Ethiopia and “Eritrea” - Antagonists in Perpetuity: Cohen, Shinn, and witless Diasporas to the Rescue?
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I Introduction
I have written on the subject of the Ethiopia-Eritrea border dispute/war, the Boundary Commission and its convoluted decision, the role of the United States et cetera extensively and this additional article draws most of my thoughts from such essays. However, here I am focusing on the recent presentations [Vision Ethiopia Conference of 18 October 2015] and the not too recent articles (calls) by two former United States Government Officials Herman Cohen [“Time to Bring Eritrea in from the Cold”] and David Shinn [“Time to Bring Eritrea in from the Cold (But It’s Harder than It Sounds)”] for normalization of relationship between Ethiopia and Eritrea. The two Diplomates in their presentations and in their articles are unusually crude and out of place considering the existing state of affairs in Eritrea. A word of advice, the two authors would have served the Government of the United States best had they focused on some of the controversial issues that the United States Government is immersed in, ever sinking further into the quagmire of ineffective and totally draining foreign policy it has been following for years now in the Middle East, rather than throwing at us cursory views on Ethiopia’s national security and interests.

Minga Negash wrote some months back an insightful article “‘Time to bring back Eritrea from the cold’ A reply to Ambassador Hank Cohen” there by refuted some of Cohen’s assertions and challenged Cohen’s presumptuous suggestion that Ethiopia would accept its landlockedness. Unfortunately Minga now seems involved in a terrorist organization that is formed recently with the Eritrean Government as babysitter. Also Amare Lucas wrote an incisive analysis in an article “Was it a Bad Day for Ambassador David Shinn, the U.S.A Career Diplomat?” on the unduly provocative statements by David Shinn. And H. Mikael in his outstanding article “Cold or warm, keep Eritrea at bay” has effectively debunked the main arguments for normalization of relationships championed by Cohen and Shinn with their impertinence and condescending attitude as if Ethiopia is in great need for such relationship. To say the least, the presentations and the articles by the two diplomats were non-diplomatic, insulting, irresponsible, and opportunistic. They are just trying to be relevant and make some money on the side. In this article, I intend to show that the foundational idea that Cohen and Shinn relied upon in developing their presentations and articles, i.e., the decision of the Boundary Commission, is invalid and should never be the basis of any relationship between Ethiopia and “Eritrea” at any future time.

The Vision Ethiopia Conference of 18 October 2015 is another example of wasted effort of individuals who should have spent their weekend on a more gainful undertakings organizing food banks for famine stricken areas in Ethiopia affecting close to 10 million Ethiopians. I will just mention the embarrassing remarks [አማርኛ] of Kassa Kebede, the Red Terror participant and enabler of the brutal savage criminal Mengistu
Hailemariam, where he claims that Isaias Afeworki has no desire to see Ethiopia disintegrating, completely denying the fact that the OLF and several secessionist political armed groups have been hosted and supported by Afeworki and his Government to this day. I need to remind all delusional Ethiopians that Afeworki is not Ethiopia’s friend but its patented nemesis who had done everything in his power to undermine, destroy, discredit, misrepresent Ethiopia’s prominent civilization at all times. After all, if you could be perceptive for a second, is it not Afeworki who supported the very political Party that you all hate the most, the TPLF? The tragedy now is that we could not see how Diaspora Ethiopians and a few others locally still are being manipulated as were the Students at HSIU in the 1970s, and later the TPLF as pawns in the strategic planning to “liberate” Eritrea for the elite local groups. Eritreans will look to getting hold of this criminal who may be oblivious of the harm he committed a long time ago, when he was in Geneva, against a young Eritrean lady who died under torture being interrogated under a false accusation of spying for EPLF. At any rate such an individual should never be on any forum to discuss the liberation of Ethiopia from undemocratic processes.

Another important principle that we need to be mindful of is the commitment to our friends. Djibouti, Somaliland, even Sudan that have been supportive of Ethiopia by allowing access to the outside world. In case of Djibouti, unlike Eritrea’s Leadership that constantly undermined and tried to sabotage Ethiopia, the Leader of Djibouti has bought bond to the tune of almost 20 million Birr fully supporting the Grand Ethiopian Renaissance Dam project on Tikur Abay (Blue Nile). It is also much easier to manipulate Djibouti than Eritrea, for it is much less independent in the diversifying its economy and also much weaker as a military force. It has also much less hostile population being homogenous consisting of two ethnic groups both indigenous in extant in Ethiopia too. Eritrean ethnic population is quite another matter with Hedareb (Beja), Nara, Rashaida, Saho, and Tigre historically and now Hamasen and Akale Guzi sub-groups being the most hateful of Ethiopians in general. Sudan has surprised Arabs and Ethiopians alike because of its unwavering support of Ethiopia and has surpassed all expectations in its enlightened support of Ethiopia’s effort to develop its resources including the Blue Nile. There is no reason for Ethiopia to move its business to Eritrea at this stage of our development interest. Such point will be the focus of this article as well.

No doubt, the current Ethiopian Government requires new leadership and completely new governmental territorial and administrative structures. But such change is not possible with the form of rhetoric and opposition posturing. What is needed most is the development of civic awareness not in the destructive endless demonstrations and hostile often insulting propaganda by groups, but in voluntarism and personal ethical relationships. The association or being an instrument of a hostile government to fight and change the Ethiopian current Government by force is an act of terrorism. The current Ethiopian Government has the right and national duty to control such hostile activities from causing loss of life and destruction of national asset in Ethiopia. In principle to sit along known terrorists and to talk about strategy in order to overthrow the current Ethiopian Government is a prosecutable offense against the State of Ethiopia and its Government. Just because one is in a “conference” room in a luxury hotel in the United States or elsewhere, does not make such activity any less than actually carrying a gun and
committing violence in Ethiopia itself. What I regret the most is that the leaders in Ethiopia are not capable of taking appropriate measures wisely to safeguard the national interest nor guide the economic interest of Ethiopians. They are just worried in keeping power to themselves as much as the opposition is just interested to snatch it from them. We, ordinary Ethiopians, are the victims of both.

II. The Boundary Commission:
1. The Algiers Treaty of 2000
The Italian Government by signing the 1947 Treaty of Peace (Paris) had declared and accepted the provisions of Article 23 stating that it had renounced “all right and title to the Italian territorial possessions in Africa, i.e. Libya, Eritrea and Italian Somaliland.” Such declaration frees Ethiopia from all obligations to abide by any of the Treaties signed with Italy. Such renouncement takes us back to the period before the signing of those treaties and conventions, namely the 1900 Convention, 1902 Treaty, and 1908 Convention between Ethiopia and Italy. Thus, Ethiopia is at much more strong position to claim all of Eritrea and Italian Somaliland because there was no one with superior right at that time than Ethiopia with claims to those areas.

The decision of the Boundary Commission has no validity to bind Ethiopia to anything. The Algiers Agreement of 2000 is often cited by the Commission as the source for the authorization of the arbitration process reviving long dead colonial period Treaties. Such Treaties are null and void for a number of reasons. And when read in conjunction with the 1947 Treaty of Paris Italian renouncement of all of its rights and title to Eritrea, it is of singular significance the fact that Emperor Haile Selassie followed through by Order No. 6 of 1952 (Official Gazette), on 11 September 1952 declared the 1900 Convention, 1902 Treaty, and 1908 Conventions between Ethiopia and Italy to be null and void. Such declaration completed the task of terminating the so-called colonial period treaties, conventions or international instruments. Although not necessary for the purpose of my analysis in regard with the nullity or termination of any treaty-based obligation on the part of Ethiopia, it was a prudent step by Haile Selassie in formally declaring all Treaties entered with Italy prior to 1947 null and void.

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.”

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.”

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.”

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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1 The Algiers Agreement of 12 December 2000.
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. 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. The Concept of “Opposability”

The Commission did not consider “opposability” 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. In the North Sea Continental Shelf Cases, 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.”

The use of “opposability” has one very attractive feature that 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. 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 suggest similar idea. 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.

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7 North Sea Continental Shelf Cases, ICJ Reports 1969, Judgment, p 3 at p. 41.
http://www.lcil.cam.ac.uk/Media/lectures/doc/Murase.doc.
4. **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. 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 the Commission’s own areal map.

The Commission cited as authority the *Beagle Channel case*, 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.*” 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. I put great emphasis on the flawed use of a logical concept by the Commission, for their entire competence to enter a final decision is based on such fallacious inference from the *Beagle Channel case*. After all “reason [logic] is the life of the law” to quote the great common law jurist Sir Edward Coke (1552-1634), and generations of outstanding jurists and Supreme Court Justices in this very United States of America. Of course, the exception of Justice Oliver W. Holmes emphasis on “experience” in no way minimizes the great importance of logic and proper inferences in order to establish factual or legal matters.

“*A fortiori*” as a contextual concept for its correct application is dependant on unique facts to a particular case. The form of argument identified in full as *argumentum a fortiori* means in Latin that an argument with even stronger reason. “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.”

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 result in death. Accordingly, if one party in arbitration did not participate, some measure against that belligerent party may be appropriate; however, the exact opposite is the effect where both parties to an arbitration decline to participate in an arbitration process they

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9 *Beagle Channel case*, 52 INTERNATIONAL LAW REPORTS.

10 Sir Edward Coke, *COMMENTARY UPON LITTLETON* 97b (Charles Butler ed., 18th ed., Legal Classics Library 1985) (1628). “[R]eason is the life of the law, nay the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's natural reason; for Nemo nascitur artillex.” Halper, Thomas (1968) ”Logic in Judicial Reasoning,” *Indiana Law Journal*; Vol. 44: Iss. 1, Article 2. Available at: http://www.repository.law.indiana.edu/ilj/vol44/iss1/2

setup, for the consequence of nonparticipation by both parties is the negation of the arbitration process itself. 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.

**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. 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.

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. 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.

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14 *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 “inter temporality 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 inter temporality but on how factual interpretation fits the principle in a particular situation.
general. They are strictly limited to the exercise of its judicial functions in cases over which it has jurisdiction.”

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. The Commission has cited in both Chapters 3 and 4 cases decided by the ICJ. 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 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.

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

16 Case concerning the Frontier Dispute (Burkina Faso v. Mali), ICJ Reports 1986 at 582.
17 Ethiopia v. Eritrea Arbitration Decision (2002) para 3.1-3.37, pp 21-30. 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.
18 Case Concerning the Frontier Dispute (Burkina Faso v. Mali), ICJ Reports 1986, para 27-28, p 582.
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*.

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 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.”

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.

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

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19 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).

20 *Argentina-Chile Frontier Case* (1966) (38 *International Law Reports* 10)
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.\textsuperscript{21} 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.

IV. 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. Ethiopia’s venerable 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.”\textsuperscript{22}

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 “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 \textit{ad bellum} is the order of the day. My assertion is based on several international law principles and norms,

\textsuperscript{22} Eskinder Nega, “The South Sudan and Eritrean precedents,” \textit{IDN-Indepth News}, March 4, 2011.
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. 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.” 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. **Badema and Irob Area**
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 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

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23 Frontier Dispute (Benin/Niger), Judgment, ICJ Reports 2005, p. 90.
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. 25 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.” 26

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.

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.27 Even worse, Lauterpacht was the Counsel for Pakistan in its case against India in 1999 and argued in front of the ICJ.28 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 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).29

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

28 Areal Incident of 10 August 1999 (Pakistan v. India), ICJ Reports 2000, p. 12.
29 1907 Convention for the Pacific Settlement of International Disputes: Article 44 and Article 45
not lose sight of the initial reasons why in 1899 the arbitration forum was needed.\textsuperscript{30} It was envisioned that seasoned statesmen and international law jurists would help stabilize the world through their wisdom by arbitrating conflicting claims by states. It was never meant a career promoting and money making scheme for lawyers, such as the Members of the Commission.

\section*{2. Third Party Funding as Corruption}

The fact of setting a “Trust Fund” out of which the expense 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 States Charter responsibilities, wherein political consideration rather than law and principles play major roles in the decision making process of arbitration. Such new structure has further polarized and distorted the independence of the tribunals or commissions.\textsuperscript{31}

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. It is not important to show that all and every member of the Commission is involved in such conflict of interest. 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.

\section*{VI. Conclusion}

I believe that both Shinn and Cohn are misguided in their thinking that patching with their type of band-aid diplomacy will heel the deep seated hostility of the Eritrean Leadership and a segment of the population against Ethiopians. I have long given up writing on the motives of people who write incendiary political articles. Thus, even though the temptation to divulge into the psychology and motives of the two diplomats/authors is tempting beyond measure, I bit my tongue from saying anything on that score. However, we can easily discern their interest to promote the influence of the United States in that part of the World, where the United States has lost considerable ground to Chinese, Indian, and European influences.

\textsuperscript{30}Preamble, 1899 Convention (1) for the Pacific Settlement of International Disputes (Hague 1) (29 July 1899) entry into force: 4 September 1900.

\textsuperscript{31}RESOLUTION 1177 (1998): Adopted by the Security Council at its 3895th meeting, on 26 June 1998.

[8. 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, \textit{establishes} a Trust Fund and \textit{urges} all Member States to contribute to it.]
John Byrely and group, are specific examples of minor officials at the State Department, whose political and life experiences in no way should have given them such degree of influence in creating such a political debacle in East Africa. They were left on their own to deal with the problems facing Ethiopia, the most ancient nation on earth. It seems no one of seniority was supervising what those low-level young careerist-climbers were doing because the big guns were engaged elsewhere. The result was a disastrous foreign policy in that part of Africa. The book by Herman Cohen, a former official at the State Department, Bureau of African Affairs, is quite revealing if one is capable of reading between the lines in an otherwise self-serving essay, justifying numerous errors of political and commonsense judgments.

Contrary to its pretentious title, the intervention and study of diplomacy Cohen is writing about, seems to be nothing more than the documentation of self-confessed selling-out of old partners for more ‘sexy’ but temporal change of partners. It shows changes from that of subtlety, wisdom, and deliberation to that of being swept by leaders of liberation fronts in army-surplus, often not much better than street thugs in urban streets. From the 1970s to date, the policy or attitude of the United States Government toward that part of Africa, especially toward Ethiopia, seems to reflect an underlying scorn, disrespect and crudeness. [See Tecola W. Hagos, “International Deceit to Destroy Ethiopia: The New Patriotic Ethiopians and the Birth of the New Ethiopia,” Boston Conference, 9 March 2002 (reposted in Websites including this one)]

Tecola W. Hagos

October 26, 2015

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