Paper submitted for The Third Annual Ethiopian and Eritrean Friendship Conference,
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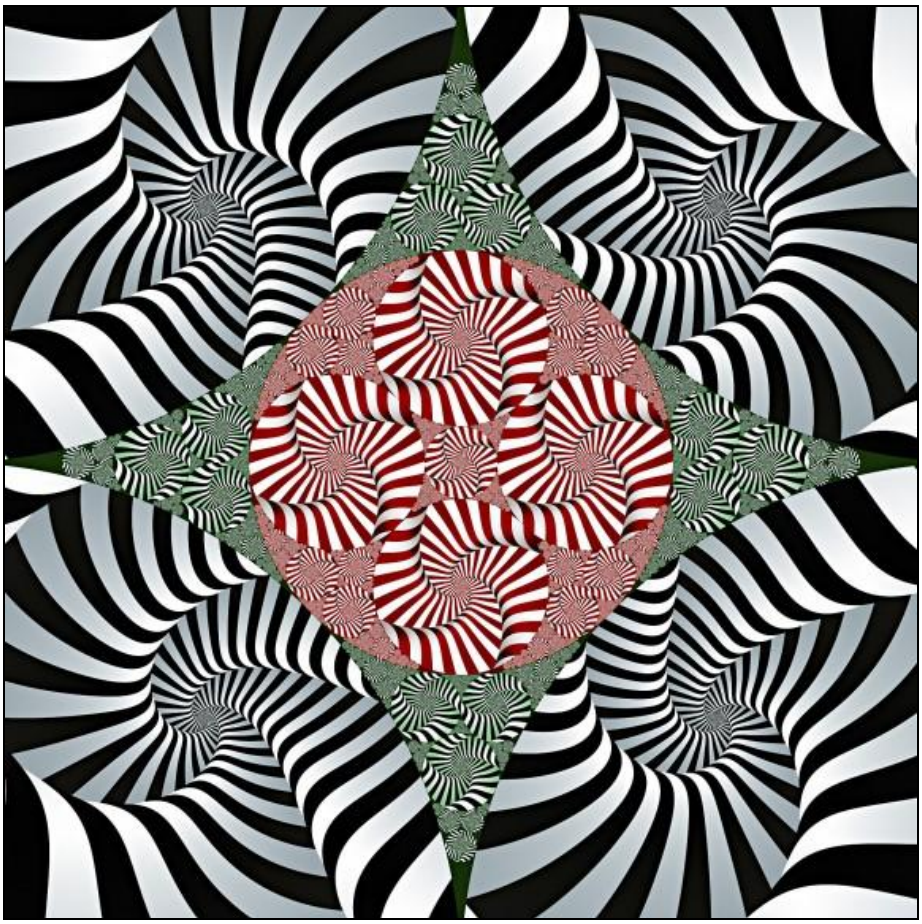
"Ethiopia & Eritrea: Healing Past Wounds and Building Strong People-To-People Relationships"



Disillusionment of International Law and National Survival[1]

By Tecola W. Hagos

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[1] **This short paper is extracted, in the main, from a book manuscript that will be published soon and will be available to the public.**

Cover Art: Benoit Mandelbrot Fractal Art Contest 2007, *Apologies to Escher*,
by Bill Beath, 2007.

Disillusionment of International Law and National Survival

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Tecola W. Hagos, ***The Ethiopian***, 6ft x 3.5ft, oil on canvas, 1970 [painted while a student at Haile Selassie I University, Addis Ababa]

Disillusionment of International Law And National Survival[2]

By Tecola W. Hagos

"Blessed are the peacemakers; for they shall be called the children of God."
Matthew 5:9

Part I. In General

I. Introduction

Bringing peace or brokering peace during a state of conflict is a noble and ethical deed. I applaud the efforts of the courageous individuals involved in the organization of this Conference. In particular, I appreciate greatly Dr. Worku Negash and Ato Tewelde Stephanos and the many individual Members and supporters of Ethiopian & Eritrean Friendship Forum (EEFF). I appreciate and thank sincerely Prof Daniel Kendie[3] and Prof Tesfatsion Medhanie,[4] two distinguished scholars and dedicated educators, for their great effort—for several years now—in promoting peace and close relationship of brothers at war. I would like also to remember here and express my deep appreciation of Prof Tekeste Negash[5] whose views on the issue of Ethiopia-Eritrea unity and future is profound and a lot closer to what I believe in, and such trend of ideas is the main theme-stream of this paper. Tekeste Negash is a visionary with great moral strength and personal integrity. There are very many other heroic Ethiopians that should be on any list of great Ethiopians. This type of effort for peace, unity, and harmony among people is not an easy task, for the enemies of peace and unity come in different forms and sizes from the very Governments of Ethiopia and Eritrea, as well as from governments of neighboring countries.

I quoted the Apostle St.Matthew above for brevity and not for originality, for very many religious people around the world do pay similar great homage to individuals who are peacemakers. I do not want to be misunderstood on that point as if I am suggesting that only Christians are peacemakers, and I ought to be read that I am giving due credit to all involved in peace making. My short paper here is aimed to interject in the conference some ideas that may not have been fully entertained in the past two Conferences. And such ideas should be taken into account for a successful and holistic resolution of the

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[3] See Daniel Kendie, *THE FIVE DIMENSIONS OF THE ERITREAN CONFLICT 1941 – 2004: DECIPHERING THE GEO-POLITICAL PUZZLE*, United States of America: Signature Book Printing, 2005. - ዳንኤል ክንዴ "የኢትዮጵያና ኤርትራ ፌዴሬሽን አስፈላጊነት" EEFF 1st Conference, March 15, 2009.

[4] See Tesfatsion Medhanie, *ERITREA AND NEIGHBOURS IN THE "NEW WORLD ORDER": GEOPOLITICS, DEMOCRACY AND "ISLAMIC FUNDAMENTALISM,"* Bremen African studies, 1997.
- Tesfatsion Medhanie, *TOWARDS CONFEDERATION IN THE HORN OF AFRICA: FOCUS ON ETHIOPIA AND ERITREA*, Cuvillier Verlag Gottingen, 2009.

[5] See Tekeste Negash, *ITALIAN COLONIALISM IN ERITREA, 1882-1941: POLICIES, PRAXIS AND IMPACT*, Uppsala University 1987.
- Tekeste Negash, *ERITREA AND ETHIOPIA: THE FEDERAL EXPERIENCE*, Transaction Publishers: New Brunswick NJ, 1997.

many serious problems facing the people of Ethiopia and Eritrea. We should also focus on the territorial integrity of Ethiopia as a whole and stop bickering about administrative internal demarcations, which can be rearranged in configurations that would take into account history, demography, administrative ease et cetera. We have to consider our effort in context of a much larger area and population with far deeper problems facing the entire Horn region and our Arab neighboring nations.

I have focused my biting criticism against Saudi Arabia, Egypt, Syria, Iraq and Libya in particular for some time now. In general, religion was the main reason for such generational hostility of Arab nations and people toward Ethiopia.[6] On the Ethiopian side, the treatment of Arabs and Moslems was fair and accommodating allowing Arabs living in Ethiopia (before they became wealthy and most left Ethiopia) unimaginable freedom of religion and social integration—a practice of magnanimity unheard of in the Arab World. In our past history, the Ottoman Turks, the Egyptians, the Mahdists each had mounted great effort to destroy Ethiopia using religion as their mobilization force against Ethiopia's legitimate existence as a Sovereign nation. In the 16th Century the Ottoman Turks in the person of a local collaborator, Gragn Mohamed, almost succeeded in the total destruction of Ethiopia. Most of the ancestors of Ethiopian Moslems in the highlands were forcefully converted from Christianity to Islam during Gragn's period.

2. Thesis and Issues: International Law and Domestic *Politicks*,

At the 2009 Annual Ethiopian and Eritrean Friendship Conference, the two distinguished scholars, Daniel Kendie and Tesfatsion Medhanie, presented two formal models of political/economic structures in order to bring the People of Ethiopia and Eritrea close to each other and help them solve existing hostilities. Daniel Kendie represented the "Federation" model, and Tesfatsion Medhanie represented the "Confederation" model. Both scholars have presented their well thought-out ideas as transitory leading to a more intimate relationship between the two communities, in time. I will not directly discuss the views of my distinguished colleagues, but present a sort of prolegomena bringing up issues that had further strained our lives in both Ethiopia and Eritrea. The "Models" in themselves may not be a problem. The problem that would surly ensue is an existential one when either model is implemented. The degree of sophistication and the willingness to control primordial instinctual aggressive behavior by the people of both communities is negligible. Due to the fracturing of societies and communities and relentless economic deprivations, the tendency of people in the region is to widen such social and political crack and decompose any form of normalizing process.

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[6] There are numerous sources written by Ethiopian, Arab, and Western historians on Ethiopian history. My preference is certainly Ethiopian scholars. At any rate, the views of foreign authors are incorporated also in the works of the Ethiopian authors cited here. For solid understanding of the religious conflicts within Ethiopia for the period of some five hundred years after the end of the Zagwe Dynasty to the 19th Century see Sergew Hable Sellassie, *ANCIENT AND MEDIEVAL ETHIOPIAN HISTORY TO 1270*, Addis Ababa: United Printers, 1972; Taddesse Tamrat, *CHURCH AND STATE IN ETHIOPIA, 1270-1527*, Hollywood, CA: Tsehai Publishers, 2009; and Trimingham, J. Spencer. *ISLAM IN ETHIOPIA*. Oxford: Geoffrey Cumberlege for the University Press, 1952.

If past experience of the relationship that existed between the EPLF and the EPRDF soon after Mengistu's Government was overrun and dismantled is an indicator, it is not hard to imagine how the Eritrean Government in the setup of either "federation" or "confederation" would end up repeating its past actions of 1991 to 1997 of acquiring the wealth of Ethiopia through illegal means, such as buying produces in local currency and exporting them in hard currency, or get involved in currency speculation and money laundering, forgery, misappropriation of Ethiopian Government property, and driving out Ethiopians from their homes in Eritrea and taking their property et cetera. Even more insidious is the possibility of its citizens who would be engaged in business in Ethiopia would become a special class of people protected by their Government taking advantage of a supra-corporate entity taking over the major businesses from the local people. In other words, whether the Ethiopia-Eritrea relationship is based on "federation" or "confederation" (even worse), it will lead into far more serious genocidal conflict.

The dichotomy of *international law* from *national law* is proper in the sense that international law is all about politics where the decisions of international forums (courts, commissions, and tribunals) are highly colored by political considerations and power politics. For example, if we look into the decisions and advisory opinions of the International Court of Justice (ICJ) cases, including those decided by the Permanent Court of International Justice (PCIJ),[7] numbering a little over two hundred cases, the overwhelming majority of the decisions are highly influenced by the politics of the time and the political outlook of the individual Judges. I have studied most of the cases decided by the two successive International Courts and also numerous arbitration decisions of The Hague Arbitration Tribunals. I admire the skill and sophistication with which the many Judges and Arbitrators expressed their decisions. However, I could not overlook the fact that some of the Judges and Arbitrators dwell too often on sophistry and undermine rigorous critical hermeneutics. They may fail in cases where great vision is needed. There is much to be done especially in the area of international boundary conflicts. The situation especially in arbitration tribunals is in great mess, for every other case decided by such forums points in contradictory directions.

I question the wisdom of the separation of "Eritrea" from Ethiopia and the independence referendum of 1993, et cetera under such covers of legality. I believe the whole exercise was more of a surreal event that should not be taken at face value and as legally binding process. The entire processes, including the Algiers Agreement of 2000 and the decisions of the Arbitration Commission, must be considered simply as an illusionist's constructs based on false history and international deceit, corruption and distortion of international law principles, norms, and practices. I do not acknowledge the independence of "Eritrea" either as moral or legal act. I think of it as a surrogate occupation of my land by hostile historic enemies of my Ethiopian (Black) original land and territory and the alienation of my kin and civilization. This may sound like hypocrisy, since I am often accused of being

[7] *ICJ Reports* from 22 May 1947 to 13 March 2011, 150 cases were entered in the General List (27 Advisory, 123 contentious cases). Between 1922 and 1940 the PCIJ dealt with 29 contentious cases between States, and also delivered 27 advisory opinions for a total of 56 cases. Thus, both International Courts have handled over 200 cases since 1922.

sympathetic to "Eritreans," in giving them sanctuary, for example. But that is due to the fact that I consider them as Ethiopians and that we ought to welcome those coming home.

In my research of decades, I have not found a single authority where national "Sovereignty" can be endowed or transferred to a colony at the point of the colony gaining its independence. The idea of Italy conferring on its former colony Eritrea aspects of its own sovereign power is unsupported by any writings of any international law expert or jurist. For that matter, I have not read a single case decision of any international forum expounding such concept. This fact has implications for us on our reading of the applicability of the concept of *uti possidetis, ita possideatis* in dealing with the establishment or acknowledgement of ownership as evidenced by possession. The confusion of merging two distinct legal concepts one from national law and the other from international public law had led to considerable confusion.

Part II. Mistake of Fact

1. A Reminder of Real History and Real Politick

Not withstanding the fantasy fable entered as history for "Eritrea" in the *NEW WORLD ENCYCLOPEDIA* (www.newworldencyclopedia.org) and several other revisionist-history of tall-tales, the genuine history of Ethiopia found in tax records, endowments of land grants to the great Monasteries, Chronicles of Ethiopian Emperors[8] written contemporaneous with real events et cetera tell us that most of the same area has always been part of Ethiopia, except for a sixty years hiatus when the area that is now designated as "Eritrea" was occupied by Italy by force.[9] As an example of the authenticity and fact based history of Hamassien as an intimate part of the Ethiopian Empire, consider the fact that the 17th Century Ethiopian Emperor Eyassu the Great, in September of 1683 married in a Church ceremony Wolete Tsion the daughter of Habte Eyessus of Deq Asgede clan of Hamassien.[10] Hamassien was the designation for the whole of the highland region that had always been part of the maritime domain of Ethiopia.

What is tragic is the fact of the current Government of Issayas Afeworki's childish attempt to rewrite history as if "Eritrea" was never part of Ethiopia, while exaggerating the fact that at one point the tiny Port of Massawa, was the colony of Ottoman Turkey! There was also an attempt by Britain to incorporate the northwest part of Ethiopia (Barka) with Sudan to extend its cotton plantation once it lost its Southern Colonies in the United States. However, except for sporadic maraudering by Bejas and other tribes, the area has always been part of the Ethiopian territory. The stone inscription of Ezana clearly establishes the antiquity of Ethiopian territories.[11] How could anyone glorify the

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[8] See G.W.B. Huntingford, ed. *THE GLORIOUS VICTORIES OF AMDA SEYON, KING OF ETHIOPIA*. Oxford: University Press, 1965.

[9] Richard Pankhurst, *THE ETHIOPIAN BORDERLANDS: ESSAYS IN REGIONAL HISTORY FROM ANCIENT TIMES TO THE END OF THE 18TH CENTURY*. Asmara, Eritrea: The Red Sea, Inc., 1997.

[10] Getatchew Haile, *BAHRA HASSAB*, Avon MN, 2000, p. 258, (In Amharic) . The best polemic on the Ethiopeaness of Eritrea and Eritreans is written by Daniel Kendie in his *book THE FIVE DIMENSIONS OF THE ERITREAN CONFLICT 1941 – 2004: DECIPHERING THE POLITICAL PUZZLE*, United States: Signature Book, 2005, pp 1-32.

[11] S. C. Munro-Hay, *AKSUM: AN AFRICAN CIVILIZATION OF LATE ANTIQUITY*, Edinburgh: University Press, 1991.

fact of being a colony in the past at one short period and forgo one's own great history as part of Ethiopia?

If the Eritrean independence movement had been a popular movement, it would not have taken thirty years of "struggle" to achieve the goal of independence. Mind you the founder of the Eritrean Liberation Army, Hamid Idris Awate, was an Italian Colonial *Askari* born in 1910 at Gerset, near Omhajer, a member of the Tigre ethnic group, but some designate him as a Nara. There is no doubt that his root is Nilotic (Sudanese). He was trained in 1935 by Italian colonial military and fought against Ethiopia as an Italian *Askari* during the Italian occupation of parts of Ethiopia. With six other Moslems from related ethnic groups, Awate is one of the first founding members of a rebellion that finally developed by way of the ELF into the EPLF. For most of its life the Liberation Movement was a few thousands strong even at its pick, which consisted of a handful of disaffected individuals from Gash\Setit and Barka (Nara) and from the Red Sea Coastal area Moslem ethnic groups of Ben-Amir and the Rashaida (squatters from the Hejaz sneaking in by home-made boats since 1850s). There is some plan by Issayas Afeworki's Government to settle the Rashaida somewhere on the eastern coastal region further up from Massawa. There they would flourish on Ethiopian territory, and along with the Ben-Amir they would form the future local *Janjaweed.*

The de-Ethiopianization of Eritrea is all the work of former ELF Members and their remnants now in control of the Eritrean Government, who are mostly descendants of immigrants from the Sudan and supporters of the Mahdists, Isma'il Pasha, and Tewfik Pasha who repeatedly tried to occupy Gondar in the 19th Century. A clear example of such process of Islamization and turning Eritrea as an extension of the Arab World is the recent purging of mostly Christian high level leaders and commanders of the EPLF who were thrown into jail or forced to flee their homes. Those who flee Eritrea due to intolerable conditions are mostly Christian Eritreans; they are the ones fleeing their homeland that perish at sea and in detention camps of brutal Arab governments. Those who are digging in and staying in Eritrea displacing the Christian Eritreans and spreading their hold are the Jebertti, the Ben-Amir and the Rashaida Arabs. In a few years the highlanders would become a rarity; either they would have migrated to Ethiopia and the West, and the few remaining would have been marginalized to such an extent that they would have no politically significant voice.

In a previous arbitration decision by the Eritrea-Yemen Arbitration Tribunal it was noted the fact that Ethiopia's historic rights were not offered as part of the supporting claims on behalf of "Eritrea" against Yemen's claims of Islands that were part of Ethiopia for all historic time. The Arbitration Tribunal wrote with a degree of puzzlement the following:

> "Eritrea makes no argument for sovereignty based on ancient title, in spite of the undeniable antiquity of Ethiopia. Rather, Eritrea in part asserts an historic consolidation of title on the part of Italy during the inter-war period that resulted in a title to the Islands that became effectively transferred to Ethiopia as a result of the territorial dispositions after the defeat of Italy in the Second World War."[12]

[12] *Eritrea v. Yemen Arbitration Decision, Award, First Stage, Para 115-117 (1998).* Permanent Court of Arbitration (www.pca-cpa.org).

The Ethiopian Government did not file any brief as interlocutor or interested party as it ought to do in that case as a matter of its legal obligation as the Government of a Sovereign People and Country. It is this type of polarized perspective that both the current Leaders of Eritrea and Ethiopia formatted, as part of their misinterpretation and revision of Ethiopian history, the ridiculous assertion claiming Ethiopian history to be only a Century old. One must not discount the fact that there were great war heroes from Hamassein, Akale Guzai, Serei et cetera who bleed for Ethiopia's independence believing in their Ethiopian identity and fighting against the Italian occupation. My discussion of the Italian Wars of aggression against the Sovereign and truly ancient Ethiopia is not meant to open old wounds, but to remind us that our Ethiopian history is a complex one and should never have been left to amateurs, and the propagandist "intellectuals" minted by either the ELF and/or the EPLF.

In the 1980s in the aftermath of the Red Terror carried out by Mengistu, after the murder of General Aman Andom (Ethiopian Patriot from Hamassein) by Mengistu, the fight for liberation in Eritrea and also in Tigray escalated dramatically. Ethiopia's national integrity and social cohesion was dealt a devastating blow by Mengistu and his Derg. The independence of Eritrea is the direct consequence of Mengistu coming into power and causing such havoc on the population of Ethiopia and Eritrea. The strengthening and popular support by the local population of the TPLF and EPLF movements was a reaction to the brutality unleashed on a population that had suffered many inequities under the new Military regime of Mengistu. Mengistu's rudimentary education and social background must have also added to the strong disaffection felt by the Liberation movements.

2. The False Claim of Eritrea as an Ethiopian Colony

One if the most insidious and insulting statement in the decision of the Boundary Commission is to consider Eritrea as a colony of Ethiopia. The only nexus the Commissioners found to anchor their decision is on the evidence that both the Eritrean and Ethiopian Governments have expressed their consent that the Eritrean border will be determined as of the date of Eritrea's independence. Without any reservations or questions, the Commission considered Eritrea to be included in AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964, in the same category as other newly independent African nations from colonialism that formed the OAU after their independence in the 1960s. The misidentification of Eritrea as a colony of Ethiopia is the first major mistake of fact that led directly to a crucial and decisive mistaken application of international law norms and practices by the Boundary Commission in its decision of 13 April 2002.

The Algiers Agreement had invalidated itself by its own provisions of reference to a 1964 OAU Resolution that had no relevance to the situation between Ethiopia and Eritrea. Eritrea is not a "colony" of Ethiopia. Thus, any such reference to identify it with provisions dealing with colonies is gross misrepresentation of facts and fraudulent and insulting to Ethiopia and its people. No Agreement with such misrepresentation of facts, vulgar and insulting statement can be binding on Ethiopia. It also shows bad faith in the parties involved including those who brokered the agreement, namely the United 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." [13]

The Boundary Commission treated this provision from the Algiers Agreement without ever examining the legality of such provision being applied retroactively, and without ever questioning the factual base for such assertion. On the contrary, the Commission seems to be resigned to doing what it knows to be wrong, for the tone of their statement as expressed in paragraphs 3.32 and 3.33 is sufficiently supportive of my evaluation of the situation:

> "On 10 June 1998 the Heads of State and Government of the Organization of African Unity submitted to the Parties for their consideration the elements of a 'Framework Agreement' based on three principles of which the third was 'respect for the borders existing at independence as stated in the Resolution of the OAU Summit in Cairo in 1964…This Framework Agreement was accepted by the Parties. On 14 September 1999, following further consideration of the dispute within the OAU and the UN Security Council, 'Technical Arrangements for the Implementation of the Framework Agreement' were agreed by the Parties. Again, the principle of respect for the borders existing at independence was reaffirmed."[14]

The Commission did not consider the inherent problem of retroactively applying a regional summit resolution at a time when in the background lurks the United Nations General Assembly Resolution 390 (V) still in force on the books. Even more so is the fact that the legislative history and background discourse leading to the 1964 Summit Resolution did not entertain such retroactive application of that resolution. The Ethiopian Government delegation would never have agreed to such provision. "However, the Commission does see the provision as having one particular consequence. It is 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."[15]

The federation of Eritrea with Ethiopia in 1952 by a Resolution passed by the United Nations General Assembly pursuant to a finding by a United Nations Commission made up of Members carried out in 1950 is never a colonial setup, especially subsequent relationships show the fact of Eritreans participating and benefiting in the privileges and

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[13] The Algiers Agreement of 12 December 2000. The signing of the Algiers Agreement was undertaken by Meles Zenawi and his very narrow interest group that had turned the table on a rival group that had the upper hand in prosecuting the counter offensive against the Eritrean Government. Many of the scholars in the Diaspora that talked with believe that it was a defining moment, and Meles succeeded in subduing his rivals and taking the country into a dangerous political and economic platform.

[14] *Eritrea-Ethiopia Boundary Commission, Decision on Delimitation of the Border between Eritrea and Ethiopia, April 13, 2002, pp* 29-30. *(hereafter Ethiopia v. Eritrea Arbitration Decision (2002).* Permanent Court of Arbitration (www.pca-cpa.org).

[15] *Ethiopia v. Eritrea Arbitration Decision (2000), p 30.* Permanent Court of Arbitration (www.pca-cpa.org).

sharing in the duties of citizens. There were very many Eritreans in prominent powerful positions as Ministers, Ambassadors, Governors, et cetera sharing in the life of a free and Sovereign State. The United Nations process of normalization attempt cannot be identified with a colonial scheme.[16] It is quite a comedy, if it were not an affair with serious consequences, to have such an absurdity as a provision in an agreement between warring states.

3. Premature Peace Accord and the Arbitration Farce

It is an understatement to say that the Ethiopian interest was not represented properly by the Government of Meles Zenawi both in the signing of the Algiers Agreement and at the Arbitration Commission. Historical documentation of the superior rights of Ethiopia's sovereignty and claims of long standing territorial control were not properly presented to the Commission. Tax records, Chronicles of Ethiopia's fabulous Emperors, records of travelers such as that of Alvarez, demographic studies et cetera were suppressed and were not submitted to the Commission. In fact, the documents submitted to the Commission were specifically meant to support the short term historical snippets that of Eritrea's claims without providing the contextual historical proof that could have countered any such claim by Eritrea.

The Commission, in a rare moment of honesty, pointed out that puzzling situation wondering that the submissions by Ethiopia tend to support the claims of Eritrea. In fact, at one point, the Commission pointed out that the Ethiopian Government had on its own, without any challenge or claim from Eritrea, conceded a chunk of Ethiopian territory that the Commission claims had no choice but to add that territory to the claims of Eritrea.

> "The words used by Ethiopia were that 'Fort Cadorna, Monoxeito, Guna Guna and Tserona' were 'mostly . . . undisputed Eritrean places.' While Monoxeito and Guna Guna are on the Eritrean side of the Treaty line as determined by the Commission, the Commission finds that, on the basis of the evidence before it, Tserona and Fort Cadorna are not. As to Tserona, the Commission cannot fail to give effect to Ethiopia's statement, made formally in a written pleading submitted to the Commission. It is an admission of which the Commission must take full account. It is necessary, therefore, to adjust the Treaty line so as to ensure that it is placed in Eritrean territory."[17]

This is just one curious lip-service statement where the Boundary Commission quipped that they will respect the rejection by Ethiopia of an admission by Eritrea that a certain village belongs to Ethiopia, since they have no choice in the matter. Again making a mistake of the scope of international law principles dealing with mistakes of facts and the legal regime that takes care of such situations—admission or rejection by the parties *per se* does not bind a commission or a tribunal to adopt such admission or rejection. The problem with the Commission is far deeper than one instance of laps of judgment that I

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[16] United Nations General Assembly Resolution 390 (V) of 13 Dec 1952 pursuant to a finding by a United Nations Commission made up of Members carried out in 1950. see also Minasse Haile**, "**The Legality of Secessions: The Case of Eritrea**,"** *8 EMORY INT'L L. REV. at 479 (1994).*

[17] *Ethiopia v. Eritrea Arbitration Decision (2002), p 50.* Permanent Court of Arbitration (www.pca-cpa.org).

cited above. The Commission also made serious additional mistake of fact on reading an evidentiary Map. Most importantly it did not read or use proper caution and standard of examination of maps that it based its entire decision on. It is telling to read the overall convoluted reasoning of the Commission in a statement that has significant argumentation and yet failed to lead to an established set of principles of international law principles and norms. The decision of the Commission would have been consistent with the admonishments of the highly acclaimed experts on boundary demarcations, had it followed through its own critical thinking as stated in its 13 April 2002 decision, Chapter 4 paragraph 4.8 as follows:

> "The 1900 Treaty described the boundary in economical language, referring only to three river names, 'Mareb-Belesa-Muna.' As a delimitation which could form the basis for a demarcation of the boundary on the ground, it fell short of a desirably detailed description, particularly in the light of the uncertain knowledge at the time concerning the topography of the area and the names to be given to geographical features."[18]

It is unfathomable how the Commission proceeded to enter a decision in the boundary conflict between Ethiopia and Eritrea, after making such critical statement on the uncertain situation of using maps to settle border disputes. The Commission did not conduct any investigation to ascertain whether local conditions at Bademe, Irob, Zala Ambesa et cetera reflect what is being submitted as evidence by a single Map that has lines drawn on it which was admitted into evidence essentially from the Eritrean Government obtained from the Italian Government archives. Had the Commission used the guidance provided by the *Island of Palmas case*,[19] there would have been no decision against the interest of Ethiopia. The authoritative works on reading maps and in the delimitation and demarcation of borders of cartographers such as those of S. B. Jones et cetera would have illuminated the problems for a clear resolution.[20]

Part III. Mistake of Law

1. International Law: Norms and Practices

There seems to be some confusion as to how the Commission was created and by whom, and the power and scope of the Boundary Commission. It seems the Commissioners themselves have added to the confusion due to their posturing and the Chairman's inflated ego trying to cast himself and the Commission as if they were a United Nations created Commission. First and foremost the Boundary Commission is an arbitration tribunal created by the Parties i.e., the Governments of Ethiopia and Eritrea. Neither the United Nations General Assembly nor its Security Council passed any resolutions creating the Boundary Commission. There should be no doubt that the Boundary Commission is a legal creature created by the Governments of Ethiopia and Eritrea by an agreement signed by the two Parties in Algiers in 2000.

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[18] *Ethiopia v. Eritrea Arbitration Decision (2002), p 33*. Permanent Court of Arbitration (www.pca-cpa.org).

[19] See *Island of Palmas case (Netherlands, USA) 4 April 1928, REPORTS OF INTERNATIONAL ARBITRAL AWARDS*, VOL II pp. 829-871. [hereafter *Island of Palmas case (Netherlands, USA), 1928*]

[20] Jones S.B. (1945) *BOUNDARY MAKING A HANDBOOK FOR STATESMEN, TREATY EDITORS AND BOUNDARY COMMISSIONERS*, Washington D.C. Carnegie Endowment For International Peace.

The role played by the United Nations is simply that of depositor, or observer or facilitator. It is absolutely clearly stated by a joint statement of Secretary General Kofi Annan of the United Nations and Secretary General Amara Essy of the Organization of African Unity that the Boundary Commission is not a creation of the United Nations. "Six months later, they signed a comprehensive peace agreement, also in Algiers, providing, among other things, for a permanent cessation of hostilities and the establishment of an independent commission to decide the border question."[21]

When I read the delimitation decision of the Boundary Commission, of 13 April 2002, I wondered why the Commissioners reached so many wrong conclusions and kept insisting on implementing such corrupted decision. The Boundary Commission's decision is full of errors and is highly subjective and politicized. All one needs to do is read the *Island of Palmas case* to see how an objective highly learned arbitrator labored in interpreting the significant treaties and maps in order to distinguish between the opposing claims of Sovereignty.[22] The Arbitrator in the *Island of Palmas case* laid out also the principles and norms of international law relevant in disposing contentious claims of Sovereign rights. He devoted a considerable degree of attention on the issue of using treaties and maps to establish the rights of the Parties. He investigated the situation both before and after the crucial treaty date. The general principle on the activity/scope of an international tribunal is succinctly elucidated by an established publicist of international law. "The Court's responsibilities in the maintenance of peace and security under the Charter are not general. They are strictly limited to the exercise of its judicial functions in cases over which it has jurisdiction."[23]

There are at list fifteen important international boundary dispute cases with highly relevant decisions on the use of maps that would have provided the fundamentals for the disposition of the question of unreliability of maps in deciding on contentious claims of sovereignty by parties to a border dispute. No rigorous examination of such cases was attempted by the Boundary Commission. The Boundary Commission cited one case on the issue of using maps for delimitation.[24] The Commission has cited in both Chapters 3 and 4 cases decided by the ICJ. [25] The serious problem for such attempted precedential authority is the fact that the cases cited by the Commission are tangential to the main issue the Commission is dealing with. The Commission has cited precisely eight cases for

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[21] Kofi Annan and Amara Essy, "*Securing a Lasting Peace Between Ethiopia and Eritrea."*

[22] *Island of Palmas case (Netherlands, USA) 1928*, pp. 829-871. I am aware of the fact that a number of international law publicists have raised questions on the decision of the *Island of Palmas Case* on the issue of the extension of the "intertemporality principle" in as far as its application to the question of the right of the Spanish crown to claim ownership (sovereignty) by mere discovery of the Island in question. However, the discussion is not on the validity or applicability of the principle of intertemporality but on how factual interpretation fits the principle in a particular situation.

[23] Christine Gray, "The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua*," EJIL* (2003), Vol. 14 No. 5, 867–905, at 891.

[24] *Case concerning the Frontier Dispute (Burkina Faso* v. *Mali), ICJ Reports 1986 at 582*.

[25] *Ethiopia v. Eritrea Arbitration Decision (2002) para 3.1-3.37, pp 21-30.* Permanent Court of Arbitration (www.pca-cpa.org). I have not included the *Ethiopia-Eritrea Claims case* in this paper. However, I do note here that case has its own set of problems of jurisdiction and competence, but not of corruption.

its "Task of the Commission and the Applicable Law." This most complex border dispute is dependant on seven cases as authorities, and none of them on point. The Commission simply rushed to decide the controversy in a political frenzy of the moment and as a result ended up making ridicules mistakes of legal principles (law) and of facts. There never was any legitimate demarcation of any sort where Ethiopia and Italy were represented on a team to demark the border between the Italian colony of Eritrean and Ethiopia—none took place during the colonial period or later.

Instead of explaining how the actual demarcation following delimitation will be accommodating of the reality on the ground that communities, towns and villages will not be divide by necessity of legal interpretation of treaty based provisions through equitable interpretation of the treaty *infra legem*, the Commission declined that process outright opting for the literal reading of the provision and the narrow view of respecting the limit on any use of "*ex aequo et bono*" norm. The use of equitable interpretation of treaties *infra legem* is not a violation of the "*ex aequo et bono*" safeguard in Article 4(2) of the 2000 Algiers Agreement. Such legal distinctions was fully stated as the central theme and analysis of equity in international law cases, in fact, in the very case the Commission cited to augment its use of a Map that was flawed and should have been disallowed as evidence. The more important principle that was overlooked by the Commission is the fact that the ICJ, although similarly barred as the Commission from deciding the case *ex aequo et bono;* nevertheless, correctly decided a case by using equity *infra legem*.[26]

The Commission, no matter how it perceived itself, was just an "arbitration tribunal" serving at the pleasure of the two Parties, Ethiopia and Eritrea. I have clearly established that fact above in this subsection. The Boundary Commission was not a national court nor an international court nor a Commission of the United Nations—period. Thus, there was no need for the Commission to enter a decision if the Parties to the dispute were not cooperative. Its "virtual demarcation" on areal map is *ultra virus* act and illegal that could be even prosecuted in the local Courts of Ethiopia as a crime against the economic and national security of Ethiopia. Here is a clear case of overreaching and abuse of mandate by the Commission. The Commission should have refused to implement unjust treaties whose origin is illegal such as colonialism revived to benefit one party in a fraudulent collusion of the parties camouflaged or hidden from the public; the Boundary Commission should have exercised its right independently to invoke the interpretation of treaties in *preato legem*.[27]

The Press Release of 12 September 2007 by the Secretariat of the Commission stated, "The Commission also reminded the Parties that the determination of the boundary points listed in its 27 November 2006 Statement followed consideration of the views of the

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[26] *Case Concerning the Frontier Dispute (Burkina Faso* v. *Mali), ICJ Reports 1986, para 27-28, p 582.*

[27] Judge Schücking forcefully stated in his dissent stating thus: "The Court would never, for instance, apply a convention the terms of which were contrary to public morality. But, in my view, a tribunal finds itself in the same position if a convention adduced by the parties is in reality null and void, owing to a flaw in its origin. The attitude of the tribunal should, in my opinion, be governed in such case by consideration of international public policy, even when jurisdiction is conferred on the court by virtue of a Special agreement." *Oscar Chinn Case, 1934 P.C.I.J. (ser. A/B) No. 63, at 149-50 (Dec. 12) (Schücking, J. dissenting).*

Parties and was in accordance with the Delimitation Decision of 13 April 2002." This is one of several examples of abuse of mandate and the Commission acting as a Court forcing its decision on the Parties that constituted it—this is a clear situation for a *non liquet* withdrawal of the Boundary Commission from deciding the case. Even the single case cited by the Commission was not dispositive or even relevant to the controversy. The Commission put it in its lame statement as "A comparable, though not identical, situation arose in the *Argentina-Chile Frontier Case* (1966) (38 *International Law Reports* 10), where aerial photography was used to identify points on the boundary."[28]

The fact is that citing the *Argentina-Chile Frontier Case* is a straw-man argument by the Commission because there is no precedent to the "virtual demarcation" that the Commission has imposed on Ethiopia and Eritrea under the circumstances where the parties in arbitration are not cooperative. Unlike the Ethiopia-Eritrea border demarcation problem, the *Argentina-Chile Frontier Case* dealt with a situation where both Parties had agreed to the identification of demarcation on an areal Map to reestablish boundary points on prior demarked border. It is a serious mistake by the Commission to site a case that is not dispositive by any stretch of imaginative interpretation of the issue of competence of the Commission in resolving the demarcation of borders.

2. The Principles of Peremptory Norms: *Jus Cogens and Erga Omne*

Jus Cogens[29] as a principle of peremptory norm in international law is a well established norm often invoked by the ICJ and well recognized and published by publicists of international law. The ICJ in a number of cases had affirmed the existence of such principles that includes the principle of *Erga Omne*.[30] The issue here is to what extent the principle of *Jus Cogens* would be extended to cover the progressive development of international law in cases of border disputes and conflicts. It seems that these peremptory norms started out with concerns with fundamental human rights. The earliest convincing, at least controversial article on the subject of such principles or norms was that of the 1937 law article of Alfred von Verdross, "Forbidden Treaties in International Law."[31]

The Algiers Agreement at its time of signing preemptively obligated Ethiopia under defunct, long dead, and supplanted international instruments, with dubious validity even at the time of their signing or presentations in 1900, 1902 and 1908, to cede millions of acres of land and coastal territorial waters and islands dispossessing its own citizens or driving them of their ancestral homes, to Eritrea. Such acts would violate all fundamental principles of human rights incorporated in the Universal Declaration of Human Rights, the Charter of the United Nations and numerous General Assembly Resolutions. For over thirty years, the ICJ and arbitration tribunals, in a handful of cases have asserted that there are individual rights that are authentic and individualized. It is established in

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[28] *Argentina-Chile Frontier Case* (1966) (38 *International Law Reports* 10)

[29] In the decision of the French-Mexican Claims Commission in the 1928 *Pablo Nájera Case* [see Patrick Dumberry, *STATE SUCCESSION TO INTERNATIONAL RESPONSIBILITY*, Martinus Nijhoff Publishers, pp367-69 (2007); and then by Judge Schücking of the Permanent Court of International Justice in the 1934 *Oscar Chinn Case (1934) P.C.I.J., Series A/B, No. 63, 134-36, 146-50*.

[30] *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).*

[31] Alfred von Verdross, "Forbidden Treaties in International Law," *31 AM. J. INT'L L. 571 (1937)*.

decisions by the ICJ that such violations of fundamental rights are violations that are covered by the J*us Cogens*[32] principle.

The Algiers Agreement did not settle anything as would peace treaties, it merely revived long defunct or abrogated or invalidated "colonial treaties" to benefit Eritrea to the disadvantage of Ethiopia. On that ground alone, the Algiers Agreement should be thrown to the dust bin of history, for it is the shameful revival of "colonial treaties" of a century ago. It is provided in the Algiers Agreement: *"Article 4:* 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."

Moreover, the Algiers Agreement in Article 3 requires the setting up of an investigative body to establish the instigator of the war between Ethiopia and Eritrea the *ius ad bellum*. However, that crucial step was never carried out. Ironically, the Eritrean Government argued that same defect in the jurisdiction of the Commission, in its memorial, which was *kind of* glossed over by the Arbitrators in the *Claims Case*.[33] Such finding would have been the first step in bringing solution to the problem, but it never was put in place, thus rendering everything else done by the Commission(s) questionable and voidable/invalid. This argument has support also by scholars of public international law.[34] On both substantive and technical grounds, failing to carry out or execute a provision that is crucial in upholding the "*conditio sine qua non"* or the "*raison d'etre,"* the very essence, of a treaty, is ground for the invalidation or termination of a treaty in customary international law.[35] By way of illustrating the importance of keeping in sight the purpose of an agreement, I have considered the ICJ's famous advisory opinion, dealing with reservations on specific provisions of a multinational treaty, the Genocide Convention of 1948, wherein the Court pointed at the "*raison d'etre"* in holding that such reservations that undermine the "the object and purpose" of that treaty may not be valid.[36]

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[32] *German Settlers in Poland, (Advisory Opinion) 10 September 1923, PCIJ Series B, No. 6, at 36*; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, p 6.*

[33]*Ethiopia-Eritrea Claims Commission, Final Awards, 19 December 2005.* Permanent Court of Arbitration (www.pca-cpa.org). See Christine Gray, "The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?" *EJIL (2006), Vol. 17 No. 4, 699, pp705-707.*

[34]William Hall, *A TREATISE ON INTERNATIONAL LAW* 382-83 (8th ed. 1924) (asserting that "fundamental principles of international law" may "invalidate, or at least render voidable," conflicting international agreements).

[35]Theodor Meron, "The Authority to Make Treaties in the Late Middle Ages," *89 AM. J. INT'L L. 1 (1995).* In general, the Vienna Convention on the Law of Treaties Article 60 (3) reflect the norms and principles of customary international law on non-observance of a provision of a treaty "essential to the accomplishment of the object or purpose of the treaty."

[36] Reservations to the Convention on Genocide, Advisory Opinion: *ICJ Reports 1951, p 15.* "The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation. " (*p 24)*

3. The Principle of Good Faith

I hear/read often people asserting that "peace treaties" and "boundary treaties" are sacrosanct and that it is not possible to reverse once a peace treaty or boundary treaty is entered between state parties.[37] Is it possible to abrogate or invalidate the signing of the Algiers Agreement? What about *de novo* negotiations without preconditions? In fact, the first hurdle for any treaty or agreement between states must overcome the challenge or question of good faith. "Good faith is a fundamental principle of international law, without which all international law would collapse," Judge Mohammed Bedjaoui of the ICJ declared emphatically.[38] The imperative of "good faith" in any international agreement is obvious. The literature on the subject is extensive and nearly every international law publicist and jurist had written to that fact over the centuries. Where there is an absence of good faith in any agreement or treaty, the goal sought after by the parties will be impossible to achieve for there is no common goal, which intern is a ground for invalidation of agreements or treaties.[39] The problem of bad faith is compounded if the setup and collusion between parties pretending to be in conflict are actually pursuing the same goal of exploiting a people and their wealth.[40]

There are several indicators in the case of the relationship of the current leaders of Ethiopian and Eritrean Governments that is anomalous to any "good faith" presumptions, and that such challenge to a treaty is serious matter that goes to the very heart of the applicability and opposability of a treaty to a particular party to a dispute. It involves the most ancient principle of International agreements and relations: *pacta sunt servanda*. "The only limits to *pacta sunt servanda* doctrine are the peremptory norms of general international law, called *jus cogens* (compelling law). The legal principle *clausula rebus sic stantibus*, part of customary international law, also allows for treaty obligations to be unfulfilled due to a compelling change in circumstances." [41] The United Nations Vienna Convention on the Law of Treaties of 1969 is significant in my analysis of good faith and arms length negotiated agreement. We may start by considering Article 31 on "good faith" in cases of the interpretation of treaties. We must also consider the counter doctrine or the opposite principle to *pacta sunt servanda* that jointly makes much sense in international law. The *clausula rebus sic stantibus* is as much a part of international law.[42] As far back as 1937 Verdross argued based on his understanding of hitherto

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[37] Gbenga Oduntan, "The Demarcation of Straddling Villages in Accordance with the International Court of Justice Jurisprudence: The Cameroon–Nigeria Experience." See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports 2002, p 303.*

[38] "Good Faith, International Law and the Elimination of Nuclear Weapons: The Once and Future Contributions of the International Court of Justice," 15-20 (1 May 2008) Translated from the French by Linda Asher and Peter Weiss. [http://www.lcnp.org/disarmament/2008May01eventBedjaoui.pdf.]

[39] Anthony D'Amato. "Good Faith" *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, 1992, pp599-601, 1234-1236; Michel Virally, "Review Essay: Good Faith in Public International Law," *77 AM. J. INT'L L.*, No. 1 (Jan., 1983), pp. 130-134; *North Sea Continental Shelf* cases, *ICJ Reports* 1969.

[40] McCracken, Matthew J., Abusing, "Self-Determination and Democracy: How the TPLF Is Looting Ethiopia," *36 CASE W. RES. J. INT'L L. 183 (2004).*

[41] *WEST'S ENCYCLOPEDIA OF AMERICAN LAW*, published by Thomson Gale.

[42] The doctrine of *clausula rebus sic stantibus* is clarified in the *Fisheries Jurisdiction Case* (*United Kingdom v. Iceland*, 1973). See also Kelsen, Hans. *THE LAW OF THE UNITED NATIONS. A CRITICAL*

existing international customary law and principles and norms that there are forbidden treaties or terms in treaties that do not satisfy "*ethical minimum* recognized by all the states of the international community."[43]

Prime Minister Meles Zenawi and President Issayas Afeworki are leaders of liberation fronts who had a long standing understanding/agreement while they were in the bush, i.e., before they took over the Government of Ethiopia in 1991. The independence of Eritrea was achieved through collusion and complacency of the leadership of the EPRDF and through force; neither method is legitimate under international law and practices. Thus, any agreement entered by the two leaders or their agents at that time in the bush and subsequent to that time is invalid with no legal consequences on Ethiopia and Ethiopians. One of the senior officials of the TPLF, Sebhat Nega, in his belligerent interview of May 28, 2007, confirmed the collusion that existed between the leaders of the present Governments of Ethiopia and that of Eritrea.

Part IV. Misreading of cases and inadequate legal base

1. The Concept of "Opposability"

The Commission did not consider "opposability"[44] objection, a progressive concept in international customary law or case based international principle. Irrespective of the particular point of contention in cases involving states in disputes, it is possible to invoke the opposability of certain allegations or pleadings based on some norms or principles of domestic or international origination or treaties in conflict to general principles of international law or norms or treaties. However, in the case in dispute of Ethiopia and Eritrea the opposability is to be based on other than the issues of *Jus Cogens,* such as legitimacy of the establishment of the Boundary Commission, the legitimacy of the revival of long dead colonial treaties in order to serve the interest of only one party to a dispute, inadequate representation, corruption, lack of arms length dealings with the alleged" opposing Parties et cetera. The ICJ used for the first time the concept of "opposability" in the *Fisheries Case* between Norway and England.[45] In the *North Sea Continental Shelf Case*s, the ICJ held, "Whether it has since acquired a broader basis remains to be seen: qua conventional rule however, as has already been concluded, it is not opposable to the Federal Republic."[46]

The use of "opposability" as a defense has one very attractive feature that we all can appreciate; it limits the scope of the decision to the case under consideration without affecting or challenging the wider scope of the foundational international principle or norm in question. For example, the Algiers Agreement could be opposable to Ethiopia without affecting the *pacta sunt servanda* attributes of treaties or agreements as a general international law principle. For example, in a different case Shinya Murase seems to

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ANALYSIS OF ITS FUNDAMENTAL PROBLEMS. New York: Frederick A. Praeger, 1964. Reprinted 2000 by *THE LAWBOOK EXCHANGE*, 128-129.

[43] Alfred von Verdross, "Forbidden Treaties in International Law," 31 *AM. J. INT'L L. 571 (1937).*

[44] J. G. Starke, Q.C., "The Concept of Opposability in International Law," *AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW, 4, 1968.*

[45] *Fisheries case, Judgment of December 18th, I95I, ICJ Reports 1951, p 116 .*

[46] *North Sea Continental Shelf Case*s, *ICJ Reports 1969, Judgment, para 3, p 41.*

suggest similar idea.[47] Defects in procedural and substantive legal misinterpretation and misapplication could be opposable, without affecting the underlying principles and norms of international law. There seems to be incompetence of the Ethiopian Government representatives or there is deliberate act of the Ethiopian Government to undermine its own case. The Pleadings and Legal Briefs and evidentiary documents presented by the Governments of Ethiopia and Eritrea are not available to the public—hence an additional serious defect of the procedure of the Commission.

2. Fallacy of *argumentum a fortiori*

It is obvious that the Commission was wrong in its use of "virtual demarcation" in the demarcation of the border between Ethiopia and Eritrea. Such action was beyond the scope of its mandate. The Commission acknowledged the fact that both Ethiopia and Eritrea declined to attend the Commission's "invitation" to attend a meeting of the Commission to consider "further procedures to be followed in connection with the demarcation" of the border.[48] That refusal of the parties should have ended the work of the Commission as an arbitration body. However, once again the Commission imposed itself beyond its mandate without any specific authorization from the parties to demarcate the border between Ethiopia and Eritrea on its own on areal map.

The Commission cited as authority the *Beagle Channel case*, [49] and in a footnote stated that "The present case is not one involving the total non-cooperation of one Party, but rather the non-cooperation of both Parties, though in differing ways and degrees. Thus, the observation of the *Beagle Channel* tribunal applies *a fortiori.*"[50] The Commission totally misapplied the concept of "*a fortiori"* in that the exact opposite outcome would have been the case, if the Commission had applied the concept it tried to use from the *Beagle Channel case* correctly *a fortiori.* In considering using the logic of *"a fortiori"* as a contextual concept, its correct application is dependant on unique facts to a particular case.

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[47] Shinya Murase, "The Relationship between the United Nations Charter and General International Law regarding Non-Use of Force: The Case of NATO's Air Campaign in the Kosovo Crisis of 1999," Presentations, Sophia University Faculty of Law, Tokyo, 2005. http://www.lcil.cam.ac.uk/Media/lectures/doc/Murase.doc.

[48] Eritrea-Ethiopia Boundary Commission Statement following its meeting in private session in The Hague on 20 November 2006, p1: "Invitations to the Parties were issued by e-mail on 8 November 2006. Both Parties declined the Commission's invitation."

[49] *Beagle Channel case, 52 INTERNATIONAL LAW REPORTS 284.* The case award led into serious conflict between Chile an Argentina, and a catastrophic war was avoided only through new negotiation with the intervention of the Vatican. One jurist of international law called the Arbitrators in the *Beagle Channel Case* as "confused." See Stephen A. Schewbel, "Concluding Observation," in THE FLAME REKINDLED: NEW HOPES FOR INTERNATIONAL ARBITRATION [Leiden Journal of Int'l Law], A. Sam Muller and Wim Mijs, Editors, Boston : M. Nijhjoff Pub., 1994 p 181. At any rate, the *Beagle Channel case* is distinguishable from the *Ethiopia v. Eritrea Arbitration (2002) case,* on several grounds, such as the arbitration process was triggered by an earlier multilateral treaty where by the King/Queen of Great Britain was designated as the 'arbitrator," the parties sought third-party intervention outside of the arbitration process and resolved their problem by passing the Arbitrators et cetera and thus, the *Beagle Channel case is* inadequate to use as authority to support the incorrect reasons offered by the Commissioners.

[50] Eritrea-Ethiopia Boundary Commission Statement following its meeting in private session in The Hague on 20 November 2006, in Footnote 1. Permanent Court of Arbitration (www.pca-cpa.org).

The form of argument identified in full in Latin as *argumentum a fortiori* means an argument with even stronger reason. The tragedy in the Ethiopia-Eritrea boundary case is the Commissioners' obvious lack of knowledge of inductive or deductive (prepositional) logic in using *a fortiori* argument in support of their conclusion. This lack corrupted their decision drawn from a case that is not applicable because of factual difference with the Ethiopia-Eritrea situation. The invalidity of their conclusion is due to the fallacy in their assumption that the addition of more of the same does necessarily lead to a more intensified or heightened justification. There are two types of logical threads in an *a fortiori* argument that would be pitfalls if not properly observed. Unsuspecting or lay persons uninitiated in logic would certainly plunge into making ridiculous conclusions. The two threads are *a maiore ad minus,* meaning "from greater to smaller," and *a minore ad maius,* meaning "from smaller to greater." Ultimately, it is in the meaning of the particular premise the truth value of any assertion is established through the method of verification either as correspondence or coherent truth.

The right syllogistic or prepositional (modal-conditional logic) structure in this case could help us establish the validity of an argument with the use of correctly drawn syllogistic or inferential relationships between terms and premises. Syllogistic or prepositional structure helps us to draw valid conclusion and since a conclusion is also a premise it has truth value. In classical Logic very many fallacies are identified among which *argumentum a fortiori* could be considered as a fallacy if it involves incorrectly inferred conclusion. In this case, both inductive logic and deductive logic are at play. "In the art of rhetoric *i.e.,* speaking or writing for the acknowledged primary purpose of persuasion, the *a fortiori* argument draws on the speaker's and/or listener's existing confidence in a proposition to argue for a second proposition that is implicit in the first, 'weaker' (less controversial and more likely to be true) than the first proposition, and therefore deserving of even more confidence than the speaker and/or listener places in the first proposition."[51] The fallacy is obvious, as an example, if one takes some poison in very small amount curing certain disease, but treating the disease with more poison will not result in more enhanced cure but in death.

My extensive comment on logic is due to the crucial assertion by the Boundary Commission that its demarcation was totally dependant on *a fortiori* application of a particular case to the disposition of the Ethiopia-Eritrea border dispute. Accordingly, if one party in arbitration did not participate, some measure against that belligerent party may be appropriate; however, the exact opposite would be the outcome or effect where both parties in an arbitration decline to participate in the arbitration process they setup, for the consequence of nonparticipation by both parties is the negation of the arbitration process itself. It is also proper to point out here that the *Beagle Channel* case Arbitrators were criticized repeatedly by international law scholars for exceeding the scope of their

[51] Hans V. Hansen, Robert C. Pinto, *FALLACIES: CLASSICAL AND CONTEMPORARY READINGS*, Penn State University Press, 1995. See also Avi Sion, "Judaic Logic," 1995, http://www.thelogician.net. The literature on that subject is enormous accessible to anyone, even those with elementary knowledge of prepositional logic. It is distressing to me how such highly educated and experienced Commissioners did not take the necessary caution in using such concept of elementary logical fallacy.

mandate, as is the case with the Members of the Eritrea-Ethiopia Boundary Commission too. In the *Beagle Channel* case, other than errors in reading maps, interpretation of international law principles and norms, the more glaring error involved procedural error wherein the Arbitrators seem to have exceeded their scope of mandate in that the Arbitrators transmitted their findings (decisions) to the Arbitrator the King of Britain at the same time they also transmitted to the Parties (Chile and Argentina). The problem was real and became material because by transmitting the decision to the Parties they deprived the Arbitrator the right to withhold or distribute the decision to the Parties. The arbitration decision was an outcome of the appointment and delegation by the Arbitrator to the Arbitrators on whose behalf they conducted their arbitration. They had no original right or obligation to communicate their decision directly to the Parties.

A short survey of cases decided by both American and English Courts using the *a fortiori* argument confirms my assessment of the error of the Commission. Moreover, the assertion of the Commission that the Commission has to enter the virtual demarcation since the Parties have expressed in the Algiers Agreement their desire to have the controversy resolved as soon as possible is simply an egregious assumption without any mandate. The claim by the Commission for expedited decision is a fallacious statement, a *non-sequitur*. Of course, the Parties require an expeditious resolution of their case, but not a forced or corrupted one.

Part V. Incompetence of Commissioners

1.The disqualification of Lauterpacht and the Boundary Commission

We should understand the role of arbitrators is distinct with more latitude from that of ICJ judges. However, this does not mean that we have to throw out all professional ethical standards when it comes to arbitrators. By the nature of their appointment or election, arbitrators do have certain preferences in supporting the position of the party that appointed or elected them. It may be argued that their preference to the party that appointed them may not disqualify them from being arbitrators. However, when it comes to the president or chairman elected by the arbitrators themselves pursuant to the arbitration agreed upon procedure, I believe both standards of "independence" and "highest moral reputation" standards are applicable to arbitrators who are thus elected by the other arbitrators to be presidents of particular commissions or tribunals. The Commission President, Sir Elihu Lauterpacht, had displayed an unusually blatant disregard of both the "high moral" and "independence" standards expected of a chairman of an arbitration commission or tribunal, and should be disqualified.

It is obvious that the United States was not an impartial neutral body. The United States had stained the arbitration process with its uncouth act of retaining as its lawyer Lauterpacht in its case with Mexico, a case cited herein that was decided by the ICJ.[52] Even worse, Lauterpacht was the Counsel for Pakistan in its case against India in 1999 and argued in front of the ICJ.[53] As we all know, Pakistan has been the arch enemy of Ethiopia, providing moral and financial support to EPLF and ELF. It was the most vociferous and antagonistic state in the United Nations against Ethiopia in the 1950s. No

[52] *Avena and Other Mexican Nationals (Mexico v. United States), Judgment, ICJ Reports 2004, p 12.*
[53] *Areal Incident of 10 August 1999 (Pakistan v. India), ICJ Reports 2000, p 12.*

degree of disclosure by Lauterpacht of his fiduciary relationships with the United States, or the Pakistani Government or the Israeli Government or anybody else would remedy the "conflict of interest" that is inherent in such relationships. Lauterpacht thereby stained also the impartiality of those Members with whom he had prior relationships as Members of arbitration tribunals or commissions.

The one ideal condition would have been for an international arbitration to be carried out by choosing from the pool of experts who are already the members of the Permanent Court of Arbitration already designated by their respective governments that are signatories of the 1899 or 1907 Treaties (Conventions).[54] With the adoption of the UNCITRAL rules, the pool of arbitrators was expanded to include ad hoc arbitrators who are not designated by any member nations. This process seems to have opened the door for corruption and conflict of interest problems. One must not lose sight of the initial reasons why in 1899 the arbitration an arbitration tribunal or forum was needed. It was envisioned that seasoned statesmen and international law jurists would help stabilize the world through their wisdom by arbitrating conflicting claims by states. [55] It was never meant a career promoting and money making scheme for lawyers, such as the Members of the Commission.

2. Third Party Funding as Corruption

The fact of setting a "Trust Fund" [56] out of which the expenses of the tribunals and commissions and the compensation for the members of such tribunals and commissions is paid has introduced into the process of arbitration elements of corruption that goes contrary to the desired independence of such forums. The problem is compounded by the fact of the involvement of the United Nations Security Council in receiving reports as a matter of course, presumably pursuant to its United Nations Charter responsibilities, wherein political consideration rather than law and principles play major roles in the decision making process of Ethiopia-Eritrea border conflict arbitration. Such financing novel structure, with its patronizing overtone, has further polarized and distorted the independence of the tribunals or commissions.

Thus, the Government of Ethiopia has every right to void all agreements, including the Algiers Agreement, and to reject the entire decision of the Commission. Ethiopia cannot be obligated to accept a decision by a Commission that is corrupted where some members of the Commission have compromised their duty to exercise "independence" and "high moral" standards. At the very minimum, they left the Parties dissatisfied and defiant; they left the public in puzzlement, and legal scholars bewildered and shocked, in my case. It is not important to show that all and every member of the Commission is involved in such

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[54] *1907 Convention for the Pacific Settlement of International Disputes*: Article 44 and Article 45.

[55] Preamble, 1899 Convention (1) for the Pacific Settlement of International Disputes (Hague 1) (29 July 1899) entry into force: 4 September 1900.

[56] RESOLUTION 1177 (1998): Adopted by the Security Council on 26 June 1998. Requests the Secretary-General to provide technical support to the parties to assist in the eventual delimitation and demarcation of the common border between Ethiopia and Eritrea and, for this purpose, establishes a Trust Fund and urges all Member States to contribute to it.

conflict of interest.[57] As long as one can show at least one member is involved in such conflict of interest, the entire proceeding and all decisions thereof, which flowed from such process, are tainted, thus void and invalid. Furthermore, Ethiopia should demand the disqualification of the President of the Commission, Elihu Lauterpacht, for conflict of interest and corruption.

Part VI. Land Locking of Ethiopia and Alienation of Ethiopian Citizens

1. Afar Coastal Territories

It is a truism to say that leaders of governments change, but the nation and its people persist longer than the lives of individual leaders and governments. The *Abyie case* decided 22 July 2009 at The Hague by an Arbitration Tribunal,[58] has almost identical problems of incompetence, overreaching, misinterpretation of legal principles, and serious mistakes of facts as I pointed out in the case of the Ethiopian – Eritrea Boundary Arbitration. The dissenting opinion of Judge Awn Shawkat Al-Khasawneh in the *Abyie case*, has very many interesting pointed criticism of the opinions of the rest of the Members of the Tribunal. Mainly the dissent focused on the excess of power and expansive interpretations of legal norms and principles, and mistakes of facts. Although I have great reservation about Judge Awn Shawkat Al-Khasawneh true intentions, for if we follow his pattern of thinking the South Sudan tribes will get very little of the territory in dispute, his dissenting opinion illustrates what seems to be the inherent problems of handling border disputes through arbitrations.

Journalist Eskinder Nega writing about the way Abyie, the oil rich region, was stolen from the legitimate owners, the people of South Sudan, legally with the arbitration decision setup by the old colonial masters, surmised what could be a perfect example of our current political bottle neck created due to be having been rendered illegally landlocked. Eskinder wrote succinctly what is illustrative of our debacle/affair as follows:

> "And so what European colonizers had disastrously lumped together as the modern nation of Sudan oblivious to history, psychology and sentiment was cleverly given leeway to succumb to local will; albeit generous concessions to the stronger party. With the secession of Eritrea, the colonial status-quo was re-established four decades after being reversed by local forces when Eritrea was reintegrated, with the blessing of the UN, with the historical hinterland, Ethiopia."[59]

The worst colonial legacy is the bottlenecking of independent states by strips of coastal land that was earlier alienated from such nations during the colonial scramble. Through the cover of creating such "independent" straw-nations from tiny coastal colonial territories a form of neocolonialism is put in place. When I state in writing and in oral discourse that the entire Afar coastal territory, which includes the port of Massawa and Assab, and the Afar people are part of Ethiopia, it is not for the sake of having access to the Red Sea. The issue of Sovereignty (ownership) is often confused with the idea of the

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[57] Commission Member Riesman wrote unduly contentious and accusatory note blaming the Ethiopian Government for not accepting the decision of the Boundary Commission.

[58] *The Government of Sudan / The Sudan People's Liberation Movement/Army (Abyei Arbitration), 22 July 2009.* Permanent Court of Arbitration (www.pca-cpa.org).

[59] Eskinder Nega, "The South Sudan and Eritrean precedents," *IDN-Indepth News*, March 4, 2011.

"rights of access" to the Red Sea. The issue should always be on "sovereignty" and ownership, for "the right of access" is dependant on the moment to moment whims of the granting state. It is particularly an unreliable "right" in an African setting where the development of state responsibility is arrested and where irresponsible *ad bellum* is the order of the day. My assertion is based on several international law principles and norms, such as solid historically based superior right of Ethiopia, the right of contiguity, the effective continuous display of state authority, the national security interest of a sovereign state, and above all the rights of Ethiopian citizens to live in their primordial homes without any foreign interference against their rights as citizens of a sovereign Ethiopia.

The Boundary Commission did not specifically cite the principle of *uti possidetis* in its decision. This is also one other evidence that indicates that the decision of the Boundary Commission to have been predetermined. The development of such international legal principle must be understood in its contextual use first in several Latin American cases. It was primarily used to settle disputed territorial boundaries and possessions between newly independent states in South America in order to counter possible resurrected Conquistador's claims of *res nullius*. The concept developed forked solution one dealing with the test based on historic rights (Sovereign) and the second dealing with effective control (possession). At any rate, the principle of *uti possidetis* in its evolved form through the decisions of the ICJ as indicated below favors Ethiopia if it has claimed properly the Afar Coastal territories as its legitimate historic territory.[60] The concept of "effectivites" that the ICJ introduced in order to fine tune the *uti possidetis* principle would recognize that Ethiopia is the parent nation that has exercised such control on the area and also the fact that the disputed area with its population is the natural extension of its territory and demography.

The majority of Afars are found within the larger region within Ethiopia. Thus, there is no reason or principle of international law that would divide a people in order to award some territory to a newly created entity, such as Eritrea. In the *Qatar v. Bahrain* (2001) case Judge S.O. Kooijmans, in his individual concurring opinion, introduced the principle of "superior claim."[61] This principle of "superior claim" is well grounded in law and history, and as an international legal principle should have played a central role dealing with issues involving such an ancient state of Ethiopia. Had the Boundary Commission considered properly the principle of "superior claim" it would have found out that Ethiopia had far superior claim that is more significant than any claim based on colonial treaty, and would have disqualified itself (Commission) for lack of capacity.

2. <u>Badema and Irob Area</u>

Here is the most heart wrenching effect of the border conflict that was started by the Eritrean Government, and the decision of the Boundary Commission would only exasperate an already inhumane situation. Forcing the Afar, Kunama, the Bilen, the Irob

[60] *Frontier Dispute (Benin/Niger), Judgment, ICJ Reports 2005, p 90.*

[61] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, ICJ Reports 2001, p. 40, Para 77. Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).*

people or the town and village people of Bademe, or that of Zala Ambesa et cetera against their wishes, into losing their historic land and citizenship goes against the principles enshrined in the Charter of the United Nations, numerous Resolutions by the General Assembly of the United Nations, and Resolutions of regional organizations such as the AU. There is no way one can abrogate such *Jus Cogens* rights of fundamental norms and principles of international law by a bilateral treaty or by a decision of an arbitration Commission, or arbitration tribunals or the ICJ.

I respect the views of Theodor Meron on this issue of thinking "outside of the box" not only because he is an accomplished international law jurist of the highest order but also of his great integrity. [62] After all, he advised the Israeli Government, as a young legal advisor to that Government, against settlement of Israelis on occupied territories—a point of view that was not popular within the officials of the Israeli Government of the time. It is ironic that the people of Irob, whose great contribution to the unity and integrity of Ethiopia is exemplary, are now threatened by the decision of a corrupted Boundary Commission. The people of Irob are quintessential Ethiopians in every facet of their heroic lives. It is absolutely unacceptable by anyone, international law or not, to try to alienate a people whose history is cemented by their blood fighting countless battles to preserve their Ethiopian identity and history for thousands of years. The Boundary Commission divided Irob into two and awarded the northern part to Eritrea, which puts the entire process of arbitration into question.

The consequence of such hasty and ill-advised and corrupt decision of the Commission would violate the fundamental rights of the people of Irob. Who would dare in the guise of international border arbitration reallocate territory to a newly formed entity overriding history, demography, and norms of international law and principles? The absurdity of the decision of the Commission is best described in a short article by Alema Tesfaye who is native to the disputed area, wherein he narrated to us the too human dimensions:

> "Today the Irob people find themselves in a very dangerous condition and it will be worse if the rather hasty "cut-and paste type" of The Hague Border Commission's Ruling (April 2002), that partitioned Irob territory into Eritrea and Ethiopia, is rigidly implemented, without modification. In its desperate search for the none existing River Muna, the Commission has irrationally renamed valleys such as Midiriba and Barbare-Gade only to impose new identity on the Irob minority (despite their strong objections), dislocate their households and expose them to Eritrean Government reprisals, a government whose occupation they bitterly fought in the 1998-2000 war. The Hague ultimately benefited neither the peoples of Eritrea nor of Ethiopia nor the goals of the UN's four year-old costly peacekeeping mission. It is not a matter of sheer territory; it is all about people's destiny and their fundamental human rights to life, protection and security."[63]

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[62]Theodor Meron, *THE HUMANIZATION OF INTERNATIONAL LAW*, Hague Academy of International Law Monographs, 3, 2006; See also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment ICJ Reports 2006, p 6.*

[63] Alema Tesfaye, "Ethio-Eritrean border debacle and the Irob condition," www.IROBMABLO.org

The gravity of the Boundary Commission's decision is clearly illustrated by the rejection of that decision by the people of Irob that have lived for generations in the designated area to be handed over to Eritrea. The sum total of the Commission's decision adds up to giving a tract of land to Eritrea and dispossessing the people who have lived on that piece of land for all of recorded history. This type of decision focuses our attention as to the purpose of the whole exercise whether we are simply interested in giving a piece of land to Eritrea on the flimsiest of grounds ever devised by politicians and lawyers. Are we dealing here with a system that has lost the very base for its reality of justice and norms in dealing with truly crucial question as to the survival of a group of people with distinct aspirations and fundamental rights? It is obvious that the Commission has erred in its decision and in its interpretation of the norms of international law.

3. <u>The Border with Sudan</u>

To date, there had not been any publication by the current Ethiopian Government of Meles Zenawi of the substance of the negotiation or draft agreement with Sudan on the Western borders of Ethiopia. We hear Meles Zenawi stating in interviews that his Government is not giving away any Ethiopian Territory to Sudan, but at the same time he is deciding what constituted Ethiopian territory. This is a circular and devious argument meant to undermine the historic fact of Ethiopian controlled border lands he had decided to cede to Sudan by labeling over sixty thousand square kilometers of Ethiopian territory with thousands of towns and villages and homes of millions of Ethiopian citizens not Ethiopian territory. It is not up to Meles Zenawi or anyone else to decide the extent of Ethiopia's territory. Ethiopian Territorial expanses are determined and set already by its history, by its demography, by its possessions and control, by valid international treaties, and above all by its Sovereign People.

Meles Zenawi is responsible for the situation of Ethiopia's border territories being compromised and given away. This is claimed by supporters as a necessary bitter pill one must swallow in order to appease the anti-Ethiopia conspiracy orchestrated by Arabs. More than such external agents the real enemies of Ethiopia were the two leaders of the guerrilla movements who succeeded to destroy an unpopular and brutal government of Mengistu Hailemariam and his associates and proceeded to dismantle a great nation that is equally the heritage of Eritreans as well. Mengistu Hailemariam was another reason for the bitter fight staged by the guerrilla fighters, because of his background and his bloody ascendance to power (in itself). Mengistu's crime against individual Ethiopians, in absolute numbers of victims, was far worse than that of either guerrilla leaders; however, he had not compromised the sovereignty and territorial integrity of Ethiopia as much as Meles Zenawi did.

Meles Zenawi is now ceding our land to Sudan as he did with our land to create Eritrea, to another artificially carved entity out of Ethiopia. Even if Ethiopia is said to be occupying land that belongs to some such non-existing entity that is claimed as part of the current Sudan, the international norm or principle applicable to the situation is not the one used in our modern time, but the one that existed over a hundred years ago contemporary to the occupation of the land by Ethiopia. The principle of *intertemporality*

is fully applicable here and that principle of international law would fully support or recognize the sovereign right of Ethiopia over the territory it now occupies. "[T]hat a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."[64] At any rate, the principle of *uti possidetis* supports Ethiopia because of its undeniable continuous existence from the dawn of history to date more or less controlling the modern configuration of its territorial expanse. International legal regime is not meant to put states in precarious situation that challenges their very existence. [65]

VII. Conclusion: Our Future

The main reason for all the controversy surrounding the decisions of the Boundary Commissions has to do with immature and rushed process of adjudicating a controversy that had its origin in hundreds of years of history and rivalry. Temporary peace would have been maintained without the rush to settle the controversy in a legal forum. The Framework Agreement of 1999 and Agreement on Cessation of Hostilities of 2000, even with their limitations did provide such breathing space. The creation of the Boundary Commission was a serious failure of statesmanship. I insist that the use of arbitration process in itself is suspect *ab initio* because of the secretive nature of the process, *and* I strongly object to the use of arbitration tribunals or commissions in cases of border conflicts. In the case of the Governments of Ethiopia and Eritrea, the choice of arbitration seems to have been adopted solely to hid material facts from the Ethiopian public.

There can be no valid international agreement or treaty or decision by the ICJ or by an arbitration commission that would jeopardize the national security and vital interest of Ethiopia. There are several instances where national governments rejected fully or partially the decisions of ICJ affecting their national interests, although the noncompliance on boundary or frontier dispute is less than ten percent of such total decisions of the ICJ. Among several articles and books written the general opinion seems that non-compliance in frontier dispute cases seems to be the case where some vital national interest is at stake, such as vital national resource, the alienation of citizens. Ethiopia has every right to keep claiming its lost territory of Eritrea in whole and certainly the Afar Coastal territory and the Red Sea territorial water and the islands thereof. Neither "federation" nor "confederation" will bring about lasting peace and prosperity to the people of Ethiopia and Eritrea. The only marriage that could work between the diverse tribes and ethnic groups that shared what common history has forged and molded into one people is a unitary state modeled in the name and identity of the historic Ethiopia. Now, in imaging a Unitary Ethiopia, Ethiopian Moslems as much as Christian Ethiopians have a stake in the survival of Ethiopia; they must take the challenge

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[64] *Island of Palmas case (Netherlands, USA) 1928, p. 485*. See also *The Minquiers and Ecrelzos case, Judgment of November 17th, 1953* : *ICJ Reports 1953, p 47. 13-14*. See also "*Legal Status of Eastern Greenland Case" P.C.I.J (1933)*. See R.Y. Jennings, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW*, New York, NY: Oceana Publications, 1963.

[65] See in general Sara Mitchell and Paul Hensel, "International Institutions and Compliance with Agreements," 2007 *AMERICAN JOURNAL OF POLITICAL SCIENCE*, Vol. 51, No. 4, October 2007, *pp*721–737.

very seriously. The relationship between people, especial in matters that would end up having long term effects on the life of a nation, is a sacred matter.

The Arabs are not our destiny; they have been unable to bring about democratic governance, even with all that wealth, among themselves. So far as a group, they represent the worst social and political structure in the World. Why would anyone want to be under their sway and dominance? Ethiopia must be united with all its historic parts and develop its great human and natural resources to benefit all of its children. I am not suggesting here that only a certain kind of people produce horrible national leaders, but that history places us at a disadvantage where we are caught in downturn spiral of incredibly difficult economic, social, and political problems. We need to seek our salvation through our own devices, as we are doing now through individual communication and building solid close relationships in our common survival goals.

I conclude this paper by reminding us all that dictators throughout the World are similar in more ways than I can count. No matter how they start out claiming noble goals as liberators from alleged ethnic dominance (Meles Zenawi), or as liberators from alleged colonialism (Issayas Afeworki), or as liberators from alleged class oppression (Mengistu Hailemariam) et cetera, they all end up becoming the exact copies of each other. They all are power hungry, violent, narcissistic, fearful, vengeful, and corrupt. They claim to know everything; their attempted monopolistic hold on ideas is the most frightening aspect of such leaders. And they end up hurting and killing their own people. Woe to us all if we fail to bring about profound change and unity in spite of such leaders! History ought to be our guide, and it need not put us in a straightjacket. We should be able to fashion our own future after our ideal of a responsive, democratic, and humane nation.

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