to be whether it was “equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent’ and as founded upon the principles of good faith and equity” as in the *Gulf of Marine* case (1984).

There are certain basic questions that call for further analysis. Was there an objective and subjective setting (in the Ethio-Eritrean context) comparable to the *Preah Vihear* case that would imply tacit consent through subsequent state practice? And did the Border Commission use such principles for the purpose of interpretation of the 1902 Treaty? Or, did it alter the content of Article 1 of the 1902 Treaty rather than interpreting it?

## Concluding Remarks

The core point of observation that captures our attention is whether the decision of the Border Commission (with regard to the western sector of the dis-

<sup>65</sup> Shaw, *Supra* note 60, pp. 84, 85

<sup>66</sup> *Ibid*, 85

<sup>67</sup> ICJ Reports, 1962, ILR

<sup>68</sup> Shaw, *Supra* note 13, pp. 439, 440

puted border) amounts to interpretation of the 1902 Treaty. The ordinary meaning that can be given to River Maiteb is clear, and the Border Commission has observed that it refers to the Maiteb stated in the Ethiopian claim line.

It is to be noted that the assignment of the Cunama into Eritrea cannot be regarded as the object and purpose of the Treaty, but among the terms of the Treaty. Apparently, Emperor Menelik signed the 1902 Treaty not for the sake of assigning the Cunama inside Eritrea but to delimit boundaries beyond which Italy would not keep on encroaching. The object and purpose of the Treaty was thus to agree on the limits beyond which Italy could not go, and as a result bring about peace.

Had demarcation begun immediately after the 1902 Treaty, efforts could have been made to assign most of the Cunama in the Eritrean side of the border. And some curves could also have possibly been renegotiated in the process. Unfortunately, however, events thereafter witnessed Italy's intentions beyond the 1900, 1902 and 1908 frontiers which ultimately developed onto the Maichew War and the 1935-41 occupation. And nearly a century after the frontier treaties, the time-bomb behind the ambiguity of the 1902 Treaty had its adverse contribution towards the 1998 border conflict which claimed lives of tens of thousands of citizens from both sides, who are indeed closely bound by shared roots, history, culture and intertwined destiny.

The Border Commission's decision seems to have exacerbated the difficulties rather than curbing them. When the dust settles, and when reason, pragmatism, reconciliation and regional integration become pervasive, these tragic chapters can indeed become events of the past. Meanwhile, the extent to which both Parties give primacy to reason and forward looking optimism would determine whether the Border Commission's decision is yet another explosive lying under our feet. ■

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