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From Separation to Conflict and Beyond

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Thematic Research Conference and Proceedings Rules

International Law Series is an annual thematic publication of the School of Law of Addis Ababa University in the field of international laws. It was established by the Academic Committee of the School of Law on December 2, 2016 to publish cross-cutting thematic researches on international law issues pertaining to Ethiopia and to support the graduate programs of the School thereby encouraging staff and student participation in research activities.

Each volume of *International Law Series* covers different themes in priority areas identified by committee of conveners and approved by the Academic Committee of the Law School. Submissions to this volume have been presented in a national conference organized by the School in June 2019 attended by invited faculty members from law schools in Ethiopia and experts from different walks of life. Moreover, each submission has been blind peer-reviewed by experts in the field for substantive merit as per the Addis Ababa University School of Law Thematic Research Conference and Proceedings Rules of 2016.

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Foreword: A New Dawn for Ethiopia-Eritrea Research?

Prof. Kjetil Tronvoll[*]

The nascent, albeit sluggish, peace rapprochement between Ethiopia and Eritrea has stirred hope for full normalisation of relations between the two countries in the near future. If so happens, this will be a new dawn for much needed Ethiopia-Eritrea research activity.

Ethiopia and Eritrea are bound together in webs of cultural, social, historical, and economic significance. No time in the history stretching back 2,500 years or so has the people-to-people contact and relations across the Mereb River border been obstructed for such a long period of time as during the "no war – no peace" era. About twenty years have passed without daily social interaction through family ties, intermarriage, migrant labour, border trade, religious feasts, or for that matter research collaboration. With a few exceptions, all mutual cross-border interactions were severed. Likewise, the breach of formal bilateral relations during the same period has left much wanted in terms of the alignment of policies of mutual relevance within all governance sectors – and much needed empirically founded knowledge production to underpin such policies are lacking.

The symposium 'Revisiting the Ethio-Eritrean Relations: From Separation to Conflict and Beyond' organised by the School of Law, College of Law and Governance Studies at Addis Ababa University, is a first small, albeit very important, step to start filling this lacuna of knowledge. A selection of papers presented at the symposium is published herewith, covering important issues *left unanswered* under the comprehensive peace agreement of 2000 (the so-called Algiers Agreement) and the lack of its full implementation – as well as *informing*

[*] Professor of Peace and Conflict Studies, Department of International Studies, Bjørknes University College, Oslo.

policy in relation to future bilateral engagements. One paper analyses the rulings of the Claims Commission under the agreement; the lack of implementation of the decisions from both sides are put in context in order to draw some lessons learned for normalising the bilateral relations between Eritrea and Ethiopia. A second paper explores the boundary dispute itself, and the intricacies of political and cultural relationships between the two former resistance movements – the EPLF and the TPLF– and how that might have influenced the shaping of bilateral ties and how the arbitration process was organised and framed. The important issue of bilateral trade relations and how that was organised and regulated after Eritrea achieved its independence is scrutinised and assessed in order to understand how that might have affected the outbreak of hostilities. Finally, the crucial humanitarian issue of the status of Eritrean refugees in Ethiopia in the aftermath of the peace process is addressed from both a legal, and in some measures, political perspective. All submissions will contribute to deepening our understanding of the outbreak of the war, its aftermath, and broadly, the settlement of sustainable peace and socio-economic relations between Ethiopia and Eritrea.

Understandably, there is a tremendous dearth of empirically based research knowledge on a range of topics of relevance to push forward and consolidate the peace process and reinvigorating the bilateral relations between the two countries. It ought thus to be an interest and priority of the two Governments' to accept and facilitate mutual research activities within each other's countries, as well as establishing join research programmes on issues of common interests. Most of this research will by necessity be shouldered by the vast and diverse Ethiopian university and research institutions, as the domestic Eritrean research capacity appears to be rather limited.

Consequently, Ethiopian universities of interest (and with sufficient capacity and expertise) should join hands and establish a task group to develop comprehensive sectorial (and subsequent disciplinary) research

agendas on a prioritised set of issues to study, with the multiple purpose of underpinning the peace process, reinvigorating the bilateral relations and regional integration, and revamping economic development activities and job creation in the borderlands and beyond. At the same time, the small Eritrean research community (primarily located at the College of Business and Social Sciences in Adi Keyhe, Hamelmalo College of Agriculture in Keren, and the Law School in Asmara), should be encouraged to do the same from their perspective and interests. Thereafter, a joint bilateral academic task group can identify the overlapping interests with the objective of establishing bilateral research groups.

A preliminary research agenda towards bilateral normalisation

There are of course many approaches to develop a research agenda on enhancing knowledge production on Ethio-Eritrean affairs, pursuing subject matters or organised along disciplinary focus. At an initial stage, however, a multi-disciplinary approach should be pursued to identify the key overarching and immediate concerns. A broad array of interdisciplinary research themes ought to be explored. To facilitate economic growth, food production and job creation in both countries, issues like *land utilisation, mineral extraction, agricultural development and their regulation* in the borderlands will be crucial to research in order to develop appropriate and contextualised interventions and value chain development. A deepening understanding of the drivers of *migration and displacement* among affected populations will also help build capacity to mitigate the negative consequences of such up-rootedness. These localised and empirically anchored research programmes will also help to foster a broader understanding of common cultural frames and issues of identity and connectedness between the peoples of Eritrea and Ethiopia.

However, taking the cue from the symposium 'Revisiting the Ethio-Eritrean Relations: From Separation to Conflict and Beyond', the

immediate research and knowledge production priorities, may be more narrowly focused into two broad themes.

Harmonising laws and institutionalising regulatory frameworks

Key to all aspects of mutual Ethio-Eritrean developments will be to revisit the legal regimes and regulatory frameworks defining the relations between the two countries. Due to the unique socio-historical relationship between the peoples of Eritrea and Ethiopia, official bilateral relations were not properly formalised and institutionalised post-independent Eritrea. Relying on political and cultural 'intimacy' between the ruling elites as 'substitutes' for formalised and institutionalised bilateral communication procedures has proved very disastrous in the run-up to the 1998-2000 war. Lessons need to be drawn from this in the current peace rapprochement, in order not to repeat earlier mistakes.

The law disciplines will be crucial in analysing the lacunas and inadequacies of law and regulatory frameworks to suggest improvements and revisions, as the peace process is unfolding and being consolidated. In partnership with social sciences, a continuous research engagement exploring how the renewed formalised bilateral relationship is evolving would be essential, in order to provide checks-and-balances, corrections, and input to policy and decision makers on both sides of the border. Building new institutions and joint bilateral committees, as prescribed in the Jeddah Peace and Friendship Agreement, may prove to be a challenging task; hence the necessity of establishing a separate scholarly analysis of the process.

Peace-building

State borders embed an inherent ambiguity. Borders may be exploited to create mistrust, stereotyping, the creation of enemy images, and thus the mobilisation of large-scale collective action by the means of identity politics. But people at the grassroots, as well as political leaders, do also harbour cognitive resources to view borders and boundaries as zones of

connection and familiarity, fostering cross-boundary contact and relationships, to mitigate stereotyping and developing cross-boundary supra-identities.

Formal bilateral relations and negotiations are but one way to negotiate peace – through agreeing on peace accords and subsequently developing a raft of bilateral agreements for balanced implementation. In this respect, legal scholars, political scientists and economists have a responsibility to explore and research the foundations and implementation of the bilateral agreements, and through that possibly suggest revisions or alternative mechanisms or collaboration.

While there is an increasing interest in peace initiatives that occur on various tracks at local levels, there is unfortunately little research on grassroots peace work and people-to-people activities. Emphasis still tends to be on the ways international actors can intervene in contemporary conflicts. However, there is growing consensus in peace building and conflict resolution theory that to resolve or transform conflict, responses are required at different levels of society: top (policy), middle (community) and grassroots (individual) levels.[1]

Achieving reconciliation and building sustainable peace between conflict-affected local populations is complementary to a top-driven process and equally important. Initiatives based on people-to-people peace building actions are played out locally in informal arenas through individual interaction and trust-building. While there has been little or no opportunity to commence dialogue and reconciliation in the past, the new context of 'formal peace' may eventually open a window of opportunity to help facilitate reconciliation at local levels. In such regard, the Ethiopian and Eritrean borderland populations play a dynamic role in grassroots peace building between the two countries. Borderland populations are a resource in (a) identifying mutually

[1] Gawerc, M. I. 2006. 'Peace-building: Theoretical and Concrete Perspectives'. 31.4 *Peace & Change*. pp. 435-478.

beneficial opportunities, (b) resolving local, inter-group discord among Ethiopians and Eritreans straddling the border, and (c) contributing to the mitigation of political disputes at a formal bilateral level. This opens up for a set of research projects in order to make this knowledge known and available for relevant decision-makers at the various administrative levels of the two states.

It is to hope that the formalised Ethio-Eritrea peace process creates a new era of research into Eritrean and Ethiopian studies, benefitting the peace process itself and the economic development of the two countries, as well as enlightening a general local and global audience to the cultural wonders and deep historical narratives of the peoples of the region.

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Ethiopia-Eritrea Claims for 'Loss, Damage or Injury' and the Claims' Commission: Lessons for Future Bilateral Relations.

Wondimagegn Tadesse Goshu *

1. Introduction

A lot has been said about the devastating war between Ethiopia and Eritrea that lasted for two years, from May 1998 to Dec 12, 2000.The human costs of the War were deaths, physical and psychological injuries and sufferings, and displacements of tens of thousands of people of citizens of both. In addition, the causalities of the War included destructions of property worth billions of dollars.[1] With the end of the War, the Parties entered the Algiers Agreement (AA) to settle outstanding issues, including claims. The Eritrea-Ethiopia Claims Commission (EECC) was established based on the terms of this Agreement. The EECC was constituted to arbitrate, on a binding manner, claims of 'loss, damage or injury' suffered by both governments, individuals and companies as caused by the acts or omissions of civilian officials, military personnel or others of both States.

The EECC began its operation in March 2001. The liability phase of the arbitration was finalized in December 2005, while the damages phase was completed in 2009. Unlike the initial plan of completion of the arbitration within four years since the formal cessation of hostilities, one year being allocated for filing of claims, the arbitration took about nine years. The EECC, after a lengthy process of filings, memorials, counter-memorials, oral statements and consultations, found both Ethiopia and Eritrea liable for some claims, while relieving them of

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[1] Eritrea-Ethiopia Claims Commission - Final Award – Ethiopia's Damages Claims, 17 August 2009, and Final Award, Eritrea's Damages Claims, The Hague, August 17, 2009.

some others. The grounds for dismissal included lack of jurisdiction (particularly temporal), not filing within the time specified in the AA, lack of evidence generally, and failure of evidence showing systematic violations, although sporadic violations could have been proven.

To its credit, in spite of the financial, time and other constraints challenging the smooth discharging of responsibilities, the EECC made a number of interesting findings, which will be briefly highlighted in this paper. Overall, the EECC granted seventeen awards ascertaining or dismissing liabilities and/or granting monetary compensation or other forms of satisfaction to both Parties. It also made eight decisions providing guidance on important issues such as jurisdiction and evidence.

Unfortunate as it has been to the Parties, to victims of the War and to those who believe in international rule of law, the EECC was dissolved without settlement of any of the awards and associated issues. It is no fault of the EECC, however. After a decade of the EECC's finalization and despite the Parties' express commitment in the AA to be bound by EECC's findings, neither of them relied on the awards and attempted to make payments of compensation to each other or to citizen victims of the War.

Things appear changing now. With the ascension of Prime Minister Abiy Ahmed to power in Ethiopia, the situation has improved and a bilateral agreement was reached between Ethiopia and Eritrea. While recent developments are no less miraculous as far as Ethio-Eritrean relationship is concerned, pending issues are yet to be settled, the principal ones being boundary disputes and claims. As indication of the ordering of pending matters, the boundary dispute is referred to in the current accord while there is no mention of claims of the billions of

dollars the Parties invoked before the EECC.[2] Whether the Parties' wish to extinguish the Claims or not, and whether the small amounts of compensation, compared to the Parties' Claims, granted by the EECC had any role in sidelining the EECC and its awards – have not yet come clear from the Agreement. But from conversations held with experts, it appears the Claims are awaiting negotiation by the Parties.

The purpose of this essay is not to evaluate the EECC's findings: they are final, binding and not to be re-litigated. The Claims were very complex. The time, resources and evidentiary challenges in the proceedings, as is often the case with mass claims in international law, were all present. As far as this study is concerned, the EECC could have done little to change course for the better of the Claims or their proceedings.

Rather, the objectives of this essay are to explore the Claims of the Parties and challenges before the EECC in order to make tentative suggestions on the way forward regarding the Claims. In doing so, this paper relies on statements and findings by the EECC. This is so because, as will be highlighted later, factual disputes between the Parties are incredibly rampant. To avoid such difficulties, unless expressly stated, factual statements are taken only as depicted in EECC's findings.

Organizationally, this paper begins with outlining EECC's mandates in the next section. Afterwards, the two phases of the Claims' proceedings, namely of liabilities and damages, will follow. The latter parts will explore the Claims that were accepted as well as dismissed, the amounts of compensation granted to both Parties and the major

[2] Agreement on Peace, Friendship and Comprehensive Cooperation between Eritrea and Ethiopia (The Jeddah Peace Agreement between Eritrea and Ethiopia), Sep 16, 2018. It doesn't say anything about the Claims, while committing to the implementation of the border decision. *See* Article 4.

challenges of the EECC in its determination of liabilities and compensation. This will be followed by discussion of current challenges and tentative recommendations. The essay completes with brief conclusions and recommendations.

2. The Commission and its Mandate

It should be noted at the outset that the two Commissions established by the AA are distinct: one dealing with Boundary disputes relating to delimitation and demarcation of the international boundaries of Eritrea and Ethiopia (the Boundary Commission) and the other dealing with claims– the Ethiopia-Eritrea Claims Commission (EECC), which is the subject of this paper. Apart from appearing under the same AA which established both,[3] there is no any formal relationship between the two commissions. As the EECC rightly indicated in one of its Awards, its findings have been irrespective of boundary delimitation/demarcation and decisions by the Boundary Commission.

The EECC's establishment, mandate and procedure were regulated by the AA, Rules of Procedure of EECC,[4]and International Law (IL). It was composed of five arbitrators, two members selected by each Party and one President selected by the four members. The decisions and awards were agreed to be final and binding; the Parties also agreed to honor all the decisions and pay promptly monetary awards of the EECC.[5]

[3] Article 4 regulates the Boundary Commission, while Article 5 is about the Claims Commission.

[4] Eritrea – Ethiopia Claims Commission, Rules of Procedure: It outlines the nature of 'Decisions'; the types of awards; the binding nature of decisions and awards; applicable law (Article 19), which is verbatim copy of the ICJ Statute; procedures for individual consideration of claims (governments on their behalf + claims in excess of $100,000, and any other meriting individual treatment such as claims seeking to prove actual damages); mass claims procedure; proof of acts or omissions, attributablity, and violation of international law; random sampling of evidence; and determination of compensation.

[5] Article 5 (17) of Algiers Agreement.

As outlined in the AA, the mandate of the EECC was to decide on 'all claims for loss, damage or injury' against each other or each other's' nationals.[6] Relying on general statements of the AA which refers to violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law which put emphasis on rules of international humanitarian law, the Rules of Procedure, as is the custom with international tribunals and general sources of IL, took the ICJ Statute as authoritative and provided the following as sources of IL for determination in the arbitration: Customary International Law; the four Geneva Conventions of 1949, as a matter of customary international humanitarian rules as well as treaty obligations (since Eritrea acceded to the Geneva Conventions on 14 August 2000, this date served as marking point for invocation as either customary law or treaty law;)[7] the Vienna Convention on Diplomatic Relations of 1961; and International Human Rights Law (e.g. ICCPR and ICESCR).[8]

In addition to Article 5(1) of the AA, the first Decision of the EECC elaborated on mandate and temporal scope of the EECC's jurisdiction.[9] On the basis of the relevant documents, the EECC's temporal jurisdiction included claims between May 1998 to December 12, 2000, i.e., the duration of the armed conflict. As a result all claims of *jus in bello* presented by both Parties were considered to fall within the temporal jurisdiction of the EECC. Eritrea's diplomatic claims of violations by Ethiopia of diplomatic immunity in 2001 was for example

[6] *Ibid*, Article 5.

[7] Partial Award, Prisoners of War, Eritrea's Claim 17, between The State of Eritrea and The Federal Democratic Republic of Ethiopia, The Hague, July 1, 2003.

[8] EECC, Rules of Procedure.

[9] Eritrea-Ethiopia Claims Commission, Decision Number 1: The Commission's Mandate/Temporal Scope of Jurisdiction.

dismissed for lack of temporal jurisdiction.[10] Moreover, the EECC assumed temporal jurisdiction on some Claims that arose after December 2000 – as long as they were related to the armed conflict or its disengagement. Hence, for example, while the EECC was not certain as to the exact period of continued violations, it found Ethiopia liable for unjustified delay in the release and repatriation of some Eritrean Prisoners of War (POWs) after December 2000 until a final release and repatriation was established, indicating that the temporal jurisdiction might extend after the cessation of hostilities as long as actions or omissions violating international law by the Parties are related to the conflict. Regarding Claims before May 1998, the EECC rightly and expressly indicated that it had no jurisdiction whatsoever.[11]

In addition to temporal jurisdiction, some Claims were also dismissed for filing out of time. The deadline for filing, i.e. 12 December 2001, was crucial for some Claims which would have otherwise been considered by EECC.[12] Claims dismissed on this ground included Eritrean Consulate's claims in Mekelle,[13] and Eritrea's claims for damages relating to the diversion of Eritrea-bound cargoes.[14]

While admitting that the essay does not intend to critically evaluate the works of the EECC, incidentally, it is worth noting that the EECC has been commended for its contributions to the development of international law including, for example, on emerging consensus, identification of gaps, and refinement of evidentiary standards in

[10] Partial Award, Diplomatic Claim, Eritrea's Claim 20, The Hague, December 19, 2005.

[11] Eritrea-Ethiopia Claims Commission, Decision Number 1: The Commission's Mandate/Temporal Scope of Jurisdiction.

[12] Article 5 (8) of AA provides one year from effective date of the Agreement. Claims not filed within the period but falling within the jurisdiction of the EECC were made to be extinguished.

[13] Partial Award, Diplomatic Claim, Eritrea's Claim 20, The Hague, December 19, 2005.

[14] Partial Award, Loss of Property in Ethiopia, Owned by Non-Residents, Eritrea's Claim 24.

connection with matters of civil/monetary compensation and international humanitarian law.[15] Indeed, it is becoming natural to expect new developments in international law from tribunals handling large and complex claims, often referred to as mass claims – as the case was with the EECC; hence, positive assessments of EECC's works regarding contribution to international law may not be surprising.[16] Under the system of international law, the lack of law-making and law-finding permanent structures that identify state practices and lead to the emergence and crystallization of customary law when fulfilling *opinio juris* requirements has impelled that *ad hoc tribunals* such as the EECC take huge responsibility in propounding on the state of rules of customary international law. The EECC has also been cited by some as important model for arbitration of international disputes, a point that will be raised later.

However, these contributions and congratulatory statements would have become more meaningful if the Parties, which established the EECC and for whose purposes the EECC existed after all (Treaty Law), had implemented and complied with its Awards diligently and with greater sense of legal duty. As highlighted in the subsequent sections, the EECC's works have been of little use apart from jurisprudential exercises.

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[15] Partial list of contributions on the works of the EECC include: Sean D. Murphy, Won Kidane, and Thomas R. Snider, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission*. 2013. Oxford University Press; Won Kidane. 2007. 'Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Ethiopia-Eritrea Claims Tribunal in The Hague'. 25 *WIS. INT'L L. J.* 23; and Ari Dybnis, Was the Eritrea–Ethiopia Claims Commission Merely a Zero-Sum Game? Exposing the Limits of Arbitration in Resolving Violent Transnational Conflict, 2011;

[16] For development and procedure of mass claims, *see* Howard M. Holtzmann and Edda Kristjánsdóttir. 2007. *International Mass Claims Processes: Legal and Practical Perspectives*.

3. The EECC: Claims, Liabilities and Compensation

3.1. Claims

Several claims were made by the Parties. According to the files of the EECC, Eritrea submitted a total number of thirty-two claims and Ethiopia eight. Apart from the variations in numbers, the claims presented by both Parties were largely similar in content: claims for reparation for injuries and for losses occasioned by violations of international law. All claims submitted by Ethiopia were on behalf of the government. For Eritrea, most were presented on behalf of the government, while it also presented a few claims on behalf of named individuals.

For systematization of the proceedings, the EECC, in consultation with the Parties, categorized the Claims into six. The first two related to unlawful expulsion and unlawful displacement of natural persons; the third and fourth related to prisoners of war and unlawful detention and treatment of civilians; the fifth category related to loss, damage or injury of persons not covered in the other categories; and the six related to governmental loss, damage or injury.[17]

Specifics of violations will be briefly noted below under liabilities and compensation. But here it would be useful to outline in a tabular form the combined Claims of both Parties and EECC's Awards. The first column presents the Parties' Claims, the second and third columns present if Ethiopia and Eritrea had the Claims and the last column presents EECC's findings.

[17] Eritrea-Ethiopia Claims Commission, Decision Number 2: Claims Categories, Forms and Procedures.

	Claims	Ethiopia [18]	Eritrea [19]	Liabilities and/or Dismissal
1	Prisoners of War	Yes	Yes	Both
2	Central Front	Yes	Yes	Both
3	Civilians Claims	Yes	Yes	Both
4	*Jus Ad Bellum*	Yes	-	Both
5	Western and Eastern Fronts	Yes	-	Both
6	Ports	Yes	-	Dismissed
7	Economic Loss Throughout Ethiopia	Yes	-	Both
8	Diplomatic Claims	Yes	Yes	Both
9	Western Front, Aerial Bombardment, Related Claims	-	Yes	Both
10	Pensions	-	Yes	Dismissed
11	Loss of Property in Ethiopia Owned by Non-Residents	-	Yes	Both

Table 1: Summary of Claims Presented, Liabilities Found, Dismissed or Both (Partly Found and Partly Dismissed)

[18] Here is the list of awards related to Ethiopia's Claims: Prisoners of War (Ethiopia's Claim 4) (Partial Award, July 1, 2003); Central Front (Ethiopia's Claim 2) (Partial Award, April 28, 2004); Civilians Claims (Ethiopia's Claim 5) (Partial Award, December 17, 2004); *Jus Ad Bellum* (Ethiopia's Claims 1-8) (Partial Award, December 19, 2005); Western and Eastern Fronts (Ethiopia's Claims 1 & 3) (Partial Award, December 19, 2005); Ports (Ethiopia's Claim 6) (Final Award, December 19, 2005); Economic Loss Throughout Ethiopia (Ethiopia's Claim 7) (Partial Award, December 19, 2005); and Diplomatic Claim (Ethiopia's Claim 8) (Partial Award, December 19, 2005).

[19] Here is the list of awards related to Eritrea's Claims: Prisoners of War (Eritrea's Claim 17) (Partial Award, July 1, 2003); Central Front (Eritrea's Claims 2, 4, 6, 7, 8 & 22) (Partial Award, April 28, 2004); Civilians Claims (Eritrea's Claims 15, 16, 23 & 27-32) (Partial Award, December 17, 2004); Western Front, Aerial Bombardment and Related Claims (Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26) (Partial Award, December 19, 2005); Pensions (Eritrea's Claims 15, 19 & 23) (Final Award, December 19, 2005); Loss of Property in Ethiopia Owned by Non-Residents (Eritrea's Claim 24) (Partial Award, December 19, 2005); and Diplomatic Claim (Eritrea's Claim 20) (Partial Award, December 19, 2005).

Again in consultation with the Parties, the EECC set out to consider the Claims in two phases: Liability and Damages phases, the first dealing with ascertainment of liabilities and the second, assuming that liabilities are established, assessment of damages and compensation or other reparations due. The following paragraphs present these two phases in brief.

3.2. Liabilities

With the exception of one Claim where Eritrea initially sought compensation for losses occasioned by breach of a telecommunications services agreement,[20] (which it withdrew later),[21] all Claims are either found justified and accepted or dismissed. In order to assist later observations on the way forward and the extent of Claims awaiting in current bilateral relations, a brief summary of liabilities found and claims dismissed will be made in the following sections. Generally it is noted that findings of liabilities are in accordance with principles and rules of state responsibility for an international wrongful conduct. According to the International Law Commission's (ILC) Draft on State Responsibility, which is generally considered to restate customary international law, the liability of a state arises when a conduct (an act or omission) is attributable to the state and the conduct violates international law.[22] As a result, acts or omissions violating rules of IL, including international humanitarian law and human rights law, conducted by state officials or individuals in Eritrea and Ethiopia had led to liabilities – as long as the acts and omissions were attributable to the states.

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[20] Telecommunications Services Agreement of September 27, 1993 between Eritrea and Ethiopia.

[21] Decision No. 6: Eritrea withdrew Claim No.18: Violations of Bilateral Telecommunications Agreement.

[22] International Law Commission (ILC). 2001. Responsibility of States for Internationally Wrongful Acts. Article 2.

a) Jus ad bellum

Among the controversial findings of the EECC has been its *jus ad bellum* ruling against Eritrea for unlawful use of force:[23] the finding that Eritrea violated Article 2(4) of the UN Charter by initiating a war in a manner contrary to international law.[24] Despite Eritrea's denial of responsibility, its invocation of self-defense as permitted under Article 51 of the UN Charter, as well as its objection of jurisdiction relying on the AA's plan to establish an independent body to investigate 'the origins of the conflict,'[25] the EECC accepted Ethiopia's argument and found Eritrea liable for unlawful use of force.[26] Particularly on the establishment of an independent body, the EECC believed the factual issues are distinct and the legality of Eritrea's use of force would not have been determined by the independent body.[27]

Setting aside whether the finding was accurate or not, two questions might be posed to those that opposed the EECC's assumption of jurisdiction on the matter. First, was it not necessary to determine the existence of violation of the legality of use of force under international law? The answer is obviously yes. International rule of law requires states to observe international law and any violation should entail liability as long as there is violation attributed to the State. It is the interest of all states, particularly concerned states, to determine the

[23] Christine Gray. 2006. 'The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?'. 17.4 *EJIL* 699–721.

[24] Eritrea-Ethiopia Claims Commission - Partial Award: *Jus Ad Bellum* - Ethiopia's Claims 1-8, 19 December 2005; Article 2 (4) of the UN Charter reads 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

[25] Article 3(2) of the AA. It envisages the establishment of an impartial body by Secretary General of the OAU, a body which was never established.

[26] Eritrea-Ethiopia Claims Commission - Partial Award: *Jus Ad Bellum [violation of rules of IL regulating the resort to force]*- Ethiopia's Claims 1-8, 19 December 2005.

[27] *Ibid*.

legality of use of force, a cardinal principle under international law. It is the interest of the wronged state or the state claiming to have been wronged, in this case Ethiopia, to invoke the violation of international law and demand state responsibility.

Second, assuming that it was necessary, what alternative was there, apart from the EECC, for the determination of legality and seeking reparations? Unless one wishes to totally disregard rule of law for the sake of peace or some other motive, the best candidate for determination of the legality was the EECC. First, the request is about reparations or claims, which the EECC was mandated. Second, assuming the 'independent body' was the one mandated, was it also to determine the claims arising from the unlawful use of force, and if yes, on what basis of the AA? The EECC did not have the luxury of determination of damages on already decided liabilities regarding the legality of use of force – as was the case with the United Nations Compensation Commission (UNCC) which had to determine only damages since the unlawful use of force by Iraq against Kuwait was already established by the Security Council itself.[28] The EECC had to determine liabilities first – before going to reparations, which it rightly did.

b) Prisoners of War (POWs)

At the start of its findings on POWs' Claims, the EECC was very kind towards the Parties. It recognized their commitment to most fundamental principles relating to the treatment of POWs, troops' training programs on international humanitarian laws (IHL), the taking

[28] UN Security Council. Resolution 687(1991), Adopted at its 2981st meeting, 3 April 1991. Available at https://uncc.ch/; Paragraph 16 of the Resolution reads: 'Iraq …, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's *unlawful invasion and occupation* of Kuwait (emphasis added!).

of POWs, the moving away of *hors de combat* to safety, and the treatment of POWs in custody despite the shortage of resources.[29] This positive acknowledgment aside, the EECC also highlighted their failures in some important obligations. Indeed the Parties raised serious allegations against one another, some of which were dismissed for lack of evidence – based on EECC's standard of proof which will be discussed later. Taking the EECC's findings alone, however, the Parties were liable for grave violations of IHL relating to the protection of POWs.

Violations by Ethiopia included acts or omissions by military personnel or other officers resulting in harms to Eritrean POWs: beatings or other unlawful abuse at capture or its immediate aftermath; deprivation of footwear during long walks from place of capture to detention; loss of personal property; enforced indoctrination; health conditions that seriously and adversely affected or endangered health; provision of diet that was seriously deficient in nutrition; failure to provide standard medical and preventive care (such as by segregating prisoners with infectious diseases and conducting regular physical examinations); and delay in repatriation.[30]

Violations by Eritrea in relation to Ethiopian POWs included: refusing visits of detention places, registrations, interviews, and services by the ICRC; killings at capture or its immediate aftermath; beatings or other physical abuse at capture or its immediate aftermath; deprivation of footwear during long walks from place of capture to place of detention; threats and beatings during interrogations at capture or its immediate

[29] Eritrea Ethiopia Claims Commission, Partial Award, Prisoners of War, Eritrea's Claim 17, between The State of Eritrea and The Federal Democratic Republic of Ethiopia, The Hague, July 1, 2003 and Partial Award, Prisoners of War, Ethiopia's Claim 4, The Hague, July 1, 2003.

[30] Partial Award, Prisoners of War, Eritrea's Claim 17, between The State of Eritrea and The Federal Democratic Republic of Ethiopia, The Hague, July 1, 2003.

aftermath; confiscation of personal property; pervasive and continuous physical and mental abuse in camps; failing to provide adequate housing, sanitation, drinking water, bathing and food; failure to provide standard medical and preventive care (by segregating prisoners with infectious diseases and conducting regular physical examinations); subjecting to unlawful conditions of labor; unnecessary suffering during transfer between camps; and failure to allow complaints about living conditions, seeking redress, and punishing for attempting to complain.[31]

c) Diplomatic Claims

Throughout the armed conflict, the Parties have not severed diplomatic relations, a fact which was commended by the EECC, which cited authorities on international law that showed the immediate termination of diplomatic relations as normal practice in armed conflicts.[32] But, the EECC acknowledged that the continued diplomatic relations were not without difficulties. It resulted in Claims of violations of diplomatic protection on several occasions by both Parties during the conflict as well as afterwards.[33] The EECC, based on the Vienna Convention,[34] which largely codifies customary law, found liabilities on both sides. Violations by Ethiopia included: searching diplomats and their luggage, confiscation of papers in violation of diplomatic immunity, and 'entering, ransacking, searching and seizing the Eritrean Embassy Residence, as well as official vehicles and other property, without Eritrea's consent.'[35] Violations by Eritrea included: brief detention of a

[31] Partial Award, Prisoners of War, Ethiopia's Claim 4, The Hague, July 1, 2003.

[32] Partial Award, Diplomatic Claim, Ethiopia's Claim 8, The Hague, December 19, 2005.

[33] Despite the existence of armed conflict, states are required to respect laws of diplomatic protection. *See* for example Article 39(2) of the Vienna Convention on Diplomatic Relations (1961), which requires respect for immunities and privileges of people having diplomatic protection even in times of armed conflict.

[34] Vienna Convention on Diplomatic Relations (1961).

[35] Partial Award, Diplomatic Claim, Eritrea's Claim 20, The Hague, December 19, 2005.

diplomatic member and withholding of a box of diplomatic correspondence including blank passports.[36]

Indeed, a number of diplomatic claims from both sides were dismissed by the EECC – mostly for not filing in timely fashion as well as for lack of temporal jurisdiction.[37]

d) Civilian and Other Complaints

Looking at the relevant clauses of the AA as well the arbitral proceedings, civilian victims were supposed to be the principal beneficiaries of the Claims process. As outlined in the previous section, four of the Categories of Claims were about civilian victims of the War. Except for lack of evidence, to be outlined later, several liabilities were found against both Parties, violating IHL rules protecting civilians and their properties. Detailing all of them is not necessary here, but relying on both liabilities and damages phases, the following would roughly depict the nature of the violations committed by both Parties.

Findings in favor of Eritrea: loss of property by non-resident Eritreans;[38] loss of businesses and property by Eritrean expellees;[39] looting, burning, stripping, destruction, etc. of buildings, businesses, government buildings, police station, courthouse, bakery, villages, livestock, cotton factory, and tobacco plant;[40] failure to prevent rape of women; an aerial bombing of a water reservoir; unlawful

[36] *Ibid*.

[37] Partial Award, Diplomatic Claim, Ethiopia's Claim 8, The Hague, December 19, 2005, and Partial Award, Diplomatic Claim, Eritrea's Claim 20, The Hague, December 19, 2005.

[38] Partial Award, Loss of Property in Ethiopia, Owned by Non-Residents, Eritrea's Claim 24, Dec 19, 2005.

[39] Partial Award of December 17, 2004 in Eritrea's Claims 15, 16, 23 and 27–32, Dec 17, 2004.

[40] Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26, The Hague, December 19, 2005.

displacement;[41] damage to or destruction of Eritrean hospitals and other medical facilities and loss of medical supplies; damage to cultural property; forcible expulsion of population; arbitrary deprivation of Ethiopian nationality to dual nationals in third countries; wrongful expulsion of dual nationals; failure to provide humane and safe treatment for expellees; and imprisonment of Eritrean civilians on security charges or detaining them for unknown reasons, under harsh and unacceptable conditions.

Findings in favor of Ethiopia include: beating of civilians; killings, injuries, abduction, forced labor, and conscription of civilians; unexplained disappearances; looting and destruction of property including houses and livestock; intentional and indiscriminate killings of civilians; failure to prevent rape of women; beatings of civilians; looting and destruction of government buildings and infrastructure;[42] failure to protect Ethiopian civilians in Eritrea from threats and violence; wrongful detention and abusive treatment of Ethiopian civilians in Eritrean custody; failure to protect the property of Ethiopian detainees expelled from Eritrea; and internal displacement.

There were several claims that were dismissed for one reason or another. Eritrea's claims dismissed, for failure of proof or lack of jurisdiction, include: unlawful, indiscriminate and disproportionate bombing campaign; prevention of displaced persons from returning, and indirect displacement.[43] Eritrea's claim on diversion of Eritrea-bound cargoes is also dismissed for not being timely filed.[44] Claims based on violations of the five bilateral agreements Ethiopia invoked

[41] *Ibid*.

[42] Partial Award, Western and Eastern Fronts, Ethiopia's Claims 1 & 3, The Hague, December 19, 2005.

[43] Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26, The Hague, December 19, 2005.

[44] Partial Award of December 17, 2004 in Eritrea's Claims 15, 16, 23 and 27–32, Dec 17, 2004.

were also dismissed for no violation of international law – since such treaties were suspended during the armed conflict.[45]

3.3. Cases dismissed

There were several Claims dismissed from both sides. Four factors account for the dismissals. First is lack of jurisdiction, principally of temporal jurisdiction; only claims related to duration of the War and as related to the War were admitted.

The second is filing out of time (filing after 12 December 2001). A clear case, for example, is Ethiopia's Claim of delays in repatriation of Ethiopian POWs, which was submitted after the deadline when Ethiopia saw Eritrea making similar submission. Ethiopia argued that it did not submit initially since it believed the EECC did not have temporal jurisdiction. The EECC found in Eritrea's favor for similar claim, making Ethiopia liable for delays in repatriation of Eritrean POWs; it dismissed Ethiopia's Claim on the ground that the Claim was not filed in time.[46]

The other, which accounts for dismissal of several of the claims and sub-claims, was lack of evidence, which will be explained later.

Another ground was the missing legal element, i.e. the finding that no violations of international law occurred, whether the facts were established or not.

The dismissed claims are noted wherever relevant. But owing to their continued importance in the bilateral relations, Ethiopia's Ports Claim

[45] Partial Award, Economic Loss Throughout Ethiopia, Ethiopia's Claim 7, The Hague, December 19, 2005.

[46] Partial Award, Prisoners of War, Eritrea's Claim 17, between The State of Eritrea and The Federal Democratic Republic of Ethiopia, The Hague, July 1, 2003 and Partial Award, Prisoners of War, Ethiopia's Claim 4, The Hague, July 1, 2003.

and Eritrea's Pensions Claim, will briefly be highlighted in the next paragraphs.

a) Ethiopia's Ports Claim

One principal category of Claims Ethiopia filed related to its properties detained at the Ports of Assab and Massawa.[47] Ethiopia alleged that dry cargoes, new vehicles, as well as fuel belonging to private citizens and the Ethiopian government were unlawfully expropriated by Eritrea. According to Ethiopia, the Ports Claims included 135,000 tons of dry cargo, including aid shipments and new vehicles, and 33 million liters of fuel. As evidence, Ethiopia attached to the Ports Claims the submission it made to the Court of Justice for the Common Market for Eastern and Southern Africa (COMESA) wherein it sought the *release of* and *damages for* Ethiopian-owned property at the Eritrean ports. The Claims before the COMESA Court was stayed because of the EECC.

Ethiopia's legal grounds for the Claims included violations of the five bilateral agreements,[48] (argument dismissed on the ground that the belligerents are entitled to suspend such agreements during war); breach to Ethiopia's transit rights as landlocked state (both on the bases of bilateral agreements as well as customary international law); and violations of international humanitarian law (regarding, at least, shipments of humanitarian goods, which were allowed to transit under IHL even in times of armed conflict).

Eritrea disputed Ethiopia's Claims arguing that the claims were either overstated or that Ethiopia lacked ownership; that Ethiopia's own initial actions partly prevented the transport of the goods; that Eritrea

[47] Around 95% of the cargoes were at Assab; *See* Ports Claim.

[48] The bilateral agreements referred to in the Claims are the following: Transit and Port Services Agreement of September 27, 1993; Protocol Agreement of September 27, 1993 on traffic between Ethiopia and Eritrea; Air Services Agreement of September 27, 1993; the Trade Agreement of September 27, 1993 and its Protocol of September 27, 1993 (on trade in goods and services), and the Commercial Road Agreement of September 27, 1993.

acted on a fair and reasonable manner; or that Eritrea was prepared for eventual transfer on terms agreed with Ethiopia (such as 23 sea containers of telecommunications equipment, belonging to the Ethiopian Telecommunications Corporation).[49]

The Claim was dismissed on the ground that there was no violation of international law; that the property was not owned by Ethiopia or Ethiopian nationals (such as shipments of humanitarian aid the ownership of which was not transferred to Ethiopia); that properties were stranded at the Ports owing to Ethiopia's actions (the EECC said evidence presented partly showed of this fact since there were movements of goods even after hostilities began); and that Eritrea legitimately exercised its belligerent rights by confiscation of Ethiopian governmental property or temporary sequestration of privately owned Ethiopian goods, which, according the EECC, were allowed under international law.

Two comments should be made here. To its credit, Eritrea did not distinguish between private and public property, and it claimed that it took custody simply because there was no any other choice to protect the environment and to enforce its domestic rules on removal of cargoes from Ports.[50] Second, Eritrea also promised to return the properties or balance off the proceeds.[51]

On the matter of post-war return, the EECC did not rule since, the EECC argued, a) Ethiopia did not reply on this issue, and b) it would in any event go beyond its temporal jurisdiction.[52] In any case, the EECC

[49] Final Award, Ports, Ethiopia's Claim 6, The Hague, December 19, 2005.
[50] *Ibid*.
[51] *Ibid*.
[52] *Ibid*.

encouraged the Parties to have mutual arrangement, do a survey of the remaining property, and ensure the transfer of stranded goods.[53]

These might be factored in the current negotiation and settlement of outstanding issues.

b) Eritrea's Pension Claims

Another claim which was dismissed on grounds of merits but awaits negotiation is the Pensions Claim presented by Eritrea. Eritrea argued the Ethiopian government interrupted, after the armed conflict, pension payments to Eritreans who served Ethiopia while Eritrea was part of Ethiopia.

In its dismissal, the EECC relied on Ethiopia's recognition of the desirability of agreed pensions regime to Eritreans and on Ethiopia's willingness to resume negotiations. While encouraging the resumption of negotiation, the EECC dismissed the Claim.[54] The EECC also offered to assist; it was not accepted.[55]

Again the pension claims might be discussed in the current settlement – based on the number of claimants and the volume of liabilities that are likely to be incurred by Ethiopia.

3.4. Compensation

Before outlining the issues of compensation, comments on two suggestions made but not followed up during the arbitration process should be made here, one by Ethiopia and another by the EECC.

Following the findings of liabilities, Ethiopia suggested a plan of using the EECC as a channel for donations and loans instead of pursuing the next phase of damages and compensation. The plan was objected to by

[53] *Ibid*.

[54] Final Award, Pensions, Eritrea's Claims 15, 19 & 23, The Hague, December 19, 2005.

[55] Final Award, Ports, Ethiopia's Claim 6, The Hague, December 19, 2005.

Eritrea and as a result had to be discarded. The plan would have been a better proposal – considering the limited resources of both countries.

Another suggestion was by the EECC, which was intended to limit the financial and other costs on the Parties. The EECC, in what it called 'fast-track' for damages, proposed to undertaking limited pleadings and evidence with a brief schedule of hearings. This proposal was not accepted by the Parties either.[56] Again, in hindsight, this suggestion would have saved costs.

Remedies provided by the EECC are, in principle, monetary compensation. In one of its decisions where it outlined the types of remedies expected, the EECC put the principle of monetary compensation without ruling out the possibility of other types of remedies – as long as they are found to be 'reasonable and appropriate'.[57] As a result, the EECC granted, with few exceptions, monetary compensation where the occurrence of damages is proven. In few cases, it also ruled satisfaction as adequate, particularly where no damage was shown.

While a detailed discussion is not necessary here owing, partly, to the little role played in the Parties' submissions of damages and EECC's Awards, the Rules of Procedure and Decision No. 5 of the EECC had

[56] Eritrea-Ethiopia Claims Commission - Final Award - Ethiopia's Damages Claims, 17 August 2009.

[57] Eritrea-Ethiopia Claims Commission, Decision Number 3: Remedies. Remedies in IL might contain restitution, reparation and satisfaction. See ILC's Responsibility of States for Internationally Wrongful Acts, 2001. Article 34 (Forms of Reparation) reads*:* Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination.

outlined a mass claims process, which unfortunately was not used in the proceedings.[58]

The proceedings for damages took into account a number of factors. In the first category were the principles applicable to damages. Three of them the EECC had elaborated. The first is the principle of *res judicata* where compensation is given only to claims to which liabilities are established in the first phase. The second related to evidence where the Parties shall prove damages. Finally, there had to be a legally sufficient connection between a wrongful conduct and injury for which damage is claimed.[59]

In addition to these principles, the EECC ruled out the possibility of punitive compensation, where huge compensation could be imposed to deter any future violation of *jus ad bellum*; it argued that in such cases the amount of monetary compensation had little deterrent effect. Instead, the EECC limited itself to the granting of remedial compensation.[60]

In addition to applicable legal principles, the EECC also took several factors into account in the determination of compensation including:

- The Parties' limited economic resources (according to the EECC, for example, Ethiopia's compensation claims amounted to three times Eritrea's national product at the time);
- The Parties' obligations under international human rights law such as ICESCR and ICCPR (high amount of compensation

[58] Rules of Procedure & Eritrea-Ethiopia Claims Commission, Decision Number 5: Multiple Claims in the Mass Claims Process, Fixed-Sum Compensation at the $500 and $1500 Levels, Multiplier for Household Claims.

[59] Eritrea-Ethiopia Claims Commission - Final Award - Ethiopia's Damages Claims, 17 August 2009.

[60] Generally, punitive damages are not available under IL. *See* for example, Nina Jørgensen. 1998. 'A Reappraisal of Punitive damages in International Law'. 68 (1) *British Year Book of International Law*, 247-266. (doi:10.1093/bybil/68.1.247).

might result in deprivation of the means of subsistence, in violation of the States' human rights obligations);

- Maintenance of peace which might be affected by extensive compensation;[61]
- The nature and seriousness of the unlawful acts, whether they were intentional or not, mitigating or extenuating circumstances, the number of victims, and implications of the injuries for the victims' future lives;[62]
- The levels of evidence (considered in a later section);[63]
- Constraints in time and resources (according to EECC, precise determination of damages would take years with 'expensive proceedings');[64]

With all factors considered, the EECC awarded reparations (monetary compensation or mere finding of satisfaction) for nineteen items under *jus in bello* and eighteen items for *jus ad bellum* damages in favor of Ethiopia. Ethiopia's Claims based on *jus ad bellum* were wide-ranging. Many of them were not accepted such as: disruption of Ethiopia's international trade, loss of tourism, loss of tax revenue, and decline in Ethiopia's investment, foreign investment included.[65]

[61] Eritrea-Ethiopia Claims Commission - Final Award - Ethiopia's Damages Claims, 17 August 2009.

[62] *Ibid.,* and Final Award, Eritrea's Damages Claims, The Hague, August 17, 2009.

[63] Eritrea-Ethiopia Claims Commission - Final Award - Ethiopia's Damages Claims, 17 August 2009.

[64] *Ibid*.

[65] Partial Award, Economic Loss Throughout Ethiopia, Ethiopia's Claim 7, The Hague, December 19, 2005.

In the end, Ethiopia's total monetary compensation awarded by the EECC was US$ 174,036,520.[66]

For Eritrea, sixteen items were counted for monetary compensation, two findings on satisfaction, and four items on behalf of named individuals in relation to Ethiopia's violations of *jus in bello*.[67]

The monetary compensation for Eritrea was US$ 161,455,000 on behalf of the State, and US$2,065,865 on behalf of named individuals.[68] The totals of the amount of compensation awarded to both sides was US$ 337,557,385.

Unsurprising from EECC's counting of factors to limit the amount of compensation, the compensation awarded is just a fraction of what the Parties had requested (0.16%). Ethiopia's claims amounted to around US$ 14 Billion, while Eritrea's equaled to US$ 6 billion, together amounting to US$ 20 Billion. Indeed, the EECC had foreseen the possibility that the compensation awards might not reflect the actual total damages both Parties had suffered.[69]

Overall, the compensation awarded in the second phase was not as sweeping as it seemed at the liability phase. The constraints as relating to evidence, EECC's engagement with systemic and rather than individual violations, and time and resources are pointed out elsewhere. Here, a few words are in order in connection with Ethiopia's *jus ad bellum* Claim.

When the EECC found Eritrea liable in the first phase for *jus ad bellum*, Ethiopia had expected awards for extensive losses, injuries and

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[66] Eritrea-Ethiopia Claims Commission - Final Award – Ethiopia's Damages Claims, 17 August 2009.

[67] Final Award, Eritrea's Damages Claims, The Hague, August 17, 2009.

[68] *Ibid*.

[69] Eritrea-Ethiopia Claims Commission - Final Award - Ethiopia's Damages Claims, 17 August 2009.

damages allegedly caused by Eritrea's violation of international law relating to use of force. Eritrea denied it violated *jus ad bellum,* or if it did, Eritrea argued a mere declaration of liability would suffice as satisfaction.

The EECC was not prepared to grant the extensive damages Ethiopia had sought. It adopted the criteria of proximate cause, reasonably foreseeable, as legal causation in determination of damages for violations of *jus ad bellum,* excluding the enormous amount of damages Ethiopia requested. Compensation and reparations in the past awarded for violations of *jus ad bellum* were thoroughly considered by EECC. It admitted the existence in history of extensive damages – like in the case of Germany towards Israel. But the EECC pointed out that extensive damages are either victor's justice, which the EECC was not established to administer, or moral or political duties (instead of demands of state responsibility). Accordingly, the EECC argued, broad damages as invoked by Ethiopia are not supported by international law.[70]

Although punitive damages are not supported, full reparation which the EECC has not granted, is the kind of reparation envisaged by general international law. According to the ILC's Draft Articles, a state which is responsible for international wrongful act is 'under an obligation to make *full reparation* for the injury caused by the internationally wrongful act'. (Emphasis added!)[71] In a part dealing with compensation which was the principal reparation adopted by the EECC, the Draft Articles require the responsible state to 'compensate for the damage caused'.[72] The only exception envisaged is contribution to injury by the wronged

[70] Eritrea-Ethiopia Claims Commission Decision Number 7: Guidance Regarding *jus ad Bellum* Liability.

[71] ILC. 2001. Responsibility of States for Internationally Wrongful Acts. Article 34.

[72] *Ibid.*, Article 36.

state.[73] One of the paragraphs of the Chorzow Factory case, which is often cited as authority regarding the amount of compensation, reads:

> *The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipeout all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.*[74]

Factors such as economic capacity, the responsible state's obligations in human rights laws and others which the EECC took into account are not envisaged under customary international law. But, a strict application of international law would have meant little in practice considering the enormity of the claims raised by both Parties. Being pragmatic was probably the only option the EECC had in the determination of the amount of compensation. Indeed pragmatism in mass claims like the Eritrea-Ethiopia Claims is not a new phenomenon. For example, the UNCC had varied standards of evidence depending on the volumes of reparations: lower standards for smaller claims and higher standards for larger claims.[75] Balancing fairness (providing compensation for all damages) and efficiency (a timely granting of

[73] *Ibid.*, Article 39.

[74] PCIJ. 1928. The Factory at Chorzow (Claim for Indemnity) (The Merits) Germany v. Poland, para 125.

[75] Pablo De Greiff . 2006. (*eds.*).*The Handbook of Reparations*. Oxford University Press. P. 372.

compensation), for example, for thousands of individual claimants, has also been among the most important considerations in mass claims.[76]

3.5. Noteworthy Challenges of the EECC

As the Claims proceedings indicate, there were challenges encountered by the EECC. Two are worth noting here.

a) Evidentiary Challenges

The EECC, relying on general international law, considered its standard of proof to be 'clear and convincing evidence' in establishment of liability.[77] The Commission rejected a higher standard of proof – as it was not trying to establish individual criminal responsibility.[78] The types of evidence presented by the Parties and obtained from other sources included sworn affidavits (e.g. by individual victims and former POWs), documents (such as medical records), claims forms, expert reports, satellite imagery, photographs, charts, news reports, statements of officials, administrative and court documents, and bomb fragments.

The principal challenge for EECC in connection with evidence was the Parties' 'diametrically opposed' understanding of relevant facts.[79] The Commission even noted, without blaming the Parties – as there would be no utility in it, of truth as 'the first casualty' of war, even quoting Julius Stone about 'nationalization of the truth'.[80] This caused difficulty

[76] *Ibid.*, p. 355.

[77] *See* for example, Partial Award, Prisoners of War, Eritrea's Claim 17, between The State of Eritrea and The Federal Democratic Republic of Ethiopia, The Hague, July 1, 2003.

[78] *See* for example on this issue of the EECC's statement: Eritrea Ethiopia Claims Commission, Partial Award, Prisoners of War, Eritrea's Claim 17; Eritrea-Ethiopia Claims Commission, Decision Number 4: Evidence also provides guidance on the importance of evidence.

[79] Partial Award, Central Front, Ethiopia's Claim 2, The Hague, April 28, 2004 and Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, The Hague, April 28, 2004.

[80] *Ibid.*

for EECC, with limited time and resources. There was no possibility of verifying sworn testimonies. The EECC simply relied on clarity, depth, corroboration, consistency, cumulative character, etc. of pieces of evidence presented. In any event, the Commission admitted that the existence of conflicting evidence, together with the standard of proof, resulted in 'fewer findings of liability than either Party expects.'[81]

It is also interesting to note that the Commission used less rigorous proof for quantification of damages (using for example estimation) and varied compensation levels depending on the level of standard of proof.[82] As indicated in the previous section, this is becoming common in mass claims and is a matter of pragmatism brought about by difficulties associated with evidence before arbitral tribunals with little time and resources to summon witnesses and cross examine, to undertake field visits and verify, and to have exhibits of documents and materials and inspect for thousands of institutional and individual claims.

b) Serious (Frequent or Pervasive) Violations and Not Individual Incidents

The other major challenge was the Commission's determination to limit itself to findings of liabilities for systemic violations, i.e. illegal acts or omissions so 'frequent or pervasive' as affecting 'significant numbers of victims' and not individual incidents.[83] Because of this, the EECC had to unfortunately dismiss individual violations despite evidence and their grave consequences to individuals affected. This the EECC attributed to the limited time (only 3 years) and resources the Parties had provided – depriving the Parties themselves and the Commission to consider

[81] *See* for example, Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, The Hague, April 28, 2004.

[82] Eritrea-Ethiopia Claims Commission - Final Award – Ethiopia's Damages Claims, 17 August 2009.

[83] Partial Award, Prisoners of War, Eritrea's Claim 17, between The State of Eritrea and The Federal Democratic Republic of Ethiopia, The Hague, July 1, 2003.

each individual cases of violations of international law.[84] As a result, the Commission had to regularly express its regrets of dismissals of isolated violations – despite their impacts on individual civilian victims, POWs or properties.[85] It happened also that in some cases sporadic violations of laws of war – including killings of POWs and killings and rapes of civilians – had to be dismissed for lack of pervasiveness. This is a balancing act of efficiency and fairness which was referred to earlier in relation to mass claims.

4. Pending Challenges and Some Suggestions

As outlined elsewhere, justice requires that the Parties address issues of claims in a transparent and fair manner. It might be that nothing changes by way of compensation or anything. But to take lessons, to provide assurance to private actors in future dealings, and so on, the Claims should be addressed. If that is so, there are several challenges that they have to address. In the following sections, the key challenges will be highlighted with a few recommendations.

4.1. Non-Implementation of EECC's Awards

In spite of the framing of the AA, the Parties' commitment to implement decisions of the EECC promptly, or enormous expenses of the arbitral proceedings etc., the awards of the EECC were not executed by both Parties. It is around a decade since the final awards were issued. As a result, one principal issue the Parties encounter if they take the Claims seriously is whether to implement the EECC's awards or not, to totally abandon them or not, or to re-negotiate or not.

The Parties' failure to implement was not as such a surprise. By the time the EECC was granting its partial and final awards (between 2005-

[84] *Ibid*.
[85] *Ibid*.

2009), the relationship between the Parties was at its lowest point since the War, owing to their inability to resolve the boundary dispute, which was the official reason for the armed conflict. The much hoped for boundary settlement through the Boundary Commission, which had passed a Delimitation Decision in 2003, could not be reached. In any case, with no hope of implementation of its awards in sight, the EECC was eventually dissolved.

It is unfortunate that the recent Agreement between Eritrea and Ethiopia has not said anything about the EECC's Awards, as well as other pending claims, while committing to implementation of the Boundary Commission's decision. [86] What is to infer from this omission?

The Agreement's silence on claims should not be interpreted to mean they are not relevant. The Agreement is a framework on peace and friendship with few clauses on urgent matters such as boundary issue, which was the immediate cause of the stalemate. As a result, there is still room for the Parties to negotiate on outstanding issues of the Claims including the EECC's Awards.

The Agreement envisages the establishment of a High-Level Joint Committee as well as Sub-committees;[87] one sub-committee could look into the possibility of implementation of the Awards of the EECC. Disregarding the decisions and awards would not be appropriate considering the resources spent so far. Any negotiation on claims should start or at least include the EECC's Awards.

[86] The Peace Agreement, Article 4 provides for a clause committing to the implementation of the Eritrea-Ethiopia Boundary Commission decision.

[87] Article 7 of the Agreement.

4.2. The Missing Humanitarian Character of the Claims

Despite the EECC's pleasant words that the Parties were able to observe IHL, serious violations of IHL were committed against civilians, POWs and properties. In violation of international rules of *jus ad bellum* and *jus in bello*, lives were lost, people were injured, and properties were destroyed. In short, there are war victims that should have been compensated for their losses, injuries and damages. Despite their sufferings, they were the principal beneficiaries of neither the Claims proceedings nor other schemes that might have planned to mitigate injuries and losses caused by the war.

For this, the AA is partly to blame in its adoption of more or less the traditional arbitral model of state-to-state complaints. Despite the declaration to address socio-economic impacts of the war on civilians, the AA has not permitted individuals to appear before the EECC. It was only the Parties on behalf of themselves or citizens that were allowed to bring claims before the EECC.[88]

Since there was no obligation, rather discretion, to bring claims on behalf of individual victims, Ethiopia's claims of compensation, for example, were submitted only on behalf of the State, and none on behalf of nationals.[89] Again upon EECC's admission, the compensation granted was more about damages against the State and not of compensation for civilian victims.[90] With a few exceptions, Eritrea's Claims were also largely on its own behalf. Arguably the AA could have adopted a better approach that allows individuals to present claims

[88] Article 5(8) of AA.

[89] Eritrea-Ethiopia Claims Commission - Final Award - Ethiopia's Damages Claims, 17 August 2009.

[90] *Ibid*.

before the EECC.[91] Probably, the results could have been better at least to individual victims.

Moreover, constraints in terms of time and resources had also contributed for the states to limit their claims to inter-state. Indeed under the circumstances, the EECC could have done little to ensure that the humanitarian objectives of the Claims proceedings were met, except to regularly remind the Parties of these objectives. To its credit, the Commission, on several occasions, had requested the Parties not to keep out of sight civilian victims out of the proceedings.[92] In one of the decisions related to war victims, it specifically appealed to the Parties to find resources, including compensation to be granted to benefit the various categories of war victims through relief programs such as 'health, agricultural and other services.'[93] That would have been useful except that the Parties did not embrace the suggestion. In the current negotiation, both states should look back and see if there are people, civilians or otherwise, who are still suffering from the damages and injuries of the War.

Of course, both Ethiopia and Eritrea might have designed programs distinct from the Claims proceedings through aid, governmental budgets, and other schemes. Civilian victims on the front lines would not have recovered from the devastating losses and injuries and displacements and violations of all sorts of rights without assistance.[94] These activities might be factored in the final settlement of claims.

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[91] Ari Dybnis. 2011. *Was the Eritrea–Ethiopia Claims Commission Merely a Zero-Sum Game?: Exposing the Limits of Arbitration in Resolving Violent Transnational Conflict*. Loyola Law School. Los Angeles.

[92] Eritrea-Ethiopia Claims Commission - Final Award – Ethiopia's Damages Claims, 17 August 2009.

[93] Eritrea-Ethiopia Claims Commission, Decision Number 8: Relief to War Victims.

[94] The Secretary General of the UN used to report on humanitarian and human rights situation relating to frontline towns and other related places, in which he also detailed humanitarian and other activities carried out by UN and other Agencies to individuals and

4.3. Lesser Damages, Claims Dismissed and Claims Extinguished

As explained in the liabilities and damages sections above, the totality of damages has not been established. Upon the EECC's admission, the awards have not reflected the entirety of damages owing to lack of evidence, or because it was restrained by resources and time. It is only a fraction of the claims that the EECC was able to award. In this connection, two categories of claims could be identified: Claims dismissed but not extinguished, and claims dismissed and extinguished.

a) Claims Dismissed but Not Extinguished

If negotiations happen today regarding Claims, there are two categories of claims that should be taken into account, apart from liabilities and damages found by the EECC. The first is the category of claims dismissed for lacking temporal jurisdiction: these Claims related to acts and omissions before the start of the armed conflict and those that arose afterwards. Depending on the gravity of violations, the claims could be negotiated.

The other category relates to claims dismissed owing to the legality of acts and omissions during the armed conflict. Once the conflict ended, as is the situation now, those claims could revive under international law and become the subject of negotiation among the Parties. Ethiopia's Ports' and Eritrea's Pensions' Claims could fall under this category. In the case of the Ports' Claims, Eritrea promised to return the balance. The Parties need to negotiate the matter, make an inventory, and if possible, ensure the return. The same could be suggested regarding the Pensions' Claims.

communities affected by the armed conflict and associated conducts by both States. *See* for example the Report of the Secretary-General on Ethiopia and Eritrea, 23 January 2008.

b) Claims Dismissed and Extinguished

There were several Claims that the EECC dismissed, claiming that they were extinguished as mandated by the AA. These include claims filed out of time and claims to which evidence was lacking. While it is difficult to revive such claims, the Claims filed out of time could be negotiated in good faith.

c) Bilateral Agreements and Effects on Wars

According to EECC's findings, the five agreements invoked by Ethiopia were suspended because of the armed conflict; hence, Ethiopia's claims for economic losses because of the alleged violations of these treaties were dismissed. While this might be right under the current state of international law, challenges might be mounted. The traditional understanding requires reassessment.

To begin with, the agreements are not mere bilateral accords. They are designed to implement the transit right of a landlocked state as allowed under international law. Customary international law provides the right of access to and from the Sea and freedom of transit to land-locked states, which should apply equally in Eritrea-Ethiopia relations.[95] True this transit regime allows the transit state, in this case Eritrea, to take all measures to protect its 'legitimate interests' which might include the termination of the transit right of Ethiopia during armed conflict.[96] But, as long as a state, including landlocked state, has inherent right of access to the Seas, the commencement of War should not automatically end transit rights and associated relations. According to the ILC, armed conflicts need not necessarily suspend or terminate treaties.[97] From this, a stronger argument could and should be made for landlocked

[95] United Nations Convention on the Law of the Sea. 1982.Part X, Article 125.

[96] *Ibid*.

[97] ILC. 1985. The Effects of Armed Conflicts on Treaties.

state not to lose, in automatic fashion, transit rights that are based on bilateral agreements.

5. Conclusions and Recommendations

It has been more than a decade since the EECC issued the final awards of compensation for violations of *jus in bello* (against both) and *jus ad bellum* (against Eritrea). The EECC expected that the compensation by both countries would be paid promptly following the final awards.[98] That has not occurred. The EECC also hoped the compensation received would be used for civilian victims of war.[99] That did not happen either, and could not have occurred in any case as no compensation settlements were realized.

Currently, the two States are in good terms with the peace agreement, the frequent visits by state leaders, the exchange of people, maintenance of roads connecting both, bountiful good faith, and other positive developments happening. With these developments, the countries are expected to close the chapter of past animosity, rectify the wrongs, and move forward for the benefit of both states and their people.

As far as the topic of this essay is concerned, there are two possibilities available for the Parties. To abandon the issues of claims in total or to fully or partly address the same. Abandonment, as noted elsewhere, is not a wise course. The Claims, both awarded and yet to be requested and negotiated, are in billions of dollars. It would also be irresponsible to ignore all civilian and POWs victims, just pretending that it had all passed or would simply go away. True, it has been two decades since

[98] Eritrea-Ethiopia Claims Commission - Final Award – Ethiopia's Damages Claims, 17 August 2009 and Final Award, Eritrea's Damages Claims, The Hague, August 17, 2009.

[99] Eritrea-Ethiopia Claims Commission - Final Award – Ethiopia's Damages Claims, 17 August 2009.

the losses, injuries and damages – and raising them right now might appear difficult. But the passage of time should not be excuse – at least to recognize past violations and rectify damages if there are still individuals suffering. Statutory limitations may not apply under the circumstances.[100] It is an emerging practice that individuals should also have a remedy for the breach of international obligations,[101] at least by way of recognition of wrongs done to them. Moreover, settling the claims in transparent and fair manner is also about the future – and about drawing lessons. Future armed conflict would less likely occur, but it is not in the realm of the impossible. The lessons from the Claims would also help peace time relationships.

Assuming that the Parties desire to address the issue of Claims, comprehensive negotiation and settlement are crucial on the way forward. There are several challenges to address, which were noted in the previous sections. The evidentiary challenges persist – now particularly that two decades have elapsed, documents destroyed, properties spoiled, damages repaired, etc. But the Parties could negotiate in good faith and avoid complete denials as they did before the EECC.

It is submitted that any negotiation on claims should start with EECC's findings and damages. The Parties should expressly acknowledge the excellent job the EECC has done, notwithstanding the unfortunate circumstances that led to non-implementation of any of its findings. This is not of course to suggest that the Parties need to agree on each finding. As a matter of fact, reasonable disagreements might surface as to some of the conclusions. For example, there appears some

[100] Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity. New York. 26 November 1968; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law. 2005. Article 6.

[101] Dinah Shelton. 2015. *Remedies in International Human Rights Law*. 3rd ed.. Oxford University Press.

inconsistency in EECC's determinations where the EECC found Ethiopia liable for not providing compensation for trucks and buses requisitioned, while implying that issues of return of Ethiopia's stranded properties at the Ports would fall beyond its temporal jurisdiction. This is simply to suggest that EECC's findings should be considered final on factual determinations.

While respecting the EECC's verdicts, however, the Parties need not feel constrained by any of the previous findings. The High-Level Joint Committee and its sub-committees established by the new bilateral agreement could be a good forum for negotiation. Mutually agreed upon settlements are not excluded. Moreover the AA expressly allows the settlement of 'outstanding claims, individually or by categories, through direct negotiation or by reference to another mutually agreed settlement mechanism.'[102] Implementing the Awards in ways the Parties see fit is a possibility and the Parties could negotiate on outstanding matters such as Pension. Monetary compensation may not be necessary owing to the lapse of time, for example. The recognition of wrongs might as well serve as satisfaction. The author is not aware of the current state of war victims. But their stories and concerns should be recognized and documented in any final settlement of claims.

Because of the long mutual history, shared cultural and religious practices, and geopolitical necessities, the fates of the two states are intertwined. As landlocked state as well, Ethiopia would benefit out of peaceful, mutually beneficial and principled relationship. If the Parties are committed, they could and should create exemplary relationship in terms of peace, friendship and trade, a model to Africa and the world. One good example is Eritrea's reluctance from invoking the application of laws of war for the Ports Claims. Although it was not prevented from confiscating governmental properties during the War, Eritrea did

[102] AA, Article 5 (16).

not claim to have the right to do so as allowed under customary international law. That was exemplary gesture. Although customary international law does not appear to create special regime wherein properties of landlocked states in a belligerent territory exercising transit rights are accorded special treatment, Eritrea had pointed out before EECC's proceedings that it was willing to return governmental properties together with private properties. Again, whatever the motives, the unilateral action adopted by the Ethiopian government granting restitution or return of proceeds of properties to Eritreans and considering them like nationals in the exercise of property ownership rights and in carrying out businesses is also exemplary.[103]

In the context of the ongoing negotiations, there are a number of factors that the Parties should consider. Currently, the opinion of the Parties is similar. Claims before and after the war, which were dismissed for lack of jurisdiction, should also be considered – including violations of diplomatic immunities dismissed for lack of temporal jurisdiction. Even some of the claims the EECC considered extinguished, such as claims filed out of time, should also be factored in the negotiation.[104]

Consultations with people affected is also crucial, particularly of those whose lives are still impacted because of the wrongs done. Studies and assessments are important regarding some of the claims such as survey of Ethiopian properties detained at the Ports in order to transfer the balances as promised by Eritrea. The pension entitlements also need valuations of the types of entitlements and whether the pensioners are still interested in the claims in order to implement Ethiopia's recognition of fair and agreed upon regime of pensions.

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[103] Council of Ministers Directive to Enable Eritreans Deported from Ethiopia Due to the Ethiopia-Eritrea War Reclaim and Develop their Properties in Ethiopia [Unofficial Translation]. 2009.

[104] According to AA, Article 5(8), claims which should have been submitted to the EECC but not submitted or not submitted within the deadline are said to be 'extinguished' in accordance with international law.

As indicated in the AA, one of the principal objectives of the Claims' substance and procedures had been to offset negative impacts of the war on civilian population, including deportees.[105] That objective has spectacularly failed, for there were no remedies coming out of the AA and EECC's processes. But this does not include remedies being granted out of the Algiers' process –such as the return of properties to Eritrean citizens by the Ethiopian government. Currently, the moment should be seized to recognize war victims and compensate, if possible, in ways the States are able.

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[105] AA, Article 5(1).

The Ethio-Eritrean Boundary Dispute: Anomalies and Imperatives for Peaceful Relations

Dereje Zeleke Mekonnen *

1. Introduction

The Ethio-Eritrean boundary dispute signifies the culmination of an unusual state of affairs where a unique inter-state relationship descended into violent conflagration in a period of five years. The apparent abnormality of the relationship is attributed, by many observers, to the special relationship between the two liberation fronts – Tigray People's Liberation Front (TPLF) and Eritrean People's Liberation Front (EPLF) – which assumed state power in Ethiopia and Eritrea respectively. The strange pre-war relation between the two fronts reached its zenith when the 'TPLF unequivocally endorsed the results of the Eritrean referendum on independence and became the first government to recognize an independent Eritrea in 1993, thus paving the way for Eritrea's entrance into the community of nations.'[1]

In the post-independence years that followed, the two ruling fronts forged anomalous relations unseen elsewhere in inter-state relations only to lock horns, five years later, in one of the bloodiest conflicts in Africa at the conclusion of which they ventured into arbitration to settle a boundary dispute.

This article briefly examines the pre-war relations of the two countries in order to give background to the devastating war. The main focus of the article, though, is examination of the legal aspects of the boundary

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[1] Michael Woldemariam. 2015. 'Partition Problems: Relative Power, Historical Memory, and the Origins of the Eritrean-Ethiopian War'. 21:2 *Nationalism and Ethnic Politics*. p. 169.

dispute. Anomalies ensuing from the very agreement on the basis of which the dispute was settled through arbitration, as well as other abnormalities such as the dubious choice of law, resurrection of defunct colonial treaties and the subsequent loss/cession of territories will be discussed. The article also looks into the vulnerabilities of Ethiopia vis-à-vis Eritrea and points out some imperatives to ensure peaceful future relations between the two countries.

2. Ethio-Eritrean Relations: From Queer Intimacy[2] to Violent Conflagration

Following Eritrea's entrance into the community of nations, there began a new era of strange relations during which TPLF pursued policies designed 'to send one clear signal to the Eritreans[:] … to portray Eritrean/Tigrean relations as being more intimate than the one existing with their 'fellow Ethiopians."[3] The most prominent of these signals, according to Leenco, is '[a]rming Eritreans residing in Ethiopia while simultaneously disarming Ethiopian nationals.'[4] Abbink concurs with Leenco's observation by describing the era as one of 'problematic political and economic relationship since 1991', involving 'Ethiopian military hardware given 'on loan' to Eritrea well before the war.'[5]

Reminiscing the prevalent zeal to recognize Eritrea's independence right after the defeat of the Derg regime in 1991, Leenco wrote: 'The TPLF then openly endorsed Eritrea's independence while EPLF leaders declared the postponement of their *de jure* independence until

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[2] Leenco Lata. 2003. 'The Ethiopian-Eritrea war'. 30:97 *Review of African Political Economy*. p. 369, points out the 'genealogical and ideological intimacy of the EPLF and TPLF leadership' as one of the contributing factors for the conflict.

[3] *Ibid.*, p. 378.

[4] *Ibid*. Leenco cites Eritrean sources which assert that 'support by Eritreans residing in Ethiopia played a critical role in enabling the TPLF to prevail over its internal challengers'.

[5] Jon Abbink. 2003. 'Ethiopia-Eritrea: proxy wars and prospects of peace in the horn of Africa'. 21:3 *Journal of Contemporary African Studies*. p. 409.

after referendum two years later.'[6] Ironically, maltreatment, abuse and killings of Ethiopians in Eritrea was so widespread then that 'massive expulsion of Ethiopians in Eritrea already started in 1991 [had] led to at least 50,000 people (…) being sent out without any of their possessions.'[7]

The goodwill of the era which was a logical sequel to the personal closeness of the two leaders was reflected in policy when the TPLF-led Transitional Government 'fully endorsed an Eritrean referendum on independence and its eventual result in April 1993, … attached no conditions to the referendum process, fully delegating its conduct to the EPLF and UN observers.'[8] In a bid to further cement the strange relationship, the government 'made no change of policy on the legal and economic status of Eritreans who remained in Ethiopia proper, continuing to vest them with virtually all the rights of an average Ethiopian.'[9] The government 'also agreed to take on the full debt obligations of the Derg regime instead of dividing it with Eritrea and generously offered to share international aid.'[10]

The strange relations also carried the seeds of the future conflict which, in the words of Abbink, was a 'widely deplored family quarrel between closely related regimes in Eritrea and Ethiopia.'[11] There appears to exist a wide consensus among observers that the conflict was not an ordinary border dispute and the root causes of the conflict are traced back to differences during the armed struggle. According to Reid, the conflict had its roots in the differences between the two movements over EPLF's military strategy and their respective attitudes towards the

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[6] Leenco Lata. *supra note* 2, p. 374.

[7] Jon Abbink. 1998. 'Briefing: The Eritrean-Ethiopian Border Dispute'. 97.389 *African Affairs*. p. 560.

[8] Michael Woldeariam. *supra note* 1, pp. 175-76.

[9] *Ibid*.

[10] *Ibid.*, p. 176.

[11] Jon Abbink. *supra note* 7, p. 551.

Soviet Union which 'reflect the seemingly limitless capacity for pedantry among revolutionary ideologues.'[12] As Reid succinctly pointed out, the issues 'of major significance for future relations between a sovereign Eritrea and a Tigrayan-dominated Ethiopia, … included the interrelated questions of 'nationality' … and the boundaries of Eritrea'[13] which 'would later return to haunt both governments in the most tragic of ways.'[14]

For Abbink, the eruption of the violent conflict is precipitated by 'the particular history and relationship of the two insurgent movements turned national governments (EPLF and TPLF) in the two countries; the nature and heritage of neo-patrimonial elite rule and the lack of democratic restructuring in the two countries; and the economic problems of Eritrea as an independent state.'[15] Both sides were locked in discord for some time while 'an Eritrean-Ethiopian border commission worked on the issue, right up to the outbreak of hostilities on 6 May.'[16] Describing both fronts as 'sectarian movements [who] had an inherently problematic relationship', Abbink maintains that '[t]he border dispute is all about the politics of state survival [as] Eritrea as a new independent state was always closely linked to the present EPRDF regime in Addis Ababa and was crucially assisted by the latter in political and economic terms.'[17]

The strange relationship and the subsequent violent conflagration are also causally linked to the nature of both regimes which 'suffer from a political culture of autocratic rule where absolute power is cherished.'[18]

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[12] Richard Reid. 2003. 'Old Problems in New Conflicts: Some Observations on Eritrea and its Relations with Tigray, from Liberation Struggle to Inter-State War. 73.3 *Africa*. pp. 382-83.

[13] *Ibid.*, p. 383.

[14] *Ibid.*, p. 386.

[15] Jon Abbink. *supra note* 7, p. 552.

[16] *Ibid.*, p. 555.

[17] *Ibid.*, p. 556.

[18] *Ibid.*, p. 557.

Consequently, they seamlessly fitted into a neo-patrimonial political model of 'personalized, authoritarian rule, extended with strong bonds of personal loyalty, and control and distribution of economic resources in a group constituted by such personalized bonds' thus making power 'a patrimony not democratically, or meritocratically, accessible to others.'[19] The relations persisted even after difference had begun to appear[20] and the incipient 'border dispute was dealt with as a strictly internal affair of the Tigrinya speakers of Ethiopia and Eritrea until the outbreak of hostilities in May 1998.'[21]

The conflict also had economic underpinnings which reinforced 'suspicions of Eritrean involvement in the re-exportation of Ethiopian goods' in violation of agreements evident in significant quantities of coffee export in the 1990s by Eritrea[22] which led the TPLF to believe that 'Ethiopian coffee, which could be freely transported into Eritrea as long as it was for local consumption, was being harnessed for the purposes of Eritrean export and hard-currency accumulation.'[23]

Whatever the causes, the conflict was, to many observers, least expected and of unprecedented ferocity which earned it the infamy of being 'the largest conventional conflict of its kind since Iran-Iraq in the 1980s.'[24] The conflict was condescendingly characterized as 'a fight between two bald men over a comb' by the world's media and Western observers which rarely apply 'to African warfare the same sophisticated

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[19] *Ibid.*, pp. 557-58.

[20] Martin Plaut. 2016. *Understanding Eritrea: Inside Africa's Most Repressive State,* p. 25, points out that the first cracks in the relationship between the two fronts appeared at the moment of victory as the EPLF expelled, on taking Asmara, tens of thousands of Ethiopian citizens. According to Plaut, a staggering 120,000 Ethiopians were expelled just between 1991 and 1992.

[21] Leenco Lata. *supra note* 2, p. 380.

[22] Michael Woldemariam. *supra note* 1, pp. 177-78.

[23] *Ibid*.

[24] Richard Reid. *supra note* 12, p. 374.

analysis which they apply to their own.'[25] Yet, it is not easy to challenge the propriety of describing the conflict as 'two ignorant governments engaging in brutal and bloody 'First World War tactics' for pieces of insignificant land.'[26] Although the war took many by surprise, it 'was not a tragic but isolated interruption of the normal course of events.' It was, to the contrary, 'part of a much longer and complex sequence of events and relationships.'[27]

As Reid observed, the conflict signifies the culmination of complex and convoluted relations between Ethiopian and Eritrean liberation fronts, 'a sorry tale of chronic disunity and frequently petty, arcane and largely meaningless disputes – at least for 'the people', which movements on either side of the Mereb purported to represent – in the face of a more powerful enemy.'[28] The conflict 'which is unprecedented in its virulence and intensity'[29] has been described as one of the '[t]wo events that gripped international public attention in such negative fashion,' the other event being 'the 1994 Genocide in Rwanda.'[30]

3. Anomalies

The Ethio-Eritrean conflict, anomalous as it was in terms of its ignition and the ferocity of its prosecution, is equally anomalous in respect of its settlement through the dispute resolution mechanism put forth by the

[25] *Ibid*. Reid appropriately challenges characterization of the conflict as 'unnatural' which is evident in the title of the Book by Tekeste Negash & Kjetil Tronvoll – *Brothers at War* – which 'leaves no doubt even before the reader opens the volume about how the authors view the relationship between the two countries, and how presumably 'unnatural' they consider the conflict to have been'. The authors, according to Reid, 'belong to what might be labelled the 'family rift' camp'.

[26] *Ibid*.

[27] *Ibid*., p. 375. Reid maintains that 'minor, localized border clashes had been taking place since at least 1993, gaining in intensity in the middle of 1997' (*ibid*., p. 374).

[28] *Ibid*., p. 381.

[29] Bahru Zewde. 2011. 'History and conflict in Africa: the experience of Ethiopia-Eritrea and Rwanda'. 3 *Rassegna di Studi Etiopici, Nuova Serie*. p. 33.

[30] *Ibid*., p .27.

Algiers Agreement.[31] The very first commitment both parties assumed to 'permanently terminate military hostilities between themselves [and] … refrain from the threat or use of force against the other'[32] remained breached and unheeded for fifteen years. But more seriously, it is submitted that the circumstances under which the Algiers Agreement was concluded constitute a political blunder which made a mockery of the much touted constitution and parliamentary system.

The normal treaty making process (of negotiation – text adoption – initialing – authentication – signature) by the executive as per Article 51(8) of the Constitution,[33] to be followed by ratification by the House of Peoples' Representatives as per Article 55(12),[34] was turned upside down as the Algiers Agreement which was signed on 12 December 2000 had already been ratified four days earlier on the 8 December 2000 by the House of People's Representatives.[35] The Agreement which came 'like a bolt of lightning on the Ethiopian political scene after five months of silence' was, according to Abbink, 'prepared

[31]Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Done at Algiers, Algeria on the 12th day of December 2000 (text available at https://pca-cpa.org/en/search/?q=Ethio-Eritrean+Boundary+Commission)

[32] *Ibid.*, Art.1(1).

[33] Art. 51 of the FDRE Constitution which lists out the powers and functions of the Federal Government provides, under sub-article 8, that the federal government 'shall negotiate and ratify international agreements'.

[34] Art. 55 of the Constitution which lists out the powers and functions of the House of Peoples' Representatives provides, under sub-article 12, that the House 'shall ratify international agreements concluded by the Executive'.

[35] Proclamation No.225/2000, Peace Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea Ratification, Federal Negarit Gazeta, 7th Year, No. 7, 8th December 2000. *See*, for contrast, Proclamation No.1024/2017, International Agreements Making and Ratification Procedure Proclamation, Federal Negarit Gazete, No.55. The Proclamation maintains the established treaty making practice by defining ratification under Article 2(10) as 'a decision by the House of Peoples' Representatives to make Ethiopia bound by an international agreement signed by the executive'. The corresponding Amharic version reads: **"ማፅደቅ ማለት የተፈረመ ዓለምአቀፍ ሥምምነት በኢትዮጵያ ላይ ተፈፃሚነት እንዲኖረው በሕዝብ ተወካዮች ምክር ቤት የሚሰጥ ውሣኔ ነው"።**

behind the scenes and its nature and conditions were of course never democratically discussed in public in the Ethiopian parliament, the press, or other forums.'[36] Such manifest impropriety in a purported constitutional dispensation 'can partly be explained with reference to the deep-seated ideological kinship between the leaders of the TPLF and EPLF rebel fronts.'[37] These anomalies, though, pale in significance in comparison to the more significant ones – including the folly of arbitration after *debellatio*, dubious choice of law and loss/cession of territories discussed below.

3.1. Arbitration after *Debellatio*

Ethiopia's victory in the war is a quintessential Pyrrhic victory which should have been followed by a unilateral decision to hold on to the hard-won national territory from which Eritrean forces had been kicked out. The ferocity of the conflict and enormity of the loss had evoked superlatives from commentators. According to Abbink, it is 'one of the most intense and bloody wars Africa has seen in recent years',[38] which, 'from May 1998 to July 2000 claimed at least 70,000 to 80,000 lives and wrought enormous material destruction in both countries'.[39] Lyons puts the casualty figures at 70,000 to 100,000 with a million people displaced.[40] Michael characterizes the war as 'one of the most serious successor-state conflagrations of the post-1945 era' with 'almost

[36] Jon Abbink. 2009. 'Law Against Reality? Contextualizing The Ethiopian Eritrean Border Problem'. In A. de Guttry, H. H. G. Post and G. Venturini (*eds*.), *The 1998-2000 War between Eritrea and Ethiopia* (T.M.C.ASSER PRESS, The Hague, The Netherlands). p. 147.

[37] *Ibid*.

[38] Jon Abbink. 2003. 'Badme and the Ethio-Eritrean Border: The Challenge of Demarcation in the Post-War Period'. 58.2 *Africa: Rivistatrimestrale di studi e documentazionedel l'Istitutoitaliano per l'Africa e l'Oriente*. p. 220.

[39] Jon Abbink. *supra note* 36, p. 143.

[40] Terrence Lyons. 2009. 'The Ethiopia–Eritrea Conflict and the Search for Peace in the Horn of Africa'. 36:120 *Review of African Political Economy*. p. 168.

100,000 battlefield fatalities, which makes it the most deadly interstate war in postcolonial African history.'[41]

The staggering loss on both sides notwithstanding, Eritrea received so crushing a defeat that 'in a matter of days, Ethiopia occupied nearly a fourth of Eritrean territory and most of the disputed territories not under its control.'[42] Explaining the defeat Eritrea experienced at the final battle and the political shockwave it sent across, Sorensen & Matsuoka aver:

> While peace plans floundered and Eritrea called for a cease-fire, on May12, 2000 Ethiopian troops invaded Eritrea, causing extensive military and civilian casualties. Reeling under this onslaught, Eritrea now agreed to withdraw from all disputed territory but Ethiopian attacks continued, displacing nearly a million people, destroying a power plant near Massawa, bombing a reservoir at Assab and targeting civilians in agricultural areas, ensuring long term damage. Under massive attacks that destroyed many towns, Eritrean troops retreated. Ethiopia now aimed not to resolve the border issue but to depose Issayas Afeworki and possibly recapture Eritrea; failing in this, it deliberately sought to cripple its neighbor.[43]

Using the biting aphorism of a 'postmortem of Eritrean thinking', Michael surmises the impact of the defeat on the EPLF leadership from what the former Eritrean Foreign Minister, Haile Woldense, reportedly said in a public meeting with the Eritrean diasporas in Germany: '*Atala Qiyomna neirom'yom*, meaning, they [the TPLF] almost finished us.'[44] The author rightly points out EPLF's 'inflated estimations of its own military potential' and its unwarranted skepticism about 'TPLF's ability to successfully mobilize the material resources of the Ethiopian

[41] Michael Woldemariam. *supra note* 1, p. 168.

[42] *Ibid.*, p. 179.

[43] John Sorensen & Atsuko Matsuoka. 2001. 'Phantom Wars and Cyberwars: Abyssinian Fundamentalism and Catastrophe in Eritrea'. 26.1 *Dialectical Anthropology*. p. 53.

[44] Michael Woldemariam. *supra note* 1, p. 180.

hinterland' as the strategic mistakes which led it into the fatal miscalculation about the outcome of the war.[45] Ethiopia, even under TPLF-dominated government, proved not to be 'an ethnic house of cards on the verge of collapse'[46] the EPLF believed it would be.

Eritrea then had neither the military strength nor the political clout to resist the territorial *fait accompli* dictated by the victor Ethiopia as the regime was alarmed by the possibility of further advance into Eritrea and a possible regime change. The regime's existential fear was, however, allayed as both warring parties agreed 'that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border….'.[47] Given the fact that it is common in state practice to exclude certain matters which are said to affect vital interests, independence or honor from arbitration,[48] agreeing to settle the boundary dispute through arbitration is, arguably, tantamount to providing a defeated enemy with an opportunity to engage in a legal battle for territorial claims it lost in a war allegedly started by itself. Ironically, the arbitration route entailed alteration, to the detriment of Ethiopia, of the internal administrative boundary of the autonomous region of Eritrea which, upon independence, should have become the international boundary as the 'presumptive *uti possidetis* line.'[49]

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[45] *Ibid*.

[46] *Ibid*.

[47] Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (hereinafter Algiers Agreement), Done at Algiers, Algeria, 12 December 2000.

[48] A. L. W. Munkman. 1972-1973. 'Adjudication and Adjustment - International Judicial Decision and the Settlement of Territorial and Boundary Disputes'. 46.1 *Brit. Y. B. Int'l L*. p. 9.

[49] Malcolm Shaw. 1997. 'Peoples, Territorialism and Boundaries'. 3 *European Journal of International Law*. p. 504. Explaining the situation where the *uti possidetis* presumptive line can be modified by consent, Shaw notes: 'The relevant parties may decide to rearrange the territorial situation so that the new state comes to independence within changed borders. Indeed, states after independence are free to consent, either expressly through a

Contrary to its status as a defeated party, the Algiers Agreement granted Eritrea what it had proposed before the outbreak of the war. Eritrea's scheme for peace made by Isaias Afwerki to the Non-aligned Summit held in Durban, South Africa, consisted of three main points which came to be the core elements of the Algiers Agreement:

1. A comprehensive solution of the problem through a technical demarcation based on established colonial treaties that clearly define the boundary between the two countries;
2. Arbitration based on the sanctity of colonial borders in the event that that is demanded by the other party, and
3. An immediate cease-fire and cessation of all hostilities that will be monitored by an observer force under the auspices of the UN until a lasting legal solution can be adopted.[50]

As a matter of fact, Ethiopia's international boundary had remained unaffected even after Eritrea's independence. As Shaw points out, '[n]o matter what the provenance of the international boundary, it remains as such unaffected by the independence of the newly established state whether by way of decolonization or secession or dismemberment.'[51] The law on international boundaries is that they 'fix permanent lines, both geographically and legally, with full effect within the international system, and can only be changed through the consent of the relevant states.'[52] The sad fact is that the Algiers Agreement constituted such

treaty or by virtue of an adjudicative award or other recognition or impliedly through acquiescence to alterations in their boundaries'.

[50] Haile Woldensae. 1998. 'The Ethiopian-Eritrean Crisis: The Eritrean Perspective'. 20:6 *American Foreign Policy Interests: The Journal of the National Committee on American Foreign Policy*. p. 24.

[51] Malcolm Shaw. *supra note 49*, p. 490.

[52] *Ibid.*, p.491. In a response to the question whether 'internal or administrative borders become transformed automatically or presumptively into international boundaries upon the independence of the new entity', Shaw invokes the ruling of the ICJ in the *El Salvador/Honduras case* where, having detailed the different colonial administrative lines established in South America, the Court noted that 'it has to be remembered that no

arrangement which significantly modified the internal boundary to the detriment of Ethiopia as both parties agreed that 'the delimitation and demarcation determinations of the Commission shall be final and binding [and] [e]ach party shall respect the border so determined, as well as territorial integrity and sovereignty of the other party.'[53]

In what might be considered sheer lack of foresight, the Commission was debarred from making decisions *ex aequo et bono*.[54] Of course, it is common in state practice to deprive tribunals the authority to make decisions *ex aequo et bono* as doing so 'gives the parties a degree of security as to the scope of the resulting decision, and some greater control over it'.[55] In circumstances where it is granted, 'the substance of the authority is simply the power to legislate for the individual case, whether by modifying an existing legal obligation, supplementing it, or making law for a particular case to which there appears to be no positive law applicable'.[56] The parties, and more appropriately Ethiopia, could have dictated the inclusion of ethnographical and social criteria, as well as the interest of the local population to be taken into

question of international boundaries could even have occurred to the minds of those servants of the Spanish Crown who established administrative boundaries'.

[53] Algiers Agreement, Art. 4(15). Malcolm Shaw. 2007. 'Control, and Closure? The Experience of the Eritrea-Ethiopia Boundary Commission'. 7.56 *International and Comparative Law Quarterly,* p. 57, considers the tasking of the Commission with both delimitation and demarcation of the boundary an advantage as 'that the demarcation process could proceed on the basis of considerable knowledge gained in the delimitation phase, which should have speeded up the process'. *See* also Jon Abbink, *supra note* 36, pp. 146-147, where he wonders at the willingness of the Ethiopian government 'to submit to a 'final and binding' arbitration on the border by an outside force, an arbitration commission hosted by the Permanent Court of Arbitration' and points out 'restoration of the status quo ante as before May 1998 and renegotiating bilateral relations' as a better option. Abbink concludes that the preferred 'solution was seen as a major mistake, from which virtually all subsequent problems were seen to emanate by many observers, and certainly by the Ethiopian public at large'.

[54] Algiers Agreement, Art. 4(2). The second sentence of the provision reads: 'The Commission shall not have the power to make decisions *ex aequo et bono'*.

[55] Munkman. *supra note* 48, p. 11.

[56] *Ibid.*, p. 17.

consideration.[57] Having not used this opportunity, Ethiopia invoked the argument of families torn apart, parishes cut off from cemeteries etc., to justify its rejection of the final award – thus evoking a stricture of the Commission[58] and pushing the whole process into deadlock.

Emphasizing on the lost opportunity, Odunta criticizes exclusion of the *ex aequo et bono* principle which 'was perhaps the only hope of the arbitration to produce a realistic, equitable and just resolution of the dispute and such powers normally fall within the competence of any self-respecting modern international court performing the type of task that was before the EEBC.'[59] Likewise, Pratt emphasizes the lack of foresight in the exclusion of the principle and maintains that 'a broader mandate might have allowed for creative solutions to be proposed for particularly problematic areas such as Badme.'[60] Drawing on the successful experience of Ecuador and Peru who managed to settle a boundary dispute following a 1995 border war, Pratt envisions a lost opportunity for amicable settlement whereby 'the village could have been designated as a condominium under the sovereignty of both Eritrea and Ethiopia, or it could have been placed under the sovereignty of one state with special rights granted to citizens of the other state who had owned land in the village prior to the war.'[61]

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[57] *Ibid.*, p. 23.

[58] In a measured response to Ethiopia's baseless claim, the EEBC, in its Observation of 21 March 2003, stated that it 'has no authority to vary the boundary line, [and] [i]f it runs through and divides a town or village, the line may be varied only on the basis of an express request agreed between and made by both Parties' (www.pca-cpa.org/PDF/Obs.EEBC.pdf)

[59] Gbenga Odunta. 2015. *International Law and Boundary Disputes in Africa*. p. 199.

[60] Martin Pratt. 2006. 'A Terminal Crisis? Examining the Breakdown of the Eritrea-Ethiopia Boundary Dispute Resolution Process'. 23 *Conflict Management and Peace Science*. p. 335.

[61] Pratt draws a very interesting parallel between Badme and Tiwinza which was the site of heavy fighting and 'a symbol of the sacrifices made by both countries during the conflict'. Under a 1999 agreement, 'Peru granted private property rights to Ecuador in a 1 km^2 area around Tiwinza', and access to the burial place of Ecuadorian soldiers.

3.2. Dubious Choice of Law

3.2.1. Stretching the Cairo Declaration out of Context

One of the advantages the settlement of disputes through arbitration accords the parties is the freedom to choose the applicable law. The choice of law provision of the Algiers Agreement, Article 4(1) provides, in part, that '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.' Titled 'Border Disputes among African States', the scope of application of the resolution is limited to decolonization as is evident from the preamble which speaks about 'the existence of extra-African maneuvers at dividing African States' and the fact that 'the borders of African States, on the day of their independence, constitute a tangible reality.'

The operative part of the Declaration has two provisions by which the Assembly of Heads of State and Government solemnly 'reaffirms the strict respect by all Member States of the Organization for the principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity *(i.e. respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence)* and 'declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence'.[62] Applicability of the Declaration to the

[62] *See* Gbenaga Oduntan, *supra note 59*, pp. 198-200 and 330-349 for a critique of the principle of *uti possidetis* and the need for its re-evaluation in light of the African experience. Oduntan criticizes the Algiers Agreement for sanctioning, unimaginatively, 'a complete adherence to the *uti possidetis* principle even with the long history of confusion surrounding the true nature and extent of the principle'. Oduntan maintains that the principle 'once regarded as the recipe for peace and territorial stability in Africa, has revealed itself to be no more than a political 'time bomb', which is threatening to detonate with resounding resonance across many regions all over Africa in this new century', and asserts that 'the time is ripe for the jettisoning of *uti possidetis* in relation to the resolution of certain types of African disputes'. In a rather dismissive tone, Oduntan opines that '[t]he principle ought to be exposed as an ambitious plasterwork to cover deep injustices that have been done to African societies and to perpetuate unrealistic geopolitical creations'.

secession of Eritrea, thus, makes sense only if it is regarded as independence from alleged Ethiopian colonial rule,[63] a long-held TPLF-EPLF political belief – that is widely challenged as a historical fact or a legal reality.

This, consequently, raises the question of what 'respect for the borders existing at independence' meant in the context of Eritrean secession – which could mean either the internal administrative boundary of the autonomous region of Eritrea or a new border agreed upon through negotiation before independence or at the earliest possible time thereafter – a crucial task both countries never cared to do during their honeymoon. Reference to the principle of respect for the borders existing at independence is, of course, common in African boundary disputes. The principle 'is of use in assisting in the determination of the critical date, that is the date at which the rights of the parties may be seen as crystallized [which] is usually the date of independence of the parties concerned, and if they are not essentially the same, the later of independence of the States in question will be taken.'[64]

Adopted by the OAU as a key political statement,[65] the resolution 'deliberately defined and stressed the principle of *uti possidetis juris*, rather than establishing it'.[66] As Shaw has rightly pointed out, 'acceptance of the colonial borders by African political leaders and by the OAU itself neither created a new rule nor extended to Africa a rule previously applied only in another continent. Rather, it constituted the recognition

[63] Jon Abbink. *supra note* 38, p. 227. Abbink wonders why the Ethiopian government 'did not take advantage of the fact that, historically and legally speaking, the entire relationship with Eritrea, from borders to port use, was up for negotiation again, due to the unilateral resort to armed force by Eritrea'. He notes that the war became necessary, partly, as a 'result of the Ethiopian regime's ambiguous and perhaps naive political dealings with the Eritrean government and of giving it too many political and economic advantages after 1993'.

[64] Malcolm Shaw, *supra note 53*, p. 760.

[65] Malcolm Shaw, *supra note* 49, p. 494.

[66] *Ibid*.

and confirmation of an existing principle.'[67] The principle is 'essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purpose' and '[t]he law that is applicable to this process is essentially domestic law, although the principle itself is one of international law so that recourse to other matters may become necessary in order to determine, if possible, the *uti possidetis* line'.[68] Even where its applicability is unquestionable, it is imperative to note that '[w]hile it 'freezes' the territorial situation during the movement to independence, *uti possidetis* does not prescribe a territorial boundary which can never be changed'.[69]

Even the contested applicability of the principle of self-determination outside the context of decolonization is subject to 'the primacy of the principle of territorial integrity'.[70] Likewise, although the principle of *uti possidetis* is 'recognized as a rule of international law applicable generally with regard to the phenomenon of decolonization',[71] its applicability beyond the context of decolonization is not certain. In the recent instance where the issue was addressed, it was stressed that '… whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise'.[72] It

[67] *Ibid*.

[68] *Ibid*., p. 495.

[69] *Ibid*.

[70] *Ibid*., p. 483.

[71] *Ibid*., pp. 495-96.

[72] The Yugoslav Arbitration Commission, Opinion No. 2, quoted in Malcolm Shaw, *supra note* 49, p. 496. Shaw emphasizes the fact that 'acceptance of *uti possidetis* as a principle of general applicability going beyond the purely decolonization scenario has [...] been challenged' for not being correct in law, and offending other principles of international law, notably 'the right to self-determination and human rights generally'. *See ibid*., p. 500, for a practical example of a boundary agreement after breakup where the frontiers of Czechoslovakia established by the Peace Treaties of 1919 were modified by the Treaty on the General Delimitation of the Common State Frontiers of 29 October 1992 so that 'the

has, however, been affirmed that 'the weight of state practice in recent years clearly supports the view that the principle of *uti possidetis* applies presumptively to post-colonial independence situations'.[73]

3.2.2. Resurrecting 'Defunct' Colonial Treaties

The applicable substantive law to resolve the Ethio-Eritrean boundary dispute is agreed to be 'pertinent colonial treaties (1900, 1902 and 1908) and applicable international law'.[74] Bemused by this act of political misbehavior, Abbink observes:

> It is already remarkable that in 2000 the two regimes, both led by a former insurgent movement that catered to a specific constituency, acquiesced in submitting to international arbitration on the basis of partly fictitious and outdated treaties lacking clarity and status. These were all abrogated by the Italo-Ethiopian Peace treaty of 1947. It was no doubt an exercise of political legitimacy, construction and state consolidation, especially on the Eritrean side. On the side of the Ethiopian government, no doubt a major mistake was made, the results of which continue to haunt the EPRDF regime, especially as it seems that it did not properly do its homework, leaving out essential evidence and ceding too much beforehand to the Eritrean position.[75]

It is quite understandable that Eritrea rejoiced the choice of colonial treaties as the basis for the delimitation and demarcation of the boundary as this 'would favour their retention of areas of land that were on their side of the border, even though they had been traditionally administered by Ethiopia'.[76] As Abbink rightly pointed out, '[t]he fact that colonial treaties are the result of contested if not illegal

boundary between the two new states was to be the administrative border existing between the Czech and Slovak parts of the former state'.

[73] Malcolm Shaw, *supra note* 49, p. 499.

[74] Algiers Agreement, Art. 4(2).

[75] Jon Abbink, *supra note* 36, p. 148.

[76] Martin Plaut. 2001. 'Towards a Cold Peace? The Outcome of the Ethiopia-Eritrea War of 1988-2000'. 28.87 *Review of African Political Economy*. p. 127.

action by a foreign conquering power in Northeast Africa should already in itself be a cause for deep reservation in accepting them at all'.[77]

On a similar ground, Odunta blames the parties for choosing to resurrect colonial treaties which, sometimes, are 'drawn up in furtherance of treacherous relations with African monarchs and on carefully constructed falsehoods'[78] and lays the blame on foreign and international legal advisers mostly based in Western Europe who 'keep recycling the same failed legal advice that contemporary African disputes should be resolved by reference to resurrected colonial treaties of doubtful providence'.[79] It is interesting to note that the justification offered by Eritrea for the applicability of the defunct colonial treaties was Ethiopia's alleged acceptance of 'the colonial border in proceedings before the League of Nations during its participation in the UN process that resulted in the formation of the Ethiopian/Eritrean federation'.[80]

This political choice made in the aftermath of a bloody war signifies, arguably, a deliberate act, a strategic blunder made to deny Ethiopia a sea outlet by resurrecting the defunct colonial treaties which, it is submitted here, had ceased to exist when Eritrea became part of Ethiopia first as a federation, and then as a province. It is an historical fact that Eritrea's colonial status ended when 'the United Nations …, in General Assembly Resolution 390A (V), 1950, declared that Eritrea would constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown'.[81] With the end of the colonial status of Eritrea, it is argued the subject matter of the treaties had permanently disappeared, entailing a supervening impossibility of

[77] Jon Abbink, *supra note* 36, p. 145.
[78] Gbenga Oduntan, *supra note* 59, p. 200.
[79] *Ibid*.
[80] *Ibid*., p. 179.
[81] Malcolm Shaw, *supra note* 53, p. 756.

performance.[82] Consequently, '[t]he treaties of 1900, 1902 and 1908 were declared null and void by Ethiopia on 11 September 1952 and the federal status of Eritrea was abolished two months later'.[83] Yet, the resurrected colonial treaties entailed a binding and final decision which gave Eritrea 'the advantage of having a questionable border internationally guaranteed and its precarious national identity reinforced'.[84] This turn of events affirms the fact that despite the bloodshed and destruction, 'Ethiopian policy […] followed the old TPLF ideological line - or dogma - that Eritrean independence within borders that were already agreed upon in the late 1970s in covert agreements between EPLF and TPLF [was] … carried out'.[85]

3.3. Loss/Cession of Territories

In view of the fact that Ethiopia decisively won the war, it is striking to see that it did not gain 'an inch of territory' out of the legal battle it willingly entered into. Explaining the cause of this anomaly, Abbink points out the weakness of the Ethiopian presentation and arguments to the Boundary Commission 'on matters related to the national territory, all because of a *parti-pris* towards Eritrean independence within borders that were defined in an off-hand deal between two insurgent movements many years ago'.[86] Consequently, territories including the symbolic Badme, won over through enormous sacrifice were lost while other territories also were ceded to Eritrea.

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[82] Article 61(1) of the 1969 Vienna Convention on the Law of Treaties in part provides: 'A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty.'

[83] Malcol Shaw, *supra note* 53, p. 756.

[84] Jon Abbink, *supra note* 38, p. 227.

[85] *Ibid.*, p. 228.

[86] *Ibid.*, p. 229.

3.3.1. Badme

Badme took on great symbolic significance in the course of the war '[d]espite its tiny size and lack of any apparent strategic or economic value'.[87] The inordinate significance attached to it is evident from the fact that its 'fate became the primary indicator of whether the enormous loss of life during the fighting had been justified'.[88] Taken by both regimes as a marker of victory, 'control of this small desolate town became linked directly to the political fortunes, even survival, of both regimes'.[89] In a rare twist of history, a village which is just 'a small cluster of houses without any significant strategic or economic value',[90] merely 'a stretch of relatively useless borderland',[91] came to be the designation of the war – the Battle of Badme – in a convoluted contrast to the Battle of Adwa wherein Ethiopians, Eritreans included, fought, died together and defeated the invading army of fascist Italy.

Once it became clear that Badme was awarded to Eritrea,[92] 'Ethiopian leaders strongly objected to it and did everything short of resumption of hostilities to delay compliance'.[93] When Ethiopia rejected the decision of the Commission as 'totally illegal, unjust, and irresponsible' and called for an alternative mechanism,[94] a no-war no-peace stalemate

[87] Martin Pratt, *supra note* 60, p. 330.

[88] *Ibid*.

[89] Terrence Lyons, *supra note* 40, p. 168.

[90] Gro Nystuen & Kjetil Tronvoll. 2008. 'The Eritrean-Ethiopian Peace Agreement: Exploring the Limits of Law'. 26.16 *Nordisk Tidsskrift for Menneskerettigheter*. p. 18.

[91] Abbink, 2003a. p. 219.

[92] *See* LeencoLata.*supra note* 2, p. 384. The Council of Ministers had issued a statement of full acceptance on the very day the ruling was handed down describing, as it did, the Commission's decision 'as a defeat that Eritrea suffered in the legal and peaceful struggle on top of its previous humiliating defeat in the battle front'. Eritrea did demonstrate sobriety in this regard as it gave a measured response discounting Ethiopia's 'full acceptance' as 'superfluous as the parties had agreed that the Commission's ruling should be final and binding'.

[93] Terrence Lyons, *supra note* 40, p. 169.

[94] Letter of Prime Minister Meles to Secretary General Kofi Anan, September 2003, quoted in Lyons. 2009. p. 169.

kicked in. This 'public repudiation of the EEBC represented a fundamental challenge to the Algiers peace process and the principle of a final and binding agreement', which entailed the Commission's rebuke against Ethiopia.[95]

Ethiopia's stance which constituted a fundamental breach of 'its commitment to accept the EEBC's decision as final and binding and to allow the Commission to demarcate the boundary identified in its delimitation decision',[96] was 'motivated mainly by an instinct for political self-preservation – a fear that the 'loss' of Badme (and, to a lesser extent, of the Irob region) would be so unpopular that the government could fall, possibly to an even more nationalistic regime'.[97] Any thawing of relations and hope for resolution of the boundary dispute had, thus, to wait for some political transformation in either country.[98] Although Ethiopia's hastily declared 'victory both in the military field and before the international court of justice left the regime in Asmara in utter shock, embarrassment and confusion',[99] the verdict of the Commission was clear enough to, at least, desist from issuing such a declaration.

The Commission, as pointed out by Shaw, 'examined the major events after 1935 and until the independence of Eritrea and took the view that

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[95] EEBC Statement of 21 March 2003 available at http://pca-cpa.org/PDF/Obs.EEBC.pdf. *See* also Jon Abbink, *supra note* 38, p. 219.

[96] Martin Pratt, *supra note* 60, p. 339.

[97] *Ibid*.

[98] Redie Bereketeab. 2019. *The Ethiopia-Eritrea Rapprochement: Peace and Stability in the Horn of Africa*. (Nordiska Afrika Insitutet The Nordic Africa Institute), p. 9. The stalemate came to an end when, on 9 July 2018, the leaders of the two countries signed a rapprochement agreement which 'was sudden and unexpected, and indeed it took the world by surprise – because it came about without the involvement of external mediators'.

[99] Leenco Lata, *supra note* 2, p. 384. The Ethiopian government even went on to launch a resettlement of some 210 people into the contested area as 'voluntary resettlement' which entailed the EEBC's rebuke 'asking Ethiopia to dismantle the settlement at a place called Dembe Mengul as it lies '0.4 km west of the delimitation line' established by the 13 April ruling'.

the boundary of 1935 remained the boundary of today'.[100] It is important to note that the Commission had carefully considered Ethiopia's evidence of activities in the disputed area and observed, specifically, that 'no evidence of such activities appeared in the Ethiopian Memorial and that it was introduced only in the Ethiopian Counter-Memorial and not added to or developed in the Ethiopian Reply'.[101] The pertinent paragraph of the decision on Badme reads:

> These references represent the bulk of the items adduced by Ethiopia in support of its claim to have exercised administrative authority west of the Eritrean claim line. The Commission does not find in them evidence of administration of the area sufficiently clear in location, substantial in scope or extensive in time to displace the title of Eritrea that had crystallized as of 1935.[102]

3.3.2. Bure

Bure is found in the Eastern Sector which is covered by the 1908 treaty according to which the Commission 'determined the boundary by the geometric method prescribed by the Treaty' and turned 'to consider whether any subsequent conduct adduced by the Parties requires the Commission to vary the boundary'.[103] With regard to the *effectivités* adduced for the period since 1908, the Commission concluded they 'essentially reinforced the geometric line, in the sense that they established that activities conducted by Ethiopia and Italy (or Eritrea, after the latter's independence) … did not take place anywhere that would have required an adjustment of the boundary determined by the geometric method'.[104] Having examined the evidence adduced by both

[100] Malcolm Shaw, *supra note* 53, p. 780.

[101] *Ibid*. See also paragraphs 5.91 and 5.92 of the Award.

[102] EEBC Award, paragraph 5.95.

[103] *Ibid*., paragraph 6.23.

[104] *Ibid*., paragraph 6.25.

parties, the Commission concluded 'they confirm the geometric boundary rather than require an adjustment to it'.[105]

The Commission, however, noted a special situation which had arisen with regard to Bure which 'is located within the Ethiopian side of the 60 kilometer line'[106] belonging, undisputedly, to Ethiopia. The special situation necessitating variation of the geometric line arose when 'Eritrea adduced evidence of an express agreement between the parties [on 7 November 1994] with corresponding performance, by which after Eritrea's independence they appear to have placed their common boundary at Bure'.[107] Reaching its final decision for the partition of Bure, the Commissioned reasoned:

> It is not unknown for States to agree to locate a checkpoint or customs facility of one State within the territory of a neighboring State. Such agreements, which reflect a common interest in efficiency and economy, do not necessarily involve a change of the boundary. That, however, was not the situation at Bure after Eritrean independence. The evidence indicates that both Parties assumed the boundary between them occurred at Bure and that their respective checkpoints were manifestations of the limits of their respective territorial sovereignty. The 1994 bilateral Report … expressly designates Bure as the border point. Accordingly, the boundary at Bure passes equidistantly the checkpoints of the two Parties.[108]

3.3.3. Tserona and Fort Cadorna

Tserona and Fort Cadorna are two other territories in the Central Sector ceded to Eritrea. Having examined the claims of the parties and

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[105] *Ibid.*, paragraph 6.28.

[106] *Ibid.*, paragraph 6.30.

[107] *Ibid.*, paragraph 6.30. Eritrea further adduced an internal Eritrean memorandum of 30 April 1994 (copied to the Ethiopian Embassy in Asmara) as well as an undated directive 'issued to control automobiles using the roads between Eritrea and Ethiopia [which] also confirms the existence of the Eritrean checkpoint at Bure'.

[108] EEBC Award, paragraph 6.31.

weighed the evidence adduced, the Commission concluded that 'subject to two important qualifications, which relate to, respectively, the northern and southern sections of this part of the projection, [it] does not find that the evidence justifies any departure from the boundary line as found by the Commission to result from the 1900 Treaty'.[109] With regard to Tserona, Ethiopia's reply was a sweeping admission that 'Fort Cadorna, Monoxeito, Guna Guna and Tserona were mostly … undisputed Eritrean places'.[110] The Commission had to mitigate the rare admission by countering it with the fact that '[w]hile 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'.[111] In what might be regarded as the application of the maxim 'render to Caesar the things that are Caesar's', the Commission underlined the fact that Tserona and Fort Cadorna are not on the Eritrean side of the Treaty line, notwithstanding the fact that Ethiopia said they are.

In line with its determination to include 'diplomatic and similar other exchanges constituting assertions of sovereignty, or acquiescence in or opposition to such assertions, by the other party' as evidence of subsequent conduct,[112] the Commission reiterated the fact that it 'cannot fail to give effect to Ethiopia's statement, made formally in a written pleading submitted to the Commission …, an admission, of which the Commission must take full account … to adjust the Treaty line so as to ensure that it is placed in Eritrean territory'.[113] In due recognition of Ethiopia's admission which 'it cannot fail to give effect to … [and] of which [it] must take full account', the Commission decided 'to adjust the Treaty line so as to ensure that [Tserona] is

[109] *Ibid.*, paragraph 4.68.
[110] *Ibid.*, paragraph 4.69.
[111] *Ibid.*
[112] *Ibid.*, paragraph 3.16.
[113] *Ibid.*, paragraph 4.70.

placed in Eritrean territory'.[114] Likewise, the Commission decided that it 'is bound to apply to [Fort Cardorna], in the same way as it does to Tserona, the Ethiopian admission'.[115] Thus, Tserona and Fort Cadorna, which were on the Ethiopian side of the Treaty line, were ceded to Eritrea upon Ethiopia's written instructions to the Commission.

4. Imperatives for Peaceful Relations

4.1. Unconditional Acceptance of the Boundary Decision

The stalemate which the Ethio-Eritrean boundary dispute remained locked in for nearly fifteen years is the making of Ethiopia's obstinacy to exhibit compliance with the binding final decision of the Boundary Commission.[116] Eritrea respected the decision and demonstrated its resolve to abide by international law even when doing so meant a significant loss of territory won in battle. In spite of the fact that it then had neither a navy nor an air force, Eritrea 'captured Greater Hanish using small craft, taking 95 Yemeni troops captive'.[117] Yet, Eritrea demonstrated a diplomatic and political stature way too high for its incipient international life by agreeing to settle the dispute through arbitration and fully accepting the final decision. Commenting on this civility of a new African state, Plaut wrote:

> The ruling went almost entirely in Yemen's favour. President Isaias gritted his teeth and accepted the ruling. In itself, the loss of almost all

[114] *Ibid*.

[115] *Ibid*., paragraph 4.71.

[116] *See*, for example, Nystuen & Tronvoll, *supra note* 90, p. 18: 'Reportedly, Eritrea was willing to comply with all of the Boundary Commission's demands in order to undertake the demarcation; Ethiopia on the other hand dismissed the proposal tabled by the Commission and refused to carry out demarcation'. *See* Martin Pratt, *supra note* 60, p. 331, narrating the demarcation deadlock. Following the adoption of Resolution 1507/2003 by which the Security Council called upon Eritrea and Ethiopia to fulfill their commitments under the Algiers Agreement so that demarcation would proceed as scheduled, Ethiopia rejected the decision on Badme and parts of the Central Sector as 'totally illegal, unjust and irresponsible'.

[117] Martin Plaut, *supra note* 20, p. 53.

> the islands beyond Eritrea's 12-mile coastal zone made little difference. The tribunal called on both nations to allow the fishermen of Eritrea and Yemen to continue their historic activities. But it established an important precedent: Eritrea and its government would stand by international treaties and agreements, even when they went against their country's perceived national interests. This was important. When Ethiopia refused to abide by the Algiers treaty that ended their border war and the ruling by the Permanent Court of Arbitration, Eritrea assumed the international community would back its cause. Eritrea looked to the United States for assurance in this regard since Washington had been directly involved in drafting the Algiers treaty, but they were sorely disappointed.[118]

Prior to the 30 November 2007 demarcation deadline set by the Commission,[119] Eritrea had officially communicated its acceptance of the demarcation coordinates stipulated as final and binding,[120] while Ethiopia rejected the coordinates as invalid for not being 'the product of a demarcation process recognized by international law',[121] and insisted that in the absence of agreement on how demarcation should proceed, 'the dispute resolution provisions of the Algiers Agreement apply [... and that the] implementation of the Commission's 2002 Delimitation Decision is now a matter for the parties to decide'.[122] Eritrea, in return, rejected Ethiopia's stance emphasizing the non-optional nature of the Commission's decision,[123] ushering, thereby, the era of stalemate in the demarcation process which would last for fifteen

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[118] *Ibid.*, p. 53. *See* also Martin Plaut, *supra note* 76, p. 127, writing earlier about Eritrea's principled stance on the Hanish Islands decision it 'scrupulously abided by'. It did so, Plaut explains, 'despite losing almost all of the islands to Yemen, and has attempted to establish normal relations with Yemen since the adjudication took place'.

[119] EEBC, Time line of Facts, available at: http://pca-cpa.org/en/caseses/99/

[120] Nystuen & Tronvoll, *supra note* 90, p. 25.

[121] *Ibid*.

[122] *Ibid*.

[123] *Ibid*. President Isaias is reported to have said that 'the border issue in its legal, political and technical aspects has [been] concluded; the remaining sole task is the unconditional withdrawal of the invading TPLF regime's forces from sovereign Eritrean territory'.

years. Frustrated by Ethiopia's recalcitrance, the Commission concluded that the boundary automatically stood as demarcated by the boundary points it listed earlier, and considered its mandate to be fulfilled and closed down its operations.[124]

An important first step towards rapprochement came from Ethiopia on 5 June 2018 when Prime Minister Abiy Ahmed announced his country's unconditional acceptance of the decision and its readiness to implement the same.[125] The announcement, which extended invitation for resumption of peaceful relations, was welcomed by the government of Eritrea whose response 'came on 20 June, when out of the blue the Eritrean President announced that Eritrea would dispatch a delegation'.[126] The stumbling block against implementation of the boundary decision was finally removed with the signing of the Jeddah Agreement[127] in which the two countries agreed, inter alia, to implement the decision of the boundary Commission.[128] The parties, one may hope, will soon resume the demarcation process and fulfill their commitments under the Algiers Agreement.[129]

4.2. Realizing Eritrea's Political Leverage and Ethiopia's Vulnerability

The thawing of Ethio-Eritrean relations as a break away from the no-war no-peace deadlock was further consolidated by the Jeddah

[124] *Ibid.*, p. 26, quoting from the twenty-sixth and final report of the Commission issued on 7 January 2008.

[125] Redie Bereketeab, *supra note* 98, p. 13.

[126] *Ibid.*, p. 14.

[127] Agreement on Peace, Friendship and Comprehensive Cooperation (hereinafter the Jeddah Agreement) between the Federal Democratic Republic of Ethiopia and the State of Eritrea, made at Jeddah, Kingdom of Saud Arabia on 16 September 2018.

[128] Jeddah Agreement, Art.4.

[129] The parties are under a standing obligation emanating from Resolution No.1507/2003 by which the Security Council had called upon Eritrea and Ethiopia to fulfill their commitments under the Algiers Agreement so that demarcation would proceed as scheduled.

Agreement which ushered in a new era of 'peace, friendship and comprehensive cooperation'[130] and a commitment to 'promote comprehensive cooperation in the political, security, defense, economic, trade, investment, cultural and social fields on the basis of complementarity and synergy'.[131] In as much as such rapprochement offers opportunities for peaceful relations and cooperative development, it also carries the risk of a relapse into the *modus operandi* of the post-independence period. Redie's exaggerated portrayal of Eritrea's role in Ethiopian politics is indicative of the challenge: 'Eritrea has', Redie debatably avers, 'for the third time – played a major role in political change in Ethiopia. The first time was in the demise of the emperor in 1974; the second was in the collapse of the Dergue regime in 1991; and in 2018 came the downfall of the TPLF as the omnipresent and omnipotent power'.[132]

A perception of the political reform in Ethiopia as a 'shift of power to the Oromos [which] resonates with the deep-seated, embedded perception of victimhood', coupled with the assertion that 'Eritrea can identify better with an underdog that has been on the receiving end of Abyssinian injustice',[133] warrants a legitimate concern for the apparent political leverage Eritrea has arguably 'gained'. Redie explains the exhilaration of Eritreans who came out in droves in the streets of Asmara to welcome the Prime Minister of Ethiopia as driven by the feeling that 'the Oromo 'victim' will be more understanding and less aggressive'.[134] The parallel he draws between the level of jubilation witnessed in May 1991 when Eritrea was liberated and the events of 2018 which, in his views, marked 'the downfall of the TPLF as the

[130] Jeddah Agreement, Art. 1.
[131] *Ibid.*, Art. 2.
[132] Redie Bereketeab, *supra note* 98, p. 32.
[133] *Ibid*.
[134] *Ibid*.

omnipresent omnipotent power' thus signifying 'a second liberation',[135] may be read as demonstrative of Eritrea's political leverage and the vulnerability of Ethiopia resulting, mainly, from the competing and/or conflicting aspirations of ethno-nationalist forces in the political setting of ethnic federalism.

Predicting a possible déjà vu of an inter-party relation paving the way for Eritrean political influence in Ethiopia, Abbink surmises that '[e]ventually, a new kind of tacit alliance between the (reformed) leading parties or elites in both countries stands a good chance of emerging, although in a much transformed shape'.[136] The internal political instability and proliferation of conflict Ethiopia is currently faced with aggravate its vulnerability vis-à-vis Eritrea which, after nearly two decades of isolation, is coming comfortably back into the fold of the international community. Pointing out the challenges, Redie notes 'those forces that are losing power because of the changes are determined to put up a last-ditch resistance, and it seems that they are provoking and exploiting inter-ethnic cleavages'.[137] Reforming the security and military establishment to the extent that would make it a positive force for transformation is another challenge.[138]

The opposition of the TPLF to the final settlement of the boundary through implementation of the decision of the EEBC[139] still constitutes a serious challenge to normalization of relations and implementation of the demarcation decision. Redie makes a conceivable but challengeable guess that 'it is to give the TPLF time to come on board that both

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[135] *Ibid*.

[136] Jon Abbink, *supra note* 5, p. 417.

[137] Redie Bereketeab, *supra note* 98, p. 35.

[138] *Ibid.*, p. 36. Redie points out the open challenge of TPLF to the reforms 'alleging that they are taking place in violation of the constitution and are not based on national institutions'.

[139] *Ibid.*, p. 37. For TPLF, 'the border issue could only be resolved through negotiations between the local populations affected by the border demarcation'.

governments have opted to delay implementation of the fifth point in the Peace and Friendship Agreement – the border issue'.[140] Quoting a federal government official as a source, Redie breathes an air of optimism that 'if the Eritreans can wait for 30 years, it will not hurt to wait for a few more months; at the end of the day, it is the federal government that decides'.[141] Given the state of current affairs, whether the federal government will be able to do so and when is hard to tell.

It is, therefore, crucial to realize Eritrea's potential political leverage and Ethiopia's vulnerability under the current political configuration. The dominant struggle between ethno-nationalist forces pushing for perpetuation of ethnic federalism based on identity politics and the so-called unionists calling for civic nationalism to be the basis of political life has made the country vulnerable to outside influence. In a bid to attain political objectives, ethno-nationalist forces may well forge alliances which would give them the upper hand internally – subjecting the country to outside influence.

Such plausible alliance of forces may for example result from the desire for an Oromo Democratic Party (ODP)/Oromo Liberation Front (OLF) hegemony relying on strong Eritrean support. Another alliance of forces may lead to reconciliation and possible revival of relations between TPLF and Eritrea, most likely, in post-Isaias Eritrea, resulting in the continuation of the post-independence dispensation with TPLF hegemony restored in Ethiopia. Yet another coalition of forces may bring about rapprochement between the ODP, OLF and TPLF to perpetuate the ethnic-federalist dispensation by jointly resisting or minimizing Eritrea's influence. In view of the enormity of the challenges the country is facing, there appears to be no better alternative than effectuating a political reconfiguration based on civic nationalism with a democratic rule which would entail stability and

[140] *Ibid*.
[141] *Ibid*.

legitimacy warranting normal interstate relations between Ethiopia and Eritrea.

4.3. Ensuring Transparency of Relations

Lack of transparency and veritable subservience of national interest issues to inter-party relations were dominant features of the pre-war period which led to the bloody conflict within a span of five years. Speaking about the lack of transparency prevalent in the pre-war period, Abbink opined: 'The current conflict is the direct result of the unresolved and ambiguous political relationship between the two countries, and the two leaderships' policy of making deals without securing a broad national consensus or legally clear formulas'.[142] Nystuen & Tronvoll concur with Abbink in pointing out lack of formal 'bilateral relations, mutual principles of inter-state economic conduct, and harmoniz[ation] of inter-dependent economic policies…[which] generated misperceptions and mistrust between the parties [and] contributed to the outbreak of hostilities'.[143]

It is hard to refute that 'the failure to hash out hard and detailed agreements on relations between the two countries prior to partition was a major reason why post-partition relations devolved into an increasingly difficult bargaining situation, as Addis and Asmara jockeyed for advantage in the ensuing negotiation process'.[144] The failure continued even after partition when, as early as September 1993, the two countries ventured into signing the Asmara Pact… [which] involved 25 protocol agreements and established three joint-technical committees and a ministerial committee to oversee full implementation

[142] Jon Abbink, *supra note* 7, p. 559.

[143] Nystuen & Tronvoll, *supra note* 90, p. 22.

[144] Michael Woldemariam, *supra note* 1, p. 176.

of these cooperative arrangements'.[145] None of the agreements was, and still is, accessible,[146] and the trend has not yet changed.[147]

It is imperative, this time around, to avert the pre-war folly of 'relationship…based on individual leaders, rather than being anchored in institutions and in open and transparent principles and guidelines'.[148] There is great need for caution against any illusions about the nature and scope of the relationship and 'there must be a clear understanding of what is meant by assertions such as 'we are one people' or 'the border has no meaning', and by phrases such as 'integration and unity', 'reconciliation', etc., which "[m]ost of the time … have different meanings for Eritreans and Ethiopians'.[149]

4.4. Putting the Lost Case of Assab to Rest

The vitality of access to the sea for Ethiopia is self-evident and needs no explanation. Securing access to the sea constituted one of the primary objectives of successive rulers who literally fought for and spared no diplomatic effort to regain it.[150] Cognizant of the likelihood of Eritrea's secession, the Derg redrew the internal administrative boundary of the country into administrative areas and autonomous regions more on political than economic or cultural basis.[151] The rationale behind the administrative arrangement was the prevention of 'the rise of local nationalism among each of the linguistic groups by

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[145] *Ibid*.

[146] Not a single treaty can be accessed from the website of the Ministry of Foreign Affairs (http://www.mofa.et).

[147] Neither the Jeddah Agreement of 16 September 2018 nor the Joint Declaration on Peace and Friendship signed earlier in Asmara on July 9, 2018 is accessible.

[148] Redie Bereketeab, *supra note* 98, p. 39.

[149] *Ibid*.

[150] *See* Yakob Hailemariam. 2010. *አሰብየ ማንናት? (የኢትዮጵያ የባህር በር ጥያቄ) ታሪክ አሳታሚ፣ አዲስአበባ* (Who Does Assab Belong To? *Ethiopia's Quest for Access to the Sea*), Tarik Publishers, Addis Ababa, pp. 29-61.

[151] Andargachew Tiruneh. 1993. *The Ethiopian Revolution 1974-1987: A Transformation from an Aristocratic to a Totalitarian Autocracy*. Cambridge University Press. p. 283.

breaking up the pre-existing relatively sizeable units and administrating them separately'.[152] All of the autonomous regions which 'had over the years put up armed resistance against the regime' were granted 'the more independent sounding status of (autonomy) to those regions in order to appease them'.[153] Accordingly, Assab was declared to be an autonomous region separate from the province of Eritrea which was, at the same time, accorded the status of an autonomous region.[154]

The 1991 triumph of the TPLF-EPLF over the military regime heralded a new era marked by the reversal of Ethiopia's long held littoral status as a result of the modus operandi of the new regime – deciding upon crucial national issues without the people having a real say – which entailed 'the unconditional split-off of Eritrea, whereby nothing was negotiated except a 'free access to the ports on the Red Sea' (as it now appears, without guarantee)'.[155] Thus, the most crucial of national issues was conveniently disposed of as '[t]he TPLF made no concerted effort to retain sovereignty over an Eritrean port, effectively making Ethiopia the world's most populous land-locked country'.[156] One may but marvel at the irony of history evident in TPLF's stance in contrast to the reasoning of the UN General Assembly on the disposal of the former Italian territory of Eritrea which, among others, took into consideration '[t]he rights and claims of Ethiopia based on

[152] *Ibid*.

[153] *Ibid*.

[154] Yakob Hailemariam, *supra note* 150, p. 46. Assab was granted the status of an autonomous region by Proclamation No.16/1980.

[155] Jon Abbink, *supra note* 7, pp. 561-62. Abbink described the problem of the time internally as well as in Ethiopia's relations with Eritrea: 'This general lack of debate and consensus on issues of national interest and the lack of sufficiently democratic institutions have been enduring sources of tension within Ethiopia, and indeed can be partly held responsible for the emergence of the present quarrel with Eritrea'.

[156] Michael Woldemariam, *supra note* 1, p. 176.

geographical, historical, ethnic or economic reasons, including in particular Ethiopia's legitimate need for adequate access to the sea'.[157]

As Abbink observed, '[i]t is also remarkable that at no point in the war did Ethiopian leaders question the right of Eritrea to possess the port of Assab, although the legal arguments and the border demarcation based on the past international treaties and maps are far from clear, and the war situation called many things into question'.[158] This being the reality and given Ethiopia's unconditional acceptance of decisions of the Boundary Commission, Eritrea's territorial integrity, including Assab, has become an unassailable legal reality Ethiopia has to live with. Hence, Redie's advice may be worth heeding to ensure peaceful future relations between Ethiopia and Eritrea:

> It is important to dispel any misconceptions about Eritrean sovereignty and to underscore its irreversibility. There are still many Ethiopians who would like to see Eritrea through the lens of ports and an outlet to the sea. Hence, it has to be made clear that the foundation of the partnership is the mutual sovereignty of the two states.[159]

5. Conclusion

The story of Ethio-Eritrean relations is a strange story – commencing with a queer relation of intimacy between two liberation fronts, which then evolved into strange inter-state relations and finally descended into violent conflagration in just five years. This, arguably, is indicative of a fundamental flaw in the relations. The ferocity of the conflict and staggering casualty figures send an unmistakable message that it must be a one-time folly which must not be repeated under any circumstances. It is, therefore, a cardinal responsibility of leaders on both sides that future relations must be rooted in accepted principles of

[157] Excerpted in Munkman, *supra note* 48, p. 25.

[158] Jon Abbink, *supra note* 5, p. 418.

[159] Redie Bereketeab, *supra note* 98, p. 39.

international law and international relations and must be conducted with the utmost transparency and accountability. Though we are living in post-communist times, there is always great need to beware of history repeating itself as a tragedy.

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The Ethio-Eritrean Rapprochement and Potential Implication on Eritrean Refugees in Ethiopia

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1. Introduction

The relationship between Ethiopia and Eritrea is as fascinating as it is sad. For reasons that continue to sharply divide opinions to date,[1] a very costly war ensued between the two countries in 1998 – resulting in the loss of more than 70,000 lives and the displacement and expulsion of thousands of civilians from both sides.[2]

Almost immediately after the cessation of hostilities in 2000 and following a swift path adopted by Eritrea in economic and political repression, thousands of Eritreans begun to flock to Sudan and Ethiopia as refugees and migrants. The outflow continued for close to two decades – as both countries maintained what became to be labeled as the 'no-peace-no-war' stalemate.[3]

In a twist of events that only a few had imagined would unfold, Ethiopia and Eritrea, the two horn of African region arch-nemesis,

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[1] *See* generally: Negash, T. and Tronvoll, K. 2000. *Brothers at War: Making Sense of the Eritrean-Ethiopian War*. Ohio University Press; and Reid, R. 2003. 'Old Problems in New Conflicts: Some Observations on Eritrea and Its Relations with Tigray, from Liberation Struggle to Inter-State War'. 73(3) *Journal of the International African Institute*. pp. 369-401.

[2] *See* for example, https://www.newsweek.com/eritrea-ethiopia-war-isaias-afwerki-united-states-626478

[3] *See* for example: François Christophe. 2017. 'Atlantic Council: The Eritrean Regime's US Spin Doctors?', in Mirjam Van Reisen and Munyaradzi Mawere (*eds*), *Human Trafficking and Trauma in the Digital Era: The Ongoing Tragedy of the Trade in Refugees from Eritrea*. Langaa RPCIG. p. 412.

made peace in June 2018 – following the coming to power of a new breed of political leadership within Ethiopia's current ruling party – the Ethiopian People's Revolutionary Democratic Front. On 9 July 2018, the two countries signed a historic peace and cooperation agreement which 'ended' two decades of hostility.[4] In the immediate aftermath, people-to-people relations were re-instituted, embassies reopened in the respective capital cities, scheduled flights restarted between Addis Ababa and Asmara, international telecommunication reinstalled, and most importantly, border crossings reopened – provisionally allowing for free movement of people in both directions. Further entrenching their relationship, new treaty frameworks are also being worked out to deal, among others, with border delimitation, customs, maritime, port use, communications and monetary issues.

Ironically, since the peace deal was not accompanied by any meaningful internal transformation in Eritrea,[5] the border openings and free movement of people only facilitated the migration of many more Eritreans – now crossing to Ethiopia with lesser risk and cost.[6] In 2018 alone, the daily arrival of refugees increased by about five-fold – reaching to average of 390 daily, from 50 previously. In less than four months, 27,000 refugees arrived at the entry points in Ethiopia.[7]

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[4] *See* African News. 18 September 2018. 'Eritrea - Ethiopia accord signed in Jeddah' available at https://www.africanews.com/2018/09/18/eritrea-ethiopia-accord-signed-in-jeddah-here-are-the-details//

[5] *See*: https://www.hrw.org/world-report/2019/country-chapters/eritrea

[6] UNHCR. 2018. '*Operational Update Ethiopia'*. At: https://reliefweb.int/sites/reliefweb.int/files/resources/66333.pdf; UNHCR. 2018. *'Renewed influx of Eritrean refugees'*: at https://reliefweb.int/sites/reliefweb.int/files/resources/66488.pdf

[7] UNHCR. Ethiopia: *Country Refugee Response Plan, the Integrated Response Plan for Refugees from Eritrea, Sudan, South Sudan and Somalia*. Jan 2019-Dec 2020, p. 8; *see also*Norwegian Refugee Council, 11 Oct 2018, *Thousands of families reunited one month after Ethiopia-Eritrea border reopens*; AFP, 21 August 2018; *27,000 Eritreans seeking refugee status' in Ethiopia*, available on https://www.news24.com/Africa/News/27-000-eritreans-seeking-refugee-status-in-ethiopia-20181221).

Such developments notwithstanding, a remarkably robust and friendly relationship between the leaders of the two states has now been in the making – potentially restyling the trajectory of political discourses – but also bringing many complex issues back to the talking table. The fate of the considerable number of Eritrean refugees in Ethiopia is one area of interest.

Essentially, this study focuses on understanding the implication of Ethio-Eritrean rapprochement on the protection of Eritrean refugees in Ethiopia. The main objective of the study is to analyze whether Ethiopia's refugee policy in relation to Eritreans will remain unaffected under changed circumstances of the bilateral relations, what bearing, if any, the politics of reciprocity dictated by compounded socio-economic and national interest considerations may have on Eritrean refugees in Ethiopia, and to understanding how Ethiopia's policy choices vis-à-vis refugees will be perceived by Eritrea – if Ethiopia fails to yield to pressures or other considerations.

The analyses will mainly approach possible impacts from two specific but interrelated angles. The first refers to the use of the prima facie status determination approach – and inquires about what the continued practice of the prima facie recognition approach (vis-à-vis Eritrean refugees) denotes in terms of Ethiopia's reading of the socio-economic and political setting in Eritrea, how such decision may be perceived by Eritrea as a country of origin, if Ethiopia can terminate the use of such procedure without breaching an international law obligation, and where it can, what considerations render the adoption of such a pathway very unlikely or unfeasible.

The second, albeit hypothetical, angle for approaching issues related to potential implications inquires if, given the contemporary political setting in Eritrea, Ethiopia can/will invoke the ceased circumstance clause under Article 1.C.5 of the Refugee Convention in relation to Eritrean refugees recognized prima facie – without breaching its

international obligation. It also strives to understand specific issues including: what unique challenges ensue from the fact that recognition was granted on a prima facie basis, what conditions apply as affecting Eritrean refugees in particular before invoking the ceased circumstance clause, what safeguards can be invoked under international law to afford refugees the opportunity to apply for exemptions – before any declaration comes into effect, and if, as a matter of international law, individualized scrutiny can be required before cessation clauses take effect.

In terms of methodology, the analyses draws heavily on international and national legal frameworks adopted on refugees – mainly focusing on the UN Refugee Convention (1951), pertinent United Nations declarations (2016-2018), the new Refugee Proclamation (2019), and a plethora of national policy and strategy documents adopted by Ethiopia in recent years; such instruments are contextually deployed as key normative references for evaluating the legal implication of actions or inactions on the part of Ethiopia in relation to the treatment of Eritrean refugees. In relevant parts, the study has also drawn insight from prior researches in law and political sciences that addressed themes covered in this undertaking; such texts have been used to understand issues, corroborate facts, or support approaches and conclusions adopted in this research.

2. Overview of international and regional instruments on refugees

The practice of fleeing one's country to seek refuge elsewhere has existed for long, and various attempts had been exerted to regulate and manage refugee situations. Of these, the 1951 UN Refugee Convention and its 1967 Protocol Relating to the Status of Refugees (hereafter

called the Refugee Convention)[8] are considered as 'centerpiece of the international refugee protection'[9] and have provided a definition of refugee that influenced regional and domestic laws. Adopted with a view to ensuring to refugees 'the widest possible exercise of fundamental rights and freedoms enshrined in the Charter of the United Nations and the UDHR',[10] the Convention identifies a refugee in relation to four core elements; as such refugees are persons who: (1) are outside their country of origin; (2) are unable or unwilling to seek or take advantage of the protection of that country, or to return there; (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted; and (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.[11] A Statute of the UNHCR was also adopted in 1950 which defined a refugee slightly differently from the Convention.[12]

In relation to African realities of the 1960's, two key reasons had been identified to indicate the insufficiency of the definition under the 1951 Refugee Convention. The first was that 'the majority of refugees in Africa at the time were not fleeing individualized persecution, but generalized violence, either as a result of ongoing wars of national liberation or because of conflicts in newly independent states'; the second was the understanding that 'the application of the 1951 Convention requires individual refugee status determination procedures', which is too expensive to undertake.[13] Consequently, while

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[8] Convention Relating to the Status of Refugees, 189 UNTS 2545, done July 28, 1951, entered into force Apr. 22, 1954 (1951 Refugee Convention).

[9] The 1951 Refugee Convention and 1967 Protocol Relating to the Status of Refugees with Introductory Note by UNHCR. p. 2. Available at: *http://www.unhcr.org/3b66c2aa10.pdf*.

[10] The 1951 Refugee Convention, *supra note* 8. Preamble.

[11] Goodwin-Gill and Jane McAdam. 2007. *The Refugee in International Law*. Oxford University Press, 3rd ed., p. 37.

[12] *See* UNHCR Statute, Art. 6.

[13] James Milner. 2009. *Refugees, the State and the Politics of Asylum in Africa*. Palgrave McMillan. p. 7; as highlighted below, the position that the UN Refugee Convention only

accepting the UN Convention as constituting 'the basic and universal instrument relating to status of refugees,' the Organization of African Union (OAU) adopted a regional instrument that maintains the Convention's definition – but expands it in some form to also incorporate certain non-Convention grounds.[14]

Over the last few decades, the international refugee law and institutional response mechanisms have undergone various phases of development. The latest drive in crafting actionable measures in responding to multifaceted challenges of refugees was demonstrated quite recently during the United Nations General Assembly on Refugees and Migrants held in 2016,[15] and the subsequent endorsement of the Global Compact of Refugees (2018). In profound expression of solidarity to refugees, the General Assembly adopted the New York Declaration for Refugees and Migrants in which several countries resolved to take measures to minimize the challenges faced by refugees – taking into account different national realities, capacities and levels of development and respecting national policies and priorities.[16] Countries also committed to take specific measures to carry out programs for humanitarian financing that are adequate, flexible, predictable and consistent – and which also enable host countries to respond both to immediate humanitarian needs and their own development needs.[17] Under Annex I of the Declaration, states agreed to implement a

mandates individual status determination - and that group status determination is specifically allowed under OAU Convention are not shared by other sources. *See mainly* Alice Edwards. 2006. 'Refugee Status Determination in Africa'. 14 *Afr. J. Int'l & Comp. L.* 204.

[14] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. 10 September 1969. Adopted by the Heads of State and Government at its Sixth Ordinary Session. Addis Ababa. Art. 1(2).

[15] New York Declaration for Refugees and Migrants. 19 September 2016. Seventy-first Session Agenda Items 13 and 117. Resolution adopted by the General Assembly (hereafter New York Declaration).

[16] *Ibid.*, para. 21.

[17] *Ibid.,* Annex I: Comprehensive Refugee Response Framework.

Comprehensive Refugee Response Framework (CRRF) which outlines the steps to be taken towards the achievement of a global compact on refugees – providing for a more equitable and predictable arrangement among countries of origin, transit and destination in addressing large movements of refugees – based on principles of 'international cooperation' and 'burden sharing'.[18]

Such developments continue to considerably inform national political thinking and discourse on the subject– and furthermore shape the contents of Ethiopia's refugee law and policy regime today.

3. The shaping of national 'refugee policy'

Refugee law is normally pronounced as an extension of international human rights; as such, the act of protection to refugees is supposed to be principally humanitarian. This understanding rings truth, as the refugee law regime is meant to extend international protection to people fleeing persecution on grounds of widely valued and shared norms, including the prohibition of discrimination, freedoms of expression and religion.

Basically, the 'refugee policy' of a state addresses vital issues such as the definition of refugees, refugee status determination mechanisms, the modality of refugees' settlement, as well as how the organ dealing with refugees is structured within government machineries.[19] Variedly composed by different countries and national legal frameworks, refugee policy is also concerned with whether states choose to apply an open door principle to those seeking protection; whether individualized assessment should be undertaken to determine status, or that they (also) apply a simplified, group-based recognition of status; whether they

[18] *Ibid.*, Annex I: Comprehensive Refugee Response Framework. Para.7 and 13; New York Declaration para. 68.

[19] Guy S. Goodwin-Gill. 2008. 'The Politics of Refugee Protection'. 27(1) *Refugee Survey Quarterly*. p. 18; *see* also Milner, *supra note* 13.

encamp or implement other durable solutions to refugees; and whether they seriously consider and enforce cessation of refugee status under changed circumstances in country of origin.

Domestic choices regarding the framing of refugee policies are predicated on various considerations. Some of the key factors include the need for pursuit of internationally recognized humanitarian causes; the desire for positing oneself as fountain of international protection; painting bad image to a country of origin; and gaining human and financial resources; most pertinently, it is also stated that 'taking in the refugees of one's enemies can be a useful political tool as it discredits the enemy's regime, drains it of its human resources and facilitates the creation of opposition groups in exile.'[20]

Hence, while it is generally posited that the pursuit of refugee law constitutes humanitarian causes, the 'reality shows that it is impossible to divorce the ethical and the political in the modern world of inter-state relations'[21] which refugee law is. In other words, the refugee policy of states is not crafted simply out of altruism and humanitarian concerns, but is shaped and affected by complex political considerations as well.

Indeed, in the past, numerous incidences had showcased how states used the refugee agenda as a card in political exercise. For instance, in the context of the ideological confrontation between the US and USSR, it is recorded that 'between 1956 and 1968, of the 233,436 refugees admitted to the US, all but 925 were from communist countries.'[22] In

[20] Salehyan, I. 2001. 'Safe Haven: International Norms, Strategic Interests and US Refugees Policy'. *Working Paper 40. Center for Comparative Immigration Studies, University of California, San Diego*, Cited in: Kidest Dawit. 2017. *Ethiopia's policy towards Eritrean refugees and migrants: altruism or extension of the conflict* (MA Thesis, AAU. unpublished). p. 69.

[21] Emma Haddad. 2008. *The Refugee in International Society: Between Sovereigns*. Cambridge University Press. p. 3.

[22] Guy S. Goodwin-Gill, *supra note* 19. p. 10.

similar trend, Pakistan's acceptance of Afghan refugees during the Soviet invasion 'was not simply a humanitarian impulse' but was 'consciously set out to position Pakistan as a *frontline state* in order to rescue the country from the isolation into which it had slipped following the execution, in 1979, of the former Pakistani Prime Minister Zulfikar Ali Bhutto.'[23] These are only a few of the most visible illustrations.

Again, political considerations may entail that not only do state-to-state relations influence the acceptance rates, modes and extent of treatment of refugees as such, but also the likelihood of refugees' expulsion by invoking cessation clauses under the 1951 Refugee Convention.[24] For instance, it is noted that as Sudan engages in warmer relations with Eritrea, Eritrean refugees in Sudan tended to receive less protection – to the extent of allowing Eritrean security forces to operate freely and abduct wanted refugees.[25] This generally signifies that the protection extended to refugees may work inversely vis-à-vis 'cozy relations' established between counties involved. In fact, between 1973 and 2008 alone, extreme measures such as the cessation of refugee status had been invoked twenty-five times in Africa and Latin America;[26] these happened in situations of independence, change in regime and democratic transition, and settlement of civil conflicts.[27] Under Article 1.C.5 of the Refugee Convention, cessation due to changed circumstances is held to be the prerogative of an asylum state which

[23] William Maley. 2016. *What Is a Refugee?* Oxford University Press. p. 149.

[24] 1951 Refugee Convention, *supra note* 8.

[25] Mirjam Van Reisen and Meron Estefanos. 2017. 'The Exodus from Eritrea and Who is Benefiting', in Mirjam Van Reisen and Munyaradzi Mawere (*eds*.). *Human Trafficking and Trauma in the Digital Era: The Ongoing Tragedy of the Trade in Refugees from Eritrea*. Langaa RPCIG. p.143.

[26] Yasmeen Siddiqui. 2011. 'Reviewing the application of the cessation clause of the 1951 convention relating to the status of refugees in Africa'. *Working Paper Series No.76*. Refugee Studies Center. p. 4.

[27] *Ibid*., p. 16.

applies international legal standards to find that the facts upon which refugee status was recognized no longer exist and that protection is once more viable in a refugee's state of origin.[28]

4. Ethiopia's broader refugee policy

Not peculiarly, Ethiopia's refugee policy is shaped by a blend of internal and external factors. In the 1960 and 70s, Ethiopia followed an open door policy for refugees, which was 'mainly driven by the ideology of Pan-Africanism and anti-colonial struggle', as did many other African countries.[29]

Whereas humanitarian gestures feature very strongly, political plays in refugee protection measures have also been noted in Ethiopia in the past. In relation to its border-related conflicts with the Sudan, for example, the two countries' policies vis-à-vis each other's refugees were at play. On one occasion (before the South's secession), for example, Ethiopia had gone from rejecting assistance offers from the UNHCR with respect to South Sudanese refugees in Ethiopia in order to 'avoid being instrumental to internationalization of the Southern Sudan problem and in order to safeguard Ethiopia's long-existing friendly relations with the Sudan,'[30] to a point where the policy directive was reversed; in the later context, Ethiopia had to publicize 'the issue of around twenty thousand South Sudanese refugees in its territory' – hence seeking 'assistance from the international community.'[31] At the time, a political choice was taken 'to serve as reminder to Sudan which allegedly supported Eritrean and Tigrayan opposition movements in

[28] James C. Hathaway and Michelle Foster. 2014. *The Law of Refugee Status*. Second Edition. Cambridge University Press. p. 476.

[29] Wogene Berhanu Mena. 2017. *Assessing the Local Integration of Urban Refugees: A Comparative Study of Eritrea and Somalia Refugees in Addis Ababa* (MA Thesis, AAU, unpublished), p. 48.

[30] Belete Belachew Yihun. 2013. *Ethiopia in African Politics 1956-1991* (PhD Thesis, AAU, unpublished). p. 68.

[31] *Ibid.*, p. 73.

North Ethiopia, that Ethiopia, too, had refugees in its territory it can use to advance national security objectives.'[32] Such radical shift in a few years' time was dictated by the change in political relations between the two countries. Similar changes in refugee policies in various African countries, pursued based on politics of the day, are also well documented.[33]

While incomplete, a few scholars have conjectured on drivers and key underpinnings of Ethiopia's refugee law and policy. Hence, it was submitted that the national refugee policy is influenced by Ethiopia's 'relation with refugee producing states, national security, the need for assistance from international refugee regimes, its capacity to control borders, and the calculation to gain political reputation';[34] in the Eritrean context, it was also held that 'the need to isolate the Eritrean regime'[35] had counted as a very important driver.

In the particular context of the accommodation of Eritrean refugees, Ethiopia's policy choice had not been immune from criticism from Eritrea itself. Such labeling is not entirely unexpected – considering that Eritrean refugees originate from a country that had, over the decades, engaged overtly and covertly in a very adversarial foreign policy relation with Ethiopia. Eritrea always viewed Ethiopia's refugee policy very suspiciously and tags the 'generous schemes' it offered to refugees generally and to Eritreans in particular, including the preferential treatment of Eritreans through the out of camp policy, as a means 'to

[32] Assefaw Bariagaber. 2006. *Conflict and the Refugee Experience: Flight, Exile, and Repatriation in the Horn of Africa*. Ashgate. p. 84.

[33] *See* in general, Milner, *supra note* 13.

[34] Wogene Berhanu Mena. 2017. *Assessing the Local Integration of Urban Refugees: A Comparative Study of Eritrea and Somalia Refugees in Addis Ababa* (MA Thesis, unpublished). p. 48.

[35] Kidest Dawit, *supra note* 20. p. 69.

entice mass exodus of Eritreans' and as a 'menacing political score'.[36] For Eritrea's Foreign Minister Osman Saleh Mohammed, the mass outflow of the Eritrean youth is not attributed to military conscription programs or human rights situations *per se* in the country, but rather to the multiple luring factors and campaigns waged by Ethiopia and other countries to humble Eritrea's future.[37]

Since 2016, Ethiopia's policy drive – potentially affecting Eritrean refugees – has evolved from the current camp-based basic service provisions approach to a more progressive model that also considers alternatives to the encampment of refugees. Such change is predicated on several considerations. These mainly include projecting a better image of Ethiopia, strengthening people to people relations, ensuring that Ethiopia's refugee protection program gets the attention and resources it deserves, enhancing Ethiopia's standing on the international stage, environmental rehabilitation, and the need for facilitating that host communities, too, get a fair benefit from interventions targeting refugees.[38]

Broadly, Ethiopia's new national enterprise in policy is attended by the adoption of concrete measures that involve three interconnected interventions: the espousal of a national roadmap featuring structured approaches for implementing rights in longer-term context; the formulation of a new refugee legislation in 2019; and the launching of a national strategy (and institutional platform) on Comprehensive Refugee Response Framework.

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[36] Adrian Kriesch. (25.08.2018) DW: '*Eritrea's Foreign Minister Osman Saleh Mohammed says Eritreans are welcome home*': available at https://www.dw.com/en/eritreas-foreign-minister-osman-saleh-mohammed-says-eritreans-are-welcome-home/a-45220912

[37] *Ibid*.

[38] Agency for Refugees and Returnee Affairs. Comprehensive Refugee Response Strategy National Workshop. Opening remarks by Kebede Chane, Director General of ARRA. 22 June 2019, Addis Ababa.

5. Main normative developments in Ethiopia

When it comes to regulatory frameworks, it is noted that Ethiopia did not have laws specifically governing refugees' affairs prior to 2004 – when the first comprehensive refugee law was enacted.[39] Reflecting on the anomalies that Ethiopia hosted a considerable number of refugees without having specialized legal regime, Kibret wrote in 1997 that, 'there are no laws in Ethiopia dealing with matters of procedure (on refugees).'[40] Yet, it has to be noted that Ethiopia is also signatory to the United Nations and OAU Refugee Conventions – both of which provided important guidance for its refugee policies.[41]

Until recently, the national practice in Ethiopia in the management of refugees' affairs has not only been incomprehensive, it had also featured a fragmented approach – mainly focusing on the provision of basic protection and care services in designated refugee camps. It was, therefore, evident that new approaches had to be devised in refugee response measures – which are dictated by global, regional and national developments. It was for this particular reason that Ethiopia joined hand in new global initiatives in which it committed to deliver on various pledges.[42] Such assurances offered by Ethiopia required a legislative overhaul – centering on the old refugee legislation which had served as a basis for the provision of limited rights. The new Refugee

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[39] *See* Zelalem Mogessie Teferra. 2017. 'Delimiting the Normative Terrain of Refugee Protection: A Critical Appraisal of the Ethiopian Refugee Proclamation No. 409/2004', in Yonas Birmeta, *Refugee Protection in Ethiopia, International Law Series*, Addis Ababa University, Vol.1, p. 45.

[40] Kibret Markos. 1997. 'Treatment of Somali Refugees in Ethiopia'. 365 *Int'l J. Refugee L.*, p. 381.

[41] Ethiopia acceded to the UN Refugee Convention and its Protocol on 10/10/1969 and ratified the OAU Convention on 15/10/1973. *See:* https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html and http://www.achpr.org/instruments/refugee-convention/ratification/, respectively for the relevant ratification tables.

[42] Administration for Refugees and Returnee Affairs. *Roadmap for the Implementation of the Ethiopian Government Pledges*. 17 February 2017. Addis Ababa, Ethiopia.

Proclamation was promulgated in February 2019 against such background.[43]

The protective regime of the new Proclamation diverges significantly from the prior legislation. It sketches a comprehensive set of rights to which refugees are entitled – some entirely new and others crafted along the lines provided under international instruments. The Proclamation also provided a solid basis for smoother implementation of the pledges and for kick-starting the CRRF mechanism nationally – the most important instrument in this regard being the ten years strategic document connected to the Roadmap – the National Comprehensive Refugee Response Strategy (CRRS) – which was drafted in August 2018.[44]

6. The protection of Eritrean refugees in Ethiopia: evolution and context

In the aftermath of the 1998-2000 border war, Ethiopia welcomed and easily recognized Eritreans as refugees – as it did to other refugees from neighboring countries. A strict encampment policy was pursued in relation to Eritrean refugees – although such practice is deemed inconsistent with the UN Refugee Convention. For years, the UNHCR has promoted the Alternative to Camps Policy (ACP) whenever possible – while also ensuring that refugees are protected and assisted in camps effectively.[45] The basic premise of the ACP stresses that it will 'remove restrictions' against refugees and enhance their opportunity to 'live with greater dignity, independence and normality as members of

[43] Refugee Proclamation No.1110/2019, February 27, 2019, 25th Year No. 38, para.3, Addis Ababa.

[44] Agency for Refugees and Returnee Affairs. *National Comprehensive Refugee Response Strategy (2018-2027)*. February 2018. Addis Ababa, Ethiopia. Repeals Refugee Proclamation No. 409/2004.

[45] UNHCR. *Policy on Alternatives to Camps*. p. 6.

the community, either from the beginning of displacement or as soon as possible thereafter'.[46]

As of 2006, the idea of formally allowing Eritrean refugees to live out of camp (OCP) was conceived.[47] The key reason that justified such move on the part of Ethiopia was that at the time Eritrean refugees were predominantly young, without family and from urban areas (central Eritrean regions). For such demography, life in camps was thus deemed harsh.[48] Another drive considered in the context of such new policy direction was also that many Eritreans have had families and relatives living in Ethiopia – hence the need for facilitating social reconnect. This phenomenon had meant that the potential for Eritreans to pose security threat to the country was deemed less.[49] In addition, the frequency of family visit requests tabled by Eritrean refugees in camps was subjected to abuse and was all-too-demanding to monitor, which strengthened the need to liberalize the encampment procedure.[50] Another important consideration in this play, which influenced the adoption of OCP in favor of Eritreans, was also the need for Eritreans to see Ethiopia and Ethiopians through a positive prism – with a hope that this would ultimately restore the damaged relationships.[51]

According to a report published in 2018, over 15,000 Eritreans live in Addis Ababa alone – accommodated within the framework of the OCP regime.[52] While in the early phases, the exclusive focus was on Eritrean refugees, many refugees from other nationalities, too, have continued

[46] *Ibid.*, p. 4.

[47] ARRA higher official who spoke to one of the authors on a condition of anonymity. Interview:14 November 2017. Addis Ababa.

[48] *Ibid*.

[49] *Ibid*.

[50] *Ibid*.

[51] *Ibid*.

[52] Alison Brown *et al*. 2018. *Urban Refugee Economies: Addis Ababa, Ethiopia*. Working Paper. p. 27. https://pubs.iied.org/pdfs/10850IIED.pdf.

to live in towns or exercise the right to freedom of movement through *de facto* OCP arrangements – with the knowledge of national and local authorities.

In principle, Ethiopia had always accepted that the OCP should be extended to all nationalities; however, a major breakthrough in this regard only came with the adoption of the Roadmap in 2017. The 'relative success' of the OCP regime with Eritrean refugees and its alleged impact in 'promoting self-reliance' was highly lauded that Ethiopia decided to steadily expand the scheme to refugees of other nationalities as well.[53]

In Ethiopia, Eritrean refugees are easily accorded refugee status. A procedure for prima facie recognition of refugee status has been applied since the mass influx required a prompt provision of assistance, safe admission and protection to those patently in need of it in such circumstances, and because also it would be forbiddingly expensive to administer individual determination processes. The prima facie approach, a common practice adopted by states as well as the UNHCR for over 60 years, entails recognition of refugee status on the basis of readily apparent and objective circumstances in the country of origin.[54]

Ethiopia's application of less-rigorous procedure meant that Eritreans who fled their country for a whole set of different motives – many for reasons that have little or nothing to do with 'fear of persecution' or 'the prevalence of events that seriously disturb public order' in the country of origin – were able to receive protection benefits in Ethiopia. Stated otherwise, refugee status was granted to thousands of Eritreans through group determination procedures whereby each of them is regarded prima facie (in the absence of contrary evidence) as a refugee – even when concerns remain that the circumstances of the flights *might*

[53] ARRA, *Supra note* 42.

[54] UNHCR. 2015. *Guidelines on International Protection No.11. Prima Facie Recognition of Refugee Status*. HCR/GIP/15/11. Geneva. Para.1 and 3.

be that not all persons fleeing Eritrea are necessarily considered as refugees *individually*.

Indeed, over the years, the simplified screening and registration procedure entailed in the context of such process *prompted* several Eritreans to exit their country – both for lack of sense of safety at home, for purposes of family reunification, and in search of better economic feature abroad – many using Ethiopia as pathway in secondary migration. While Eritrea remains one of the most authoritarian states in the world, and *generally*, desertion and draft evasion do not of themselves constitute a well-founded fear of persecution under the Refugee Convention,[55] it is widely held that the mass flight of Eritrean youth is significantly, if not entirely, attributed to its policy of conscription for indefinite national service.[56]

7. Prima facie recognition and group determination procedures and Eritrean refugees

While the UN and OAU refugee conventions provide for definitions, principles of protection, and rights and obligations of refugees, they do not as such offer specific mechanisms for establishing refugee status. The OAU Convention is in fact more explicit in this regard; it states, '[F]or the purposes of this Convention, the Contracting State of asylum shall determine whether an applicant is a refugee.'[57] It is, thus, left for states to put in place a system of refugee status determination.

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[55] This generally holds unless it is shown that a disproportionately severe punishment would follow on account of race, religion, nationality, membership of a particular social group or political opinion, or that the performance of military service would have required participation in actions contrary to one's genuine political, religious or moral convictions.UNHCR. 2019. *Handbook on Procedures and Criteria for Determination of Refugee Status and Guidelines in International Protection*. Geneva. para. 167-170.

[56] Martin Plaut. 2016. *Understanding Eritrea: Inside Africa's Most Repressive State*. Hurst and Company. p. 49.

[57] OAU Convention. Art.1(6).

In cases where states are not parties to the 1951 Convention or have not developed a system to determine refugee status, refugee status determination (RSD) is conducted by the UNHCR.[58] In many developing countries with limited financial or technical expertise to carry out RSD, the UNHCR is highly involved in the process. Yet, the UNHCR considers the task as primarily that of the hosting states,[59] and regards its mandate as observatory one.

7.1. Individual refugee status determination procedure

In refugee status decisions, individual determination is the principle and group determination the exception. Considering the 1951 Convention and its listed grounds for attaining refugee status, individual determination is best suited to achieve the purposes; it hastens refugees' rights – especially in avoiding unwarranted cessation of refugee status.[60]

As such, many African states are increasingly applying individual status determination, either under own auspices or through the UNHCR.[61] Moreover, individual status determination is undertaken in countries of secondary or tertiary refuge, as well as in urban centers, especially capital cities.[62] The popularity of individual RSD could be explained by reference to UNHCR's constant push for states to have their own RSD, the increase in mixed migration flows, and humanitarian fatigue on the part of countries.[63]

Ethiopia's refugee proclamations provide individual assessment as the principle – and furthermore outline how such process works. The

[58] Micheal Alexander. 'Refugee Status Determination Conducted by UNHCR'. 11(2) *International Journal of Refugee Law*. p. 251.

[59] *Ibid.*, p. 254.

[60] *See* Michael Kagan. 2017. '(Avoiding) The End of Refugee Status Determination'. 9 *Journal of Human Rights Practice*. Pp. 197–202.

[61] Alice Edwards, *supra note* 3. p. 205.

[62] *Ibid*.

[63] *Ibid.*, p. 206.

procedure is initiated by the asylum seeker who wishes to be regarded as refugee and for this purpose submits application to the nearest agency office, branch office or police station.[64] The Agency for Refugees and Returnees Affairs (ARRA) shall, then, give a decision on status within six months of submission of the application and after verifying that the criteria are fulfilled.[65] In practice, this is ordinarily carried out by the 'Eligibility Committee' which is composed of ARRA's experts and UNHCR delegates who sit with observer status.[66] UNHCR's involvement mainly focuses on the provision of technical support during the interviews and analyses phases in the determination processes.

7.2. Group refugee status determination procedures

The majority of African states recognize group refugee status.[67] The same is true in Ethiopia. Under the law, while individualized status determination is the principle, group determination is provided as exception.[68] The Proclamation grants ARRA the power to *declare* a class of persons as refugees if they meet the criteria under Article 5 which defines a refugee.[69]

The new Proclamation has brought about some changes in this regard. Unlike in the previous law which does not dictate the form on the basis

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[64] Art.15(1) of Proclamation No.1110/2019.

[65] *Ibid.*, Art. 16(1).

[66] Jetu Edosa Chewaka, *'Procedural Guarantees for Refugee Status Determination under Ethiopian Refugee Law'*, in Yonas Birmeta, *supra note* 39. pp. 138-139, citing Internal Procedural Guidelines for the Appeal Hearing Council circulated on 20 January 2008 as referring to the "first instance body" in the ARRA/NISS.

[67] Alice Edwards. 2006. 'Refugee Status Determination in Africa', 14 *Afr. J. Int'l & Comp. L.* 204. p. 228.

[68] *See* Art. 19 cum 13 (1) of Proclamation No.409/2004 and Art. 15 cum. Art. 21 of Proclamation No. 1110/2019.

[69] Art. 21(1) of Proclamation No. 1110/2019.

of which the declaration was to be made,[70] under the new proclamation, the designation shall be effected by enacting *detailed directive* containing a description of events in the country of origin that necessitated the decision, beneficiaries of the decision, and its applicable date.[71]

In the past, Ethiopia has designated groups of persons coming from certain countries as *prima facie* refugees.[72] In relation to claimants from these countries, what is required in general is a preliminary screening to verify nationality and an apparent reason to deny the request for status of the individual concerned.[73] This is normally executed by the Eligibility Committee mentioned above.

Before turning to the workings of group status determination of Eritrean refugees, it is worth pointing to the slight disconnect between how group determination of status was envisaged during the preparation of Proclamation No. 409/2004 and how it was actually applied in practice. In the explanatory note, a group determination of refugees in pursuance of Article 19 applies to people who *at once (literally)* arrive in Ethiopia *as a group* due to challenges encountered in their country. Difficulty in ascertaining the suitability of extending protection at *individual levels* was mentioned as the main reason for resorting to such a procedure. In practice, however, *group status determination* was mistakenly taken as synonym to a *prima facie recognition* of refugee status.

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[70] Art.19 of Proclamation No.409/2004 simply mandates the Head of ARRA to declare a class of persons as refugees if s/he 'considers that any class of persons met the criteria under Art. 4(3) of the Proclamation'.

[71] Art.21(2) of Proclamation No.1110/2019.

[72] An expert at the UNHCR indicated that currently people coming from Eritrea, South Sudan, Southern and Central Somalia, Yemen and Cordofan, Darfur and Blue Nile states of the Sudan and claiming refugee in Ethiopia are entertained through the prima facie system. (Phone Interview, May 14, 2019).

[73] *Ibid*.

7.3. Prima facie recognition of status and procedures

A large-scale influx has been described by UNHCR as referring to an exceptional situation in which rapid arrival of large numbers of asylum-seekers may overwhelm the state's capacity, in particular, for individual administration of their claims.[74] One of the main mechanisms devised to respond to large-scale influxes is therefore group determination of status on prima facie basis, which, in essence, involves recognition by a state of refugee status on the basis of readily apparent and objective circumstances in the country of origin giving rise to exodus.[75]

As stated above, group determination of status is not necessarily the same as *prima facie* recognition. According to the Guideline on Prima Facie Recognition of Refugee Status, 'a prima facie approach (simply) means the recognition by a State or UNHCR of refugee status on the basis of readily apparent, objective circumstances in the country of origin.'[76] Regarding its scope, it further clarifies that 'although a prima facie approach may be applied within individual refugee status determination procedures, it is more often used in group situations.'[77]

Setting out the specific procedures for the determination of which person qualifies to receive refugee status based on the criteria established under the 1951 and OAU conventions is largely the discretionary work of states in whose territory the refugee applies. National practices vary across jurisdictions, and thus, the matter is left to states who, by drawing on the spirit of resolutions adopted by the UNHCR EXCOM on various occasions,[78] or just on their own, may

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[74] UNHCR. 2011. *Handbook on Procedures and Criteria of Refugee Status Determination*. para. 23.

[75] *Ibid*.

[76] UNHCR. 2015. *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee*. para.1

[77] *Ibid*, para. 2.

[78] *For example*, EXCOM Conclusion No 22 on Protection of Asylum Seekers in Situations of Large-Scale Influx. 1981. Available at https://www.unhcr.org/en-my/578371524.pdf

establish procedures having regard to resources and administrative structures.

As briefly indicated above, in Ethiopia, this matter is regulated through a formally established law and institutional arrangement. The persona of the Security, Immigration and Refugee Affairs (subsequently renamed as National Intelligence and Security Services) was vested with a huge administrative power to declare a class of persons to be refugees if they meet the criteria set under the Article 4(3), i.e., qualifying as 'living under circumstances indicating that each member of the group could be considered individually as refugee'.[79] With a slight twist, Article 21 of Proclamation No. 1109/2019 bestowed the power on the institution i.e., ARRA which may declare any group of persons meeting Article 5 criteria as refugees by issuing a directive to that effect.

It follows that the objective factors that prevail in the country of origin and ARRA's own assessment in this regard are the key basis for the enjoyment and grant of prima facie recognition of refugee status to refugee clusters fleeing from their countries. By the same token, changes in the circumstances in the country of origin which led to recognition of the status would permit ARRA to re-issue a directive terminating group refugee status or the application of prima facie recognition of status with regard to a group of persons fleeing from particular countries.

Either way, while states have discretion in terms of the specific procedures they apply in status determination, it goes without saying that whether a refugee acquires status through a group or individualized status determination or the employment of prima facie procedures would have no material bearing on her status as refugee. Refugees enjoy the same class of rights recognized under the refugee conventions and national law and to the same extent.

[79] Art. 19 of Refugee Proclamation No.409/2004.

7.4. The use of prima facie recognition with regard to Eritrean refugees

The key rational for adopting the prima facie recognition approach in relation to refugees originating from Eritrea can be traced to a mix of humanitarian, practical and political factors –which are not necessarily unique to Eritreans. The broader humanitarian appeal is essentially about making such simplified and less rigorous procedure available to Eritreans – as is also the case with regard to other refugees in Ethiopia emigrating from South Sudan, Somalia, Sudan or Yemen. The strong historical, political and cultural bond between Eritrea and Ethiopia is an added factor that prompts the use of accelerated procedures and enhanced treatment of the affairs of refugees from Eritrea – while the state still maintains discretion to engage in costly, time-taking and inconvenient status determination procedures based on assessment of each individual case.

Legally, this is also much easier to sell – considering the prevalence of objective factors which implies that most, if not all, Eritreans fled their country under circumstances indicating that each of them may individually be considered as a refugee.

From practical point of view, the mass influx of refugees triggers challenges for host countries to engage in individual determination procedures. Ethiopia is no exception. Not only will situations require prompt provision of assistance, safe admission and protection in such circumstances, it is also costly and hence 'impossible' to administer individual determination procedures; hence, Ethiopia's policy has to settle on prima facie recognition of refugee status with each Eritrean fleeing his country.

7.5. A strong rationale for maintaining the prima facie approach?

The basis on which Ethiopia founded the prima facie recognition approach notwithstanding, there is no denying that the procedure has, in practice, benefitted Eritreans who fled their country for different, including non-convention, reasons. Martin Plaut mainly attributes the mass flight of the Eritrean youth to their conscription for indefinite national service.[80] A resultant of such open-ended national services, the 'devastating social and economic consequence that resulted from it and which has undermined the long-standing tenuous livelihood systems in the country', has equally contributed to the exodus of Eritreans.[81]

Naturally, deploying stricter procedure in granting status – based on examination of individual cases – will exclude thousands of Eritreans fleeing their country, possibly including border-case scenarios of deserters and draft-evaders, from getting refugee status and protection in Ethiopia. Many will have difficulty proving they fear persecution or are escaping from events seriously disturbing public order in Eritrea – criteria alternatively required under the refugee Proclamation, the UN Refugee Convention and the African Refugee Convention. From a humanitarian perspective, therefore, it would make sense and a convincing case could also be made that the present approach of prima facie recognition of refugee status continues. In this regard, it is imperative to note that subsidiary refugee protection mechanisms are not recognized in the Ethiopian legal system,[82] and this fact lends additional explanation for continuation of the existing system.

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[80] Martin Plaut. 2016. *Understanding Eritrea: Inside Africa's Most Repressive State*. Hurst and Company. pp. 49.

[81] Gaim Kibreab. 2014. 'The Open-Ended Eritrean National Service: The Driver of Forced Migration'. Paper for the European Asylum Support Office - Practical Cooperation Meeting on Eritrea, 15-16 October 2014, Valetta - Malta. Available at http://lifos.migrationsverket.se/dokument?documentSummaryId=33512 pp. 15-16, 18.

[82] Zelalem Mogessie, *supra note* 39. p. 55.

But, in deciding on continuation of the status quo, the pursuit of the prima facie approach also needs to be seen carefully in light of Ethiopia's obligation under international law, the practical burdens of pursuing individual determination procedures, Ethiopia's national policy orientation on multifaceted refugee issues, and more importantly, the projected impact of maintaining such approach on the newly re-established diplomatic and economic relationship with Eritrea. Obviously, law and politics and bilateral relationships that ensue from such courses cannot be treated as wholly distinct subject matters.

From a purely normative perspective, Ethiopia can cease the use of the prima facie recognition procedures without breaching any international law obligation. As discussed above, the primary concern of the international normative order is to define the entitlement of refugees – rather than prescribing specific administrative workings that should be employed to accord a refugee status.

Yet, from practical point of view, the termination of such approach would simply be unfeasible – given the sheer scale of new refugee arrivals witnessed over the years. Individual determination procedure is not impossible – but a less viable alternative – owing to the huge administrative and financial outlays it entails. Hence, reason applied, there is no pressing rational that prompts the Ethiopian government to change course on the subject.

Indeed, prima facie recognition will continue to be a valuable and much required tool in handling refugee cases from Eritrea. While it is inevitable that undeserving persons, including those who had committed war crimes, crimes against peace and humanity and other serious non-political crimes prior to entry to Ethiopia would abuse the system, there is always a mechanism through which such persons can be *screened post-facto* and their status revoked.

However, it must also be noted that humanitarian appeal alone or the presence of practical exigencies at the national level would not suffice as singular considerations for decision making – especially when looked at from the point of view of the need for promoting Ethiopia's national interest without compromising international law obligations.

While practical necessities may compel Ethiopia to continue the prima facie recognition of refugees, questions remain whether it will really continue to uphold such approach in relation to Eritrean refugees, what the new political rapprochement with Eritrea implies to its 'cherished' bilateral relationship with Eritrea and to Ethiopia's long-held refugee policy on the subject, and because of this, if a change in refugee policy course is inevitable in the prima facie classification of select groups of persons as 'refugees'.

This requires understanding the context in relation to three interconnected issues, namely: what does 'rapprochement' mean in terms of Ethiopia's reading of the political setting in Eritrea? What does Ethiopia's continuation of the prima facie recognition approach (vis-à-vis Eritreans) mean to the State of Eritrea (including how this can perceived by Eritrea)? And what impact does this occasion on Ethiopia's thinking in refugee policy? These will be looked upon against the background of new developments which ensued after the historic peace agreement concluded between Ethiopia and Eritrea on July 9, 2018.

7.6. Rapprochement *vs.* continuity in Ethiopia's national policy on refugees

Unanticipated as the conclusion of the peace accord, cooperation and friendly relations was, the Ethio-Eritrean reconciliation was hailed as remarkable in many quarters of the world. Concerns however remain regarding transparency, pace of delivery, and institutionalization of the whole process. Again, while the bilateral relationship has bolstered in

many fronts, paradoxically, the freedom of movement of people endorsed in such context also facilitated a greater exodus of Eritreans to Ethiopia and beyond. No mention was made under the peace accord regarding the situation of Eritrean refugees in Ethiopia – either in the context of repatriation or a broader framework for durable solutions.

More ironically, though, the development in the bilateral relations of Ethiopia and Eritrea coincided with highpoints in Ethiopia's refugee policy overhaul. Despite the complex political transformation in which the Ethiopian state found itself in the past three years, a strong political ambience has been set in motion – demonstrating commitment and steadiness in the national refugee protection regime.

Unquestionably, the discourse in refugee law and policy has gained momentum in Ethiopia – projecting more entitlements and sustainable solutions to the recurring refugee issues. This gives the impression that there is nothing in the making which indicates a possible digression in the treatment of refugees or in the application of the prima facie approach in status determination procedures vis-à-vis Eritreans.

Yet, this verity does not necessarily imply that Ethiopia's current policy will be *read positively* by Eritrea, or that Ethiopia would not *yield* to any pressures or considerations in the future. Needless to state that in past the 'ceased circumstance' clause under Art.1.C.5 of the Refugee Convention has been widely *activated* by states to apply to refugees recognized on a prima facie basis,[83] some based on dubious justifications.

Given the strong political rhetoric aired in the past, it remains very unlikely Eritrea would just stand by or favorably consider Ethiopia's 'humanitarian' gestures, and this so despite the OAU Convention's emphatic message that 'solving refugee problems is essentially a humanitarian approach' and that while 'refugee problems have been the

[83] UNHCR, *supra note* 74.para. 28.

source of friction among many member states, (they) require eliminating the sources of such discord in the spirit of the OAU Charter'.[84] As discussed above, Eritrea had previously held that the threat posed to its sovereignty – through the mass migration of its working-age youth – is a coefficient of luring conspiracy devised by countries near and far. Eritrea's discontentment will likely continue – given that while Ethiopia's implementation of the prima facie recognition of refugees serves a very noble humanitarian cause and sensibly responds to practical challenges on the ground, reduced to its essentials, its policy can impliedly be read as a 'negative value judgment' in relation to Eritrea's handling of own affairs and its standing among 'civilized nations' and in Ethiopia's eyes – and particularly so in terms of how it treats its own people. It is a courteous certification of the fact that Eritrea is not a place to be for many of its citizens – and hence people fleeing from such country shall be accorded sanctuary through very lenient and simplified procedures.

In the contemporary context, there is no clearly articulated and formal evidence showcasing that Eritrea views Ethiopia's policy on the subject as a 'hostile approach'. Yet, the continued pursuit of such policy in accommodating Eritrean refugees will definitely impact bilateral relations between the two countries at some point – although it remains unclear in what measure. So far, Ethiopia appears to have managed to maintain a fine-line between its diplomatic relations with Eritrea and the wider humanitarian commitment under international law – as demonstrated in its broader responses to multifaceted refugee issues; there is also little visible pressure applied on Ethiopia (either from Eritrea or based on national interest considerations) to yield to political imperatives that stem from this angle.

With the embedding relationships in bilateral relations, though, Eritrean refugees have expressed fear and pessimism more than hope in the

[84] OAU Convention. Preamble.

peace process – publicly voicing their deep concerns that the Eritrean regime's hands would be stretched to Ethiopia to selectively threaten or persecute members of the refugee community. There has also been mention of a clandestine presence of Eritrean security forces in Addis Ababa; the open nature of borders, the refugee camps' relative physical proximity to Eritrea's boundaries and a prior history of similar experience in Sudan were cited as reasonable grounds for harboring fear. In the past, there had been reports Eritrea's intelligence operatives had been deployed in Sudan covertly – leading to 'deportation' of a large number of refugees.[85]

This year, when reports spread that Ethiopia may shift focus on its diplomatic relations with Eritrea – supposedly giving the latter 'free hand' to threaten select refugees in Ethiopia and demand them sign 'regret letters', Ethiopia's Ministry of Foreign Affairs was swift in its reaction – refuting any such insinuation. The Ministry pronounced Ethiopia shall continue to be 'active actor of the international migration affairs and believes in all necessary support to be given to migrants'; it furthermore held that '…Eritreans are not only our neighbors, but more our families; their safety is our safety, (and hence, Ethiopia) will work more on people-to-people relations".[86] Both the UNHCR and ARRA, too, offered prompt reassurance to refugees living in Ethiopia who claimed they feared losing status and reprisals by Eritrean authorities following the influx.[87] This impresses as reinforcing Ethiopia's strong traditional stance in defense of refugee causes.

Currently, the old practice of prima facie recognition continues; no ARRA directive has been issued yet determining the grounds on which

[85] Van Reisen and Mawere, *supra note* 25. p. 149; *see also* https://www.hrw.org/world-report/2019/country-chapters/eritrea, p. 249.

[86] Kiram Tadesse. (July 17, 2018). '*Ministry Rejects Report on Eritrean Refugees'*. Available at http://www.afro105fm.com/afrofm.com/2018/07/17/ministry-rejects-report-on-eritrean-refugees/

[87] *Ibid*.

the government passes decisions regarding the designation of a group of persons originating from a given country as prima facie refugees. Historically, it is inferred from prior trends that such decisions had been made on the basis of the reading of events in the country of origin, including the prevalence of widespread violence, civil war, human rights abuses or breakdown of public order which force people to flee their country. The same had applied to Eritrea. In international relations, no country enjoys being labeled as a primary refugee-generating state on account of these very unexciting factors, and especially so by neighboring peers.

To recap, Ethiopia's pursuit of the prima facie approach will likely continue – not just because of its appeal from humanitarian angles and practical points of view (wherein Ethiopia has not resolved to adopt a directive and uniformly make refugee determinations based on less-politically sensitive individual procedures), but also because while so much has been achieved so far in ending decades of hostility between both countries and in normalizing bilateral relations in many fields, this has not been attended by equally imperative reforms and opening-up in Eritrea in realizing the socio-economic, civil and political rights of its citizens. Refugee outflow will likely continue.

Eritrea alleges it is making progress and strives to put in place a new strategic development plan which includes consolidation of the political process and reorganization of government institutions;[88] and yet, in reality, the country remains a pariah state – run under a one man rule for nearly three decades – without institutional restraint and system of accountability. In 2017, Eritreans represented the ninth-largest refugee population in the world – with 486,200 people forcibly displaced,[89] and

[88] Human Rights Council Working Group on the Universal Periodic Review. 32nd session: Eritrea, National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21. November 12, 2018, para. 113.

[89] UNHCR. *Global Trends: Forced Displacement in 2018*. p. 15, available at: https://www.unhcr.org/5d08d7ee7.pdf

constitute a significant proportion of the migrants disembarked on the northern shores of Mediterranean trying to reach Europe in search of safety and better economic feature. The overall state of the situation in Eritrea prompted the UN Commission of Inquiry on Human Rights in Eritrea established by the Human Rights Council to announce that there are reasonable grounds to believe that the government had committed crimes against humanity and showed a wholesale disregard for liberty of Eritrea's citizens.[90]

In a similar vein, the Council submitted that the government made no effort to address chronic human rights abuses outlined in previous reports, and accused the regime of continuing to perpetrate crimes against humanity.[91] Countering the accusations, Eritrea stood in its position that the international community is imposing on it unwarranted pressure and that there has never been systematic crisis to justify the appointment of UN special rapporteur.[92]

The strong argument remains, though, that given the calamitous socio-economic and political circumstances in Eritrea – including the system of indefinite military conscription that has been operated since 1995 under conditions which may be labeled as amounting to 'forced labour', Ethiopia should continue its current policy course in the accommodation of Eritrean refugees. While national interest considerations cannot be obviated in all circumstances, and it is also true that applicants not covered by convention grounds will always

[90] UN Human Rights Council (UNHRC) Report. June 2016. Available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20067&LangID=E.

[91] UN Human Rights Council (UNHRC) Report. June 2017. Available at: https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21751&LangID=E.

[92] Human Rights Council Working Group, *supra note* 91, para.108; *also* Head of Eritrean delegation speaking in the Human Rights Council - UN Human Rights Council, 12 March, 2019. Human Rights Council holds enhanced interactive dialogue on the situation of human rights in Eritrea.

abuse the system of protection, Ethiopia's decision whether or not to continue the prima facie approach must only be based on a reading of the objective circumstances in Eritrea.

The preceding sections have looked into the potential impact of rapprochement on the operation of prima facie recognition of refugee status as affecting Eritreans.

Yet, it must be noted that fundamental political changes, if and when triggered in Eritrea at some point, could also have impact in changing the status of refugees in Ethiopia. The following sections will analyze the possibility of invoking the 'ceased circumstances' clause to declare the termination of status of Eritrean refugees and the effects thereof on refugees. While it is true that currently the prospects of any meaningful change in Eritrea which would impel Ethiopia to reformulate its policy course remains very remote, the objective of the subsequent sections is to show the high stakes and the precise nature of Ethiopia's obligations under international, regional and national laws – should it choose to operationalize the ceased circumstance clause.

8. Grounds for cessation of refugee status: general

Refugee status is temporary and shall not be granted for 'a day longer than was absolutely necessary'.[93] Cessation may be raised because of a number of grounds which lead to the conclusion that it will be unnecessary to extend a refugee status.

The ceased circumstances clause under the laws relates to objective standard of measuring a situation in the country of origin which would make continuity of the protection unjustified. This is done by evaluating the change in circumstances which had dictated the grant of refugee status in the first place.

[93] UNHCR Standing Committee. 1997. *Note on the Cessation Clauses EC/47/SC/CRP 30.* Para. 4.

In this part, the focus of the discussions will only relate to one specific ground for the cessation of refugee status – fundamental change of circumstances – and looks into how the current relations between Ethiopia and Eritrea and the overall political setting in Eritrea feature in this regard.

8.1. 'Fundamental change of circumstances' in country of origin: requirements

One ground for invoking cessation of refugee status is when there is a fundamental change of circumstances in a country of origin which makes the original reason for flight not justified any more. Ethiopia's law uses the same expression as in the 1951 and OAU conventions to describe the ceased circumstances clause: it applies when a refugee 'can no longer, because the circumstances in connection with which he was recognized as a refugee has ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality…'.[94] Hence, where fundamental change referred to in Article 9 is considered to have taken place in a country of nationality, ARRA shall initiate assessment and verification of the nature and durability of the changes having regard to the circumstances which justified the grant of refugee status.[95]

There is a general agreement that for the cessation clause to be applicable, the changes in the country of origin must be fundamental, durable and effective.[96] This clause applies to both individual and group determinations of status.[97] It must also be noted that cessation of status because of ceased circumstances is different from the 'safe country of origin' consideration. While the former applies to change of

[94] Art. 9 of Proclamation No.1110/2019.
[95] *Ibid.*, Article 10(1)
[96] UNHCR Standing Committee, *supra note* 93, para. 19. *Executive Committee of the High Commissioner Program Conclusion No. 65 (XLII), Cessation of Refugee Status (1991) states:* 'changes in the country of origin must be 'profound and enduring'.
[97] UNHCR Standing Committee, *supra note* 93, para. 37.

circumstances which enabled the grant of refugee status at a particular time, the latter is mostly used in refugee status determination. So, the designation of one shall not be a conclusive proof of the other.[98] Yet, if conditions that gave rise to group status determination have ceased to exist, the asylum country can change determination to an individual basis.[99] In other words, declaration of cessation or its consideration shall not have a bearing on refugee status determination. However, in practice, declaration of cessation has also negatively affected new asylum seekers.[100]

8.1.1. Fundamental change

Change must be fundamental to invoke the ceased circumstances clause. This implies that the general situation of a country of origin must have changed. If the change is not substantial enough to presumably remove a refugee's or a group of refugees' fear, it is not fundamental.[101] Due to this reason, improvement in the general situation of human rights is made part of the analysis of the fundamental nature of changes in a country.

The fundamental nature of the change must be made in 'objective and verifiable way'.[102] This can be performed by taking human rights instruments as a guide.[103] Significant improvements observed in the protection of civil and political rights, independence of the judiciary, respect for rule of law, and establishment or consolidation of human

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[98] *Ibid.*, para.7*; and* UNHCR, 'Lisbon Expert Roundtable'. 2003. Available at: https://www.refworld.org/docid/3fe9981e4.html .

[99] Art. 21(4) of the Refugee Proclamation states: 'The Agency shall issue a directive terminating group recognition procedure when determining, giving due consideration to country of origin information and in consultation with UNHCR, that the circumstances that led to the group refugee recognition has ceased to exist.'

[100] Erika Feller *et al.* 2003. R*efugee Protection in International Law: UNHCR's Global Consultations on International Protection*. Cambridge University Press. p. 531.

[101] UNHCR Handbook, *supra note* 74, para. 135.

[102] UNHCR Standing Committee, *supra note* 93, para. 36.

[103] *Ibid.*, para. 23.

rights institutions can be good illustrations.[104] Democratic elections, amnesty to potential returnees, repeal of oppressive laws, change in power structure, establishing or consolidating constitutional systems, and ending systemic repression can also be regarded as examples in determining whether changes are fundamental or not.[105]

8.1.2. Effective change

Fundamental changes are considered effective only if they remove the basis of the fear of persecution.[106] An agreed meaning of this term is that the changes must remove the reasons that enabled the acquisition of refugee status. If a refugee was recognized because of the fear of persecution based on his religion, changes shall relate to the freedom of religion in the country of origin. If a group of refugees were given recognition because of disturbances in public order in the country of origin, the change must relate to the general public order in that country. If there were multiple reasons for recognition of a refugee status, such reasons must have ceased to exist. If the circumstances which a refugee feared have not been altered, any change cannot be fundamental. In other words, since the paramount assumption is that the refugee who will be denied status because of cessation based on ceased circumstances can reclaim protection from the state of his nationality, the changes must be able to remove the reason for his fear.

Effectiveness is also measured by the concrete changes a country of origin takes that ultimately show that the country is willing and able to protect the refugees. Moreover, while not related with the original cause of fear, if a refugee or group of refugee will flee their country for fear

[104] *Ibid*.
[105] Erika Feller *et al*., *supra note* 100. p. 495.
[106] UNHCR Standing Committee, *supra note* 93, para. 19.

of other circumstances, the change in the country of origin will not be regarded as effective.[107]

8.1.3. Durable change

Even when changes are apparently fundamental, some waiting period must be there to observe their durability. The UNHCR recommends twelve to eighteen months between the occurrence of a fundamental change and the decision of cessation.[108] Its own practice also shows that longer periods of time (four to five years) were taken to reach the decision of cessation.[109] Some countries have set longer periods in national legislations.[110]

The period of time required to gauge the durability of change shall be measured against the nature of the change itself. Less time would be needed in circumstances of peaceful transition to constitutional or democratic system as opposed to instances where change is volatile and not stable. The UNHCR's declaration of cessation nine years after change with regard to Ethiopian refugees in Sudan in the 1990s is one example in this regard.[111] Moreover, '[u]ntil national reconciliation takes root and political changes are stable and firmly in place, such changes cannot be considered as durable.'[112]

In conclusion, the changes in circumstances must be fundamental, durable and effective for an asylum state or the UNHCR to invoke cessation based on the ceased circumstances clause. The country of origin must be willing and able to offer national protection to refugees when they return to its jurisdiction.

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[107] *Ibid.*, para. 20.
[108] Discussion Note on the Application of 'ceased circumstances' cessation clause in the 1951 Convention (EC/SCP/1992/CRP.1).
[109] UNHCR Standing Committee, *supra note* 93.para. 21.
[110] Erika Feller *et al., supra note* 100, p. 495.
[111] Yasmeen Siddiqui*, supra note* 26, p. 19.
[112] UNHCR Standing Committee, *supra note* 93, para. 22.

Cessation can be decided to apply to a specific group of refugees within a population. For instance, cessation was limited to pre-1991 Ethiopian refugees in Sudan when it was declared in the late 1990s.[113]

In considering the application of the cessation clause, the experience of returnees, reports by independent observers,[114] and visit by refugee and refugee representatives are some of the key sources of information that may be utilized.[115] However, voluntary repatriation by itself cannot imply the possibility of applying cessation.[116] The threshold for safe and dignified repatriation is less than for cessation.

Refugees may choose to return on their own will, and with or without assistance. In that case, a voluntary return shall result in cessation when the return is to reestablish link with the country of origin.[117] This is different from separate incidents of stay in form of visiting family members,[118] or to evaluate the change of circumstances in a country of origin.[119]

Fundamental, durable and effective change does not imply durable solution. While the enforcement of durable solutions will likely lead to the application of cessation clause, it does not mean that there must be durable solution for a cessation to be implemented.[120] However, durable solutions must follow cessation decision and refugees affected

[113] Erika Feller *et al., supra note* 100, p. 531.
[114] UNHCR Standing Committee, *supra note* 93, para. 21.
[115] Conclusion Number 18 adopted by the Executive Committee at its thirty-first session (A/AC.96/588), para. 48.
[116] UNHCR Standing Committee, *supra note* 93, para. 29.
[117] UNHCR Handbook, *supra note* 74, para. 125.
[118] *Ibid*.
[119] UNHCR. 'Voluntary Repatriation,' *Conclusion Number 18 adopted by the Executive Committee at its thirty-first session (1080, A/AC.96/588) para. 48;* available at https://www.unhcr.org/en-my/578371524.pdf
[120] UNHCR Standing Committee, *supra note* 93, para. 28.

by the decision shall not be in a state of confusion about their status, especially if they remain in the host state.[121]

Cessation of refugee status should not be used as a short-cut to overcome an intractable refugee problem. Where an unjustified or premature application of a cessation clause results in the forced return of refugees, the consequences could be extremely serious, leading to further displacement within the country of origin or renewed displacement outside, as well as risks to life and personal security.[122] Between 1973 and 2008, cessation was invoked twenty-five times in Africa and Latin America;[123] they happened in situations of independence, change in regime and democratic transition, and settlement of civil conflict.[124]

8.1.4. Procedural matters in Ethiopia

When and if the need arises and a decision is taken to that effect in Ethiopia, ARRA takes the initiative of assessment and verification of the nature and durability of the change in circumstances.[125] In so doing, ARRA has to collaborate and coordinate with UNHCR.[126] This is in line with UNHCR's supervisory role.[127] The baseline for assessment and verification is the circumstances that justified the grant of refugee status.

Following this procedure, ARRA, with support from UNHCR, makes a decision on cessation.[128] This is consistent with UNHCR's position

[121] UNHCR.2003. Lisbon Expert Roundtable. para. 21, available at: https://www.refworld.org/docid/3fe9981e4.html.
[122] UNHCR Standing Committee, *supra note* 93, para. 40.
[123] Yasmeen Siddiqui, *supra note* 26, p. 4.
[124] *Ibid.*, p. 16.
[125] Refugee Proclamation No. 1110/2019. Art 10(1).
[126] *Ibid.*, Art 10(1).
[127] UNHCR Standing Committee, *supra note* 93, para.33*;* UNHCR also participates as observer in refugee status determination (Art. 16(2)) and in appeal proceedings against such determination (Article 18(2)).
[128] Refugee Proclamation No. 1110/2019. Art. 10(2).

which holds that the state of asylum decides on the application of cessation clause.[129] What the decision means and who is affected are to be indicated in the decision.[130]

It must be noted that cessation is not necessarily followed by return.[131] An asylum country bears the burden of proof that changes in circumstance are fundamental, durable and effective.[132] That said, the UNHCR can also invoke cessation of protection under Paragraph 6 of its Statute.

An individual refugee who claims continuity of a refugee status based on any ground may appeal to the Appeal Hearing Council within 60 days,[133] or appeal out of time when there is justified delay.[134]

A country of origin can also take steps to facilitate repatriation of its citizens. In relation to Ethiopian refugees in Djibouti in the 1980s, for example, the Ethiopian government had issued a law (The Repatriation of Ethiopian Refugees in the Republic of Djibouti) and established a coordination committee to ensure repatriation and rehabilitation. The law had proclaimed, among others, amnesty for those wishing to return.[135]

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[129] UNHCR Standing Committee, *supra note* 93, para. 36.
[130] Refuge Proclamation No.1110/2019. Art.10(3).
[131] UNHCR. 2003. Lisbon Expert Roundtable. Para. 21.
[132] *Ibid.*, para. 27.
[133] Refugee Proclamation No.1110/2019. Art. 9(3). Sub-Article (2) of Art. 9 states: 'Cessation shall not apply, however, to a refugee who is able to invoke compelling reasons arising out of previous persecutions as set out in Art. 5 of this proclamation, for refusing to avail himself of the protection of the country of his nationality or the country of his habitual residence.'
[134] *Ibid.*, Art. 9(4).
[135] Jeff Crisp. 1984. 'The Politics of Repatriation: Ethiopian Refugees in Djibouti 1977-83', *11(30) Review of African Political Economy*, 73-82, p. 76.

8.2. Eritrea, the human rights situation and 'possibility' of invoking cessation clause

The general human rights situation in a country of origin is taken as a threshold to evaluate the fundamental nature of change of circumstances.[136] Hence, it is worth discussing human rights in Eritrea to understand how this may influence the invocation of cessation clauses and look into scenarios that may affect Eritrean refugees in Ethiopia.

As pointed out above, the human rights situation in Eritrea is extremely dire. Indefinite national service and arbitrary detention after return are cited as typical manifestations of human rights violations in Eritrea.[137] The report of the Commission of Inquiry on Human Rights in Eritrea stated: 'An essential layer of Eritrea's repressive system is its mandatory military service, which is indefinite in duration; [...] although national service is officially justified by the threat posed by foreign enemies such as Ethiopia, it provides the government with a constant supply of virtually free labour and allows it to maintain control over the Eritrean population'.[138] The report adds, 'Power [...] is concentrated in the hands of the President and of a small and amorphous circle of military and political loyalists.'[139]

Eritrea is mentioned for all the bad things that involve grave human rights violations – including jailing journalists, arbitrary arrest, incommunicado detention, enforced disappearances, the shoot-to-kill

[136] UNHCR Standing Committee, *supra note* 93, para. 19.

[137] Mixed Migration Center. 2018. Revisiting the Eritrean Exodus, Report*; see also* Amnesty International. 13 July 2018. 'Eritrea: Peace with Ethiopia must be catalyst for human rights change'; Van Reisen and Mawere, *supra note* 25, p. 98; and Interpress Service. 08 Aug, 2018. HRW. 'Along with Peace, Eritreans Need Repression to End'.

[138] UNHRC. 8 June 2016. *Detailed Findings of the Commission of Inquiry on Human Rights in Eritrea* (A/HRC/32/47/CRP.1). Geneva, Switzerland; p. 5 and p. 12, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIEritrea/A_HRC_32_CRP.1_read-only.pdf

[139] *Ibid.*, pp. 5 and 16.

policy at borders, guilt by association, restricted movement within, forced labor, random round up, mass arrests, a climate of fear and lack of hope.[140] Eritrea has not implemented its 1997 Constitution; it has not held national election; its military and security personnel benefit from trafficking and smuggling;[141] it is ranked as one of the top ten torture victim producing countries;[142] it was called 'the fastest emptying country';[143] it has no functioning legislature, no independent judiciary; it hosts a horrific prison system, allows no independent domestic media; there are no opposition parties or NGOs; public protest is extremely rare, and freedom of religion is hugely restricted.[144]

Testimonies of recent arrivals from Eritrea also indicate involuntary open-ended military conscription, arbitrary arrest and detention without trial, compulsory land acquisition and other systematic human rights violations by the state remain prevalent.'[145]

As indicated above, the human rights condition in Eritrea has been so grave that the UN Human Rights Council was prompted to establish a special Commission of Inquiry on Eritrea in 2014. The Commission concluded 'the Eritrean government engages in systematic, widespread

[140] Amnesty International. 13 July 2018. Eritrea: Peace with Ethiopia must be catalyst for human rights change; *see* also UN Human Rights Council. 15 June 2017. Eritrea accused over catalogue of human rights abuses – New Report; and Van Reisen and Mawere (eds.), Human Trafficking and Trauma in the Digital Era: the Ongoing Tragedy of the Trade in Refugees from Eritrea, pp. 98, 103.

[141] Van Reisen and Mawere, *supra note* 25, p. 148.

[142] Kjetil Tronvoll. 2009. The Lasting Struggle for Freedom in Eritrea. Oslo, Norway: The Oslo Centre. pp. 84-85.

[143] Matina Stevis and Joe Parkinson. 20 October 2015. Wall Street Journal. *Thousands Flee Isolated Eritrea to Escape Life of Conscription and Poverty*. Available at: http://www.wsj.com/articles/eritreans-flee-conscription-and-poverty-adding-to-the-migrant-crisis-in-europe-1445391364?alg=y

[144] Interpress service. 08 Aug, 2018. HRW. 'Along with peace, Eritreans need repression to end'.

[145] UNHCR. Jan 2019-Dec 2020. *Ethiopia Country Refugee Response Plan, the Integrated Response Plan for Refugees from Eritrea, Sudan, South Sudan and Somalia*. p. 8.

and gross human rights violations and that it is not the law that rules Eritreans, but fear.'[146]

On the part of the Eritrean government, the Report was time and again rejected as politically motivated.[147] And Eritrea's reaction is, to some extent, shared by some countries and organizations. For instance, the African Center for Atlantic Council described the human rights crisis in Eritrea as fabrication.[148] A Danish report narrated that the situation in Eritrea 'may not be as bad as rumored',[149] while the UK Home Office came up with a similar conclusion.[150] In fact, the Home Office's report brought about a huge drop (from 84% to 44%) in the acceptance rate of Eritrean refugees in the UK.[151]

The Eritrean government accepts that institutional changes and political transition in Eritrea have not progressed as planned. The border war with Ethiopia and the subsequent existential threat were offered as causes for the failures.[152] Eritrea blames the sanctions and human rights supervision measures imposed on it for doing more harm than good.[153] Moreover, it submitted that the philosophy of collective

[146] UNHRC. 5 June 2015b. *Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea* (A/HRC/29/CRP.1, pp. 1 and 8.

[147] Human Rights Council Working Group on the Universal Periodic Review, *supra note* 88, para. 108.

[148] Van Reisen and Mawere, *supra note* 25, p. 411.

[149] Danish Immigration Service. 2014. *Eritrea - Drivers and Root Causes of Emigration, National Service and the Possibility of Return*. Copenhagen. available at: https://www.nyidanmark.dk/NR/rdonlyres/B28905F5-5C3F-409B-8A22-0DF0DACBDAEF/0/EritreareportEndeligversion.pdf

[150] United Kingdom: Home Office. 2015. Country Information and Guidance – Eritrea: Illegal Exit, as cited in Van Reisen and Mawere, *supra note* 25, p. 442.

[151] *Ibid*.

[152] Human Rights Council Working Group on the Universal Periodic Review, *supra note* 88, paras.6 and 110; uncertainty in its relations with Ethiopia and the latter's refusal to respect the Commission's decision were raised as points of argument for the need to have national service, Van Reisen and Mawere, *supra note* 25, p. 442*; See also* Interpress Service. HRW. 08 Aug, 2018. 'Along with peace, Eritreans need repression to end'.

[153] Human Rights Council Working Group on the Universal Periodic Review, *supra note* 88, para. 112.

responsibility by all Eritreans should have been taken into context in the assessment of situations.[154]

Since the rapprochement with Ethiopia, one key development in relation to the state of human rights in Eritrea was the opening of borders. There was free movement of people within; people were also allowed to exit Eritrea without any documentation. This was an important step for a country that had very restrictive exit laws.[155] The relative freedom continued for months until the Eritrean government unilaterally took measures to close all border crossings one by one.

There was also a report on the release of prisoners detained for religious beliefs following the rapprochement. The Eritrean Minister of Foreign Affairs reportedly announced that refugees were welcome and could return home without difficulty.[156]

As discoursed above, no mention was made in the peace accord or in any plan of the Eritrean government regarding the situation of hundreds of thousands of Eritrean refugees in Ethiopia.

Assessments of the Eritrean refugee situation in Ethiopia based on interviews conducted indicate that the border situation was not what they feared most; it was rather the government's invisible overreach.[157]

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[154] *Ibid.*, para. 5.

[155] Jennifer Riggan and Amanda Poole.1August 2018. 'We can't go home': what does peace mean for Eritrea's refugees'. Available at: https://africanarguments.org/2018/08/01/cant-go-home-peace-eritrea-refugees.

[156] Adrian Kriesch. 25 August 2018. 'Eritrea's Foreign Minister Osman Saleh Mohammed says Eritreans are welcome home'. Available at: https://www.dw.com/en/eritreas-foreign-minister-osman-saleh-mohammed-says-eritreans-are-welcome-home/a-45220912.

[157] *See*, for instance, Amanda Poole and Jennifer Riggan. 17 August 2018. 'Fear Dampens Hope Among Eritrean Refugees in Ethiopia'. Available at: https://www.newsdeeply.com/peacebuilding/community/2018/08/17/fear-dampens-hope-among-eritrean-refugees-in-ethiopia-2; *see also* AFP. 21 August 2018. '27,000 Eritreans seeking refugee status in Ethiopia'. Available at: https://www.news24.com/Africa/News/27-000-eritreans-seeking-refugee-status-in-ethiopia-20181221.

This explains why many more Eritreans continue to leave Eritrea since the border openings. In spite of the limited protections, or material assistances, local integration, resettlement and family reunification opportunities availed in Ethiopia, no voluntary repatriation of Eritrean refugees has been initiated thus far.

Against the foretasted background, the narrative of facts that depict the present state of affairs in Eritrea cannot be described as 'changes', and even if it is submitted there is one, the 'change in circumstances' cannot be labeled as fundamental, durable or effective for Ethiopia to invoke the cessation cause.

Of course, the expectation was that improvement in bilateral and regional relations would imply a reduced need for war or hostilities, which in effect means a reduced need for the perpetuation of national military service schemes in Eritrea. In prior researches, the indefinite military service in Eritrea was mentioned as one of the major, if not the strongest, reasons for mass flights.[158] Yet, despite the reconciliation and changing geo-political situations in the Horn, the trajectory of youth outflow from Eritrea has not shown any sign of abatement.

In this light, it can be safely submitted that Ethiopia cannot now invoke the cessation clause without seriously breaching its international law obligation – whether or not status was accorded on prima facie basis. If conditions evolve to the extent that they arguably warrant the invocation of the clause, Ethiopia is still obliged to offer refugees the opportunity to apply for individualized assessment of their cases before any declaration comes into effect.

There are also other factors that inhibit any potential invocation of the cessation clause with regard to Eritrean refugees. Given that resettlement options to third countries are very limited and local

[158] Charlotte Alfred. 27 June 2016. 'Eritreans Flee Military Draft in Record Numbers'. Available at: https://www.newsdeeply.com/refugees/articles/2016/06/17/eritreans-flee-military-draft-in-record-numbers.

integration of Eritrean refugees in Ethiopia has not been (meaningfully) implemented, a very large number of refugees would be repatriated to Eritrea if the cessation clause is operationalized. For an economy that had been shattered by war, poor investment trail and costly diplomatic isolation, it would prove extremely difficult for Eritrea to accept a large number of refugees – even with assistance from the international community. Hence, if pursued in the current circumstances, the repatriation will most probably be undignified and not orderly. This makes the national protection of returnees very difficult, and therefore, the change in circumstances non-effective – even if it is found to be fundamental and durable.

9. Conclusion

How a refugee status is determined in any given setting is left to the discretionary workings of states. Individual assessment or the pursuit of group status determination based on objective and apparent reasons prevailing in the country of origin are the two most commonly used modalities.

Within the framework of obligations assumed under international law, refugee hosting states design and implement national refugee policies – which are themselves shaped by various interests and considerations, including their relations with countries of origin.

Despite the cessation of active hostility with Eritrea in 2018, Ethiopia continues to host thousands of Eritrean refugees within its jurisdiction. Eritrean refugees are recognized prima facie. In light of the general encampment policy, they are also accommodated in designated refugee camps – while over the years a few had also benefitted from the out of camp policy.

In 2018, a breakthrough in the relations of Ethiopia and Eritrea brought forward the intricate but not yet examined issue of what

rapprochement entails to Eritrean refugees under changing geo-political circumstances and how such development affects Ethiopia's refugee policy course. While Ethiopia's humanitarian gesture continues to feature very strongly, political play in refugees protection measures had also been noted in the past.

The analyses in this article concluded that in deciding on the continued application or otherwise of the prima facie approach, due consideration should be given to Ethiopia's obligation under international law, the practical burdens of pursuing individual determination procedures, Ethiopia's broader policy orientation on refugees, and no less, the projected impact of maintaining such approach on its newly crafted relationship with Eritrea. Obviously, law and politics cannot be treated as wholly separate subject matters.

From a purely normative perspective, Ethiopia can cease the use of prima facie recognition procedures without breaching any international law obligation; yet, it was submitted that the termination of such approach would simply be unfeasible – given the sheer scale of new refugee arrivals witnessed over the years and the huge administrative and financial burdens individual determination procedures entail. Hence, reason applied, there is no pressing rational, nor interest consideration, that prompts Ethiopia to change course on the subject.

Yet, it was argued that the pursuit of such policy on the part of Ethiopia will impact bilateral relations between the two countries at some point – although it remains unclear in what measure. So far, Ethiopia appears to maintain a fine-line between its diplomatic relations with Eritrea and the wider humanitarian commitment under international law; there is little visible pressure applied on Ethiopia to yield to political imperatives that stem from this angle.

The pursuit of the prima facie approach will likely continue – not just because of its appeal from humanitarian or practical points of view, but also because of the fact that the new relationship between Ethiopia and

Eritrea has not been attended by vital reforms and opening-up in Eritrea itself in realizing the socio-economic, civil and political rights of citizens.

On the other hand, it was observed that the overall human rights situation in Eritrea is so dire and wanting of drastic reforms such that its current state of affairs cannot be described as 'change in circumstances' that is fundamental, durable or effective for Ethiopia to invoke the cessation clause under the Convention or its own legislation. Despite the reconciliation and positively changing geo-political situations in the Horn region, the pattern of refugees outflow from Eritrea has not shown any sign of abatement.

As a result, it is safe to conclude that Ethiopia cannot invoke the cessation clause and seek the return of Eritrean refugees without breaching an international law obligation. Even if conditions evolve to the extent that they warrant the invocation of the clause, Ethiopia is still obliged to offer refugees the opportunity to apply for individualized assessment of their asylum cases before any such declaration takes effect.

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Mending Ethio-Eritrea Trade Relations: the Why and How

Martha Belete Hailu *

1. Background

There is no consensus on the history and relationship between Ethiopia and Eritrea. Based on cultural, linguistic and other similarities between people living in Eritrea and Tigray, the northernmost part of Ethiopia, some claim that Ethiopia and Eritrea were of one country. The sense of separate identity emerged in the 14th century with division of the region in two parts for administrative purposes, using the Mereb River as demarcation.[1] The division which was originally meant for administrative purposes became a political boundary in the 1890s with the territory north of Mereb River becoming Italian colony.[2] The territory remained under the Italian administration until the end of the Second World War and Ethiopia remained independent – except for the brief Italian occupation attended by resistance movements between 1935 and 1941.

This account, however, is contested by others who 'totally disagree that Eritrea was ever part of Ethiopia.'[3] Before colonization by Italy, some claim, Eritrea was an independent country for more than 700 years – with the exception of a narrow strip of coastal land which was under

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The author is grateful for the valuable comments, remarks and suggestions received from the two anonymous reviewers. All errors remain mine. I am also grateful to my colleague and friend Yazachew, who insisted that I write on this topic.

[1] Gebru Tareke. 2009. *The Ethiopian Revolution: War in the Horn of Africa*. Yale University Press. pp. 55-56.

[2] *Ibid.*, p. 56.

[3] Seyoum Yohannes. 2012. 'Eritrea-Ethiopia Arbitration: a 'Cure' based on Neither Diagnosis nor Prognosis'. 6.2 *Mizan Law Review*. p. 169.

the control of Ottoman Turks.[4] Writings of historians are adduced noting cultural and developmental differences between the two countries to assert the distinctness of the two countries in the early period.[5]

Following the defeat of Italy during the Second World War, Britain was tasked with the administration of Eritrea until its future was determined. The 1950 United Nations Resolution 390 A(v) established the status of Eritrea as an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown.[6] However, the federation stayed only for a short period as Ethiopia revoked the arrangement and declared Eritrea as one of its administrative provinces,[7] leading to the creation of an insurgent movement, the Eritrean Liberation Movement (ELM). The ELM was later absorbed by the Eritrean Liberation Front (ELF), from which a splinter group, the Eritrean People's Liberation Front (EPLF), was formed.[8] The EPLF joined force with another insurgency group, the Tigray People's Liberation Front, which later formed the Ethiopian People's Revolutionary Democratic Front (EPRDF) by creating alliance with other rebel groups in the fight against the incumbent power in Addis Ababa. A three decades long war ended in 1991 with the *de facto* independence of Eritrea and overthrow of the Dergue, the Ethiopian Marxist regime, from power.

In the aftermath of the war, both insurgency groups 'transformed into transitional governments whose leaders presided over the two

[4] Zdenek Cervenka. 1977. Struggle for self-determination or secession? 12.1 *Africa Spectrum*. p. 38.

[5] *Ibid*.

[6] UN General Assembly. 17 December 1952. *Eritrea: report of the United Nations Commissioner in Eritrea*. A/RES/617, available at: <https://www.refworld.org/docid/3b00f1de54.html> [accessed 4 Feb. 2020]

[7] Cervenka, *supra note* 4. p. 40.

[8] Gebru Tareke, *supra note* 1. p. 63.

countries' post-war political and economic reconstruction.'[9] Until the formal separation of Eritrea from Ethiopia in 1993, the countries continued using the legal frameworks set up under previous regimes. In the meantime, the Eritrean government developed a new nationality legislation which, in some respects, followed a broad approach in assigning Eritrean nationality.[10] Consequently, children born of Eritrean mothers[11] were accorded Eritrean nationality and persons residing outside the territory of Eritrea were allowed to vote in the referendum.[12] This allowed many Eritreans living in exile in different parts of the world to take part in the referendum. The results of the referendum, announced on April 27 by the United Nations, indicated 99.8% voted 'independence'; the transitional government of Ethiopia accepted the result twenty-one days before the formal declaration of independence and recognised the former province as a sovereign state.[13]

For about half a decade, the two countries enjoyed mutual peace and cooperation. As noted by many researchers, this amicable relation, however, rested on the good but strained personal relationship of leaders of the two countries rather than institutions and public support.[14] The relatively peaceful relation which was forged based on friendship of personas, nonetheless, ended with the outbreak of the war in 1998.

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[9] Ruth Iyob. 2000. 'The Ethiopia-Eritrean Conflict: Diasporic Vs. Hegemonic States in the Horn of Africa, 1991-2000'. 38.4 *The Journal of Modern African Studies*. p. 670.

[10] *Ibid.*, p. 671.

[11] Customarily, the nationality of the father, and not the other is considered to determine nationality of a child.

[12] Ruth Iyob, *supra note* 9. p. 671.

[13] *Ibid*.

[14] *See* Redie Bereketeab. 2010. 'The Complex Roots of the Second Eritrea-Ethiopia war: Re-examining the Causes'. 13.1&2 *African Journal of International Affairs*.

Over the years, numerous studies have been conducted to understand the proximate and underlying causes that triggered war between the two countries. While the widely proclaimed dispute over the control of certain border areas comes to the fore, differences in trade, economic and other policy areas have contributed share to the disagreement. Many seem to agree that there was a difference in the expectation of the two countries regarding their post-independence relationships. 'The Eritrean government was believed to have been interested in the economic aspect of the relationship … where it pushed for optimal exploitation of the Ethiopian market…'[15] On the other hand, some believed that the Ethiopian government, through 'economic privileges given to Eritrea and Eritreans would ultimately induce or even force the Eritrean leadership to re-enter into some form of political union with Ethiopia.'[16]

Whatever the overt and covert motives of the respective governments, it will be shown in section III below that the different paths taken in important economic matters have contributed to the tension wherein the border conflict in May 1998 seemed to just be the start of a two year-long war between the countries, claiming thousands of lives on both sides.

Following mediation efforts by foreign governments and international organizations, the two warring countries agreed to cease fire in 2000. The peace deal, the Algiers Agreement, which was brokered by the Organization of African Unity, was signed in December 2000 in Algiers – signalling the end of the two-year war.[17] The Algiers Agreement established the Boundary Commission and Claims Commission. The

[15] *Ibid.*, pp. 44-45.

[16] Richard M. Trivelli.1998. 'Divided Histories, Opportunistic Alliances: Background Notes on the Ethiopian-Eritrean War'. 33.3 *Africa Spectrum*. p. 280.

[17] Redie Bereketeab (a). 2019. *The Ethiopia-Eritrea Rapprochement: Peace and Stability in the Horn of Africa, Policy Dialogue No. 13*. The Nordic Africa Institute, Uppsala. p. 9.

mandate given to the Boundary Commission was to delimit and demarcate the border between the two countries based on treaties concluded between Ethiopia and Italy in 1900, 1902 and 1908 and applicable international law.[18] While the Commission did not have the power to make decisions '*ex aequo et bono*', its ruling is to be final and binding on the two states.[19]

Two years since its establishment, the Boundary Commission rendered a decision. Each country won some territories that were claimed by the other; yet, Bademe, the flashpoint of the war, was awarded to Eritrea,[20] prompting Ethiopia to refuse accepting the award.[21] The stalemate following refusal by Ethiopia to accept the award forced the Boundary Commission to eventually resort to virtual demarcation of the border and close the case.[22]

The next sixteen years saw a period of 'no peace, no war' between the two countries. The situation started to improve with the declaration, in June 2018, of the new Prime Minister of Ethiopia, Dr. Abiy Ahmed, to unconditionally accept the Boundary Commission's ruling.[23] This was followed by successive visits of each other's delegations and leaderships to the two countries and the signing of agreements.

2. Regulation of Trade Relations Following 'Separation': *Experiences of Yugoslavia and Czechoslovakia*

For purposes of the analyses under this section, two contrasting stories that took place in Eastern Europe are considered. In both countries,

[18] Seyoum Yohannes, *supra note* 3. p. 185.

[19] *See* article 4/2 of the Algiers Agreement and Redie (a), *supra note* 17, p. 9.

[20] Seyoum Yohannes, *supra note* 3. p. 186.

[21] Redie (a), *supra note* 17. p. 9.

[22] *Ibid*.

[23] The Economist. *The Economist Explains: How Ethiopia and Eritrea made Peace*. available at: <https://www.economist.com/the-economist-explains/2018/07/17/how-ethiopia-and-eritrea-made-peace> [accessed on September 2, 2019]

Yugoslavia and Czechoslovakia, the process of breaking-up was the result of centrifugal forces associated with secessionist aspirations.[24] However, the process of breaking up was different as one exhibited an unprecedented peaceful process while the other resulted in a horrific war.

Yugoslavia was created as a federation of six republics and two autonomous regions under the 1974 Constitution.[25] The presence of centrifugal forces in the country was visible as early as the 1970s.[26] While the country had experienced economic growth and relative political stability up until the 1980s, each constituent federation had complained of economic exploitation by the other. The rising economic and political challenges – coupled with ethnic factors – contributed to the breakup in 1993 of Yugoslavia into eight independent states.[27] The question of secession was put to the public in the form of referenda in Yugoslavia, giving some measure of legitimacy to the disintegration.[28] Despite this, it remains a recent history that the 'Yugoslav wars', caused by ethnic tensions and insurgency movements, broke the country in to different pieces – claiming in the process hundreds of thousands of lives.

Czechoslovakia composed previously of the Czech lands (Bohemia and Moravia) and Slovakia– that were administered by Austria and Hungary respectively, was established in the aftermath of the First World War in 1918.[29] However, as a result of their respective historical development,

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[24] Milica Z. Bookman. 1994. 'War and Peace: The divergent breakups of Yugoslavia and Czechoslovakia', 31.2 *Journal of Peace Research*. p. 175.

[25] Ljubiasa S. Adamovich. 1995. 'Nations of the Former Yugoslavia: Consequences of Economic Breakdown'. 9.1 *International Journal of Politics, Culture and Society*. p. 150.

[26] *Ibid*.

[27] Bookman, *supra note* 24. p. 176.

[28] *Ibid*.

[29] Abigail Jane Innes. *The Partition of Czechoslovakia*. PhD Thesis. London School of Economics and Political Science. p. 8.

there was huge difference in the economic and social conditions between Czech and Slovakia at the beginning of the establishment of the common state.[30] While significant progresses have been made in education in the Slovak part, the economic situation worsened due to relocation of foreign-owned companies to other countries as a result of competition from Czech industries, prompting the declaration of Slovak autonomy in 1939.[31] The two states formed a common state in the aftermath of the Second World War. In the following years, economic and social improvements had been witnessed in Slovakia which, as alleged by some, were mainly attributed to redistribution of resources created in Czech lands and had also led to a relative decline and technological deceleration of the Czech industry.[32]

A law issued in 1968 by the National Assembly created a federal system that established symmetrical institutions and some level of autonomy to the Slovaks; however, mistrust and dissatisfaction continued in both parts.[33] In 1993, Czechoslovakia was split into two to form the Republic of Czech and Republic of Slovakia. The decision to separate the country came after several economic policy reforms were proposed by the Czech – which were not accepted by the Slovak part. The decision was made through mutual agreement of the leaders of the two parts of the country, but no referendum had taken place on the breakup.[34]

One of the phases in separation processes of countries is 'redefinition'; this term refers to a 'period during which a region is in the process of breaking its existing ties with the center, and is formulating new ties to

[30] Jiri Blazek. 1989. 'Break up of Czechoslovakia: Roots, and Consequences'. 39. X *Treballs de la Societat Catalana de Geografia*. p. 144.

[31] *Ibid*., p. 145.

[32] *Ibid*.

[33] Blazek, *supra note* 30. p. 145.

[34] Bookman, *supra note* 24. p. 76.

its former union as well as the international economy'.[35] The process in general entails division of debts, budgets as well as foreign currency and other financial holdings and property.[36] In parallel, 'the new economy must introduce a new currency, a new monetary policy, new tax and legal systems… while at the international level trade agreements and investments must be renegotiated'.[37] The successful completion of these processes needs consultation and negotiation between the splitting countries. Success in any such negotiation depends on the manner in which the region seceded. If there was a general acceptance of the idea of secession, negotiations on the division of assets and debts can proceed peacefully – while distribution negotiations preceded by episodes of war are usually difficult to bear fruit.[38] This difference in outcome has been experienced in the breakup of the two eastern European countries.

In the case of Czechoslovakia, as the separation was conducted peacefully, the trade and political relationship of the countries post-separation was crafted harmoniously before the separation took place on January 1, 1993. By the time set for the actual separation, governments of the two national republics forming the federation had already signed about thirty agreements that defined their future relations.[39] The agreements that established a customs union and regulated the continued use of common currency are the most important ones for our discussion here.

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[35] *Ibid.*, p. 179. According to Bookman, there are three phases through which the secessionist process evolves: re-evaluation, redefinition and re-equilibration, each roughly corresponding to the before, during and after. *Ibid.*, p. 177.

[36] *Ibid.*

[37] *Ibid.*, p. 179.

[38] *Ibid.*

[39] Stanislava Janackova. 1994. 'Parting with the Common State and Currency: First Steps of the Czech Republic'. 32.2 *Eastern European Economics*. p. 12.

The Czech-Slovak customs union agreement aimed, among others, at ensuring integration of economies and of economic policies of the contracting parties.[40] However, a look into the general background of its conclusion tells another story as it was used as a means to ensure a peaceful and successful breakup of a single country. The creation of the customs union, as part of a broader package of arrangements to ensure a smooth and conflict-free division of Czechoslovakia, had as its goal minimizing the economic cost of the decline in economic ties of the two republics.[41]

In essence, the customs union proposes the elimination of tariff and non-tariff barriers between the countries and the harmonization of commercial and customs policies towards third countries. While there was no need to provide a detailed scheme for the elimination of tariff (as no trade barrier existed between the two republics when they were united), customs duties which were applied by the former Czechoslovakia were adopted as the common external tariff. The Council of the Customs Union which consisted of equal number of representatives from both parties worked on harmonization of policies and made sure that the same legal norms would be adopted regarding rules of origin, customs procedures, statistics, intellectual property, countervailing and antidumping.[42]

With regard to currency, it was planned from the very beginning that the countries would have their own currencies in the future; the central banks of both republics started taking steps on the division of currencies soon after the decision on separation was made known.[43] The currency division was planned to take place in different stages,

[40] Article 3 of the Agreement establishing the Czech-Slovak customs union.

[41] Bartlomiej Kaminski and Beata Smarzynska. 2003. *Never too Late to Get Together Again: Turning the Czech and Slovak Customs Union into a Stepping Stone to EU Integration.* World Bank Policy Research Working Paper 2954.

[42] *Ibid*.

[43] Janackova, *supra note* 39.

starting from a period of using a common currency, through a stage of two currencies convertible in a fixed 1:1 rate of exchange, to the stage or stages when the exchange rate would be determined in a mutually agreed-upon way – by considering prevailing economic situation in both republics.[44] The process was meticulously designed, prepared and carried out with the utmost care – leading to a smooth realization of currency division.[45]

While one can appreciate the composure and far-sightedness of politicians and policymakers who designed such arrangement governing future relations of the separating countries, it must also be known that their enthusiasm to join the European Union had played a very important role. In order to join the European Union, countries are required to meet what are called the 'Copenhagen Criteria', which include stable institutions guaranteeing democracy, rule of law and human rights and the protection of minorities; a functioning market economy and capacity to cope with competition and market forces in the EU; and ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union.[46] Having orderly separation means the splitting countries can focus on building their economic capacity to cope with market forces in the EU and on ensuring functioning market economy.

Considering the manner of disintegration of Yugoslavia, one cannot expect a carefully designed legal framework that governs the separation and future relationship of the separating entities.

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[44] *Ibid.*, p. 13.

[45] *Ibid.*, p. 17.

[46] European Commission. *European Neighbourhood policy and Enlargement Negotiations*. available at:- https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-bership_en

3. Ethio-Eritrea Trade Relations post-Eritrean Secession

As discussed briefly in the background section, the separation of Eritrea was realized after three decades of war. An important fact giving rise to opportunity for a peaceful negotiation in designing regulatory frameworks of the post-separation relations was the strategic alliance coined between EPLF and EPRDF during insurgency. While one cannot underrate the bumpy relations the two Fronts had had during the years of insurgency, there were times of smooth association based on pragmatic tactical interests.[47] It is believed that such alliance primarily forged based on tactical interests of the two rebel groups had contributed to shortening the lifespan of the Dergue regime in the capital, Addis Ababa. Moreover, following the formation of transitional governments in their respective territories in early 1990's, both governments had taken measures which indicated of opportunity for peaceful post-separation relations. For example, on the side of Ethiopia, 'the government made no policy change on the legal and economic status of Eritreans who remained in Ethiopia – continuing to vest in them all rights of Ethiopians'.[48] Moreover, even though the division of assets and liabilities was meant to be made during the redefinition phase of secession based on certain principles to be agreed upon jointly, the Transitional Government of Ethiopia (TGE) agreed to take on the full debt obligation of the Dergue regime.[49] On its part, the Eritrean Transitional Government 'made no demand on Ethiopia for restitution or compensation for the cost of Dergue transgressions in Eritrea, even though almost every major Eritrean town had been destroyed in the war'.[50] These can be considered as signaling the

[47] Redie Bereketeab, *supra note* 14. p. 40.

[48] Michael Woldemariam. 2015. 'Partition Problems: Relative Power, Historical Memory and the Origins of the Eritrean-Ethiopian war'. 21.2 *Nationalism and Ethnic Politics*. p. 176.

[49] *Ibid*.

[50] *Ibid*.

existence of opportunity for a good post-separation relation that is similar to Czechoslovakia.

A few months after the *de jure* independence of Eritrea in May 1993, Ethiopia and Eritrea signed the Agreement of Friendship and Cooperation, also referred to as the 'Asmara Pact', which consisted of several agreements and established three joint technical committees and a ministerial committee to oversee full implementation of the agreements.[51] In addition to the 'Asmara Pact', an accord was reached with the objective of establishing a free trade area (FTA) between the two countries – signed on April 4, 1995.[52] Moreover, various agreements on sectoral cooperation had also been signed, including the agreement on the use of Eritrean ports, the joint use of Assab refinery, and waiver of visa requirements for their nationals.[53]

The Asmara Pact consisted of many agreements one of which was the Trade Agreement.[54] The Agreement was very brief – composed of only ten articles. Under Article 2, the countries agreed to adopt common trade policies. Specifically, they agreed for the free movement of goods and services for local consumption; goods imported from third countries will freely move between the two countries in accordance with the relevant national laws of the parties; and that there shall not be re-exportation of goods and services originating from a contracting party to a third country.[55] As discussed in the subsequent sections, the restriction on re-exporting of goods and services originating from a

[51] *Ibid*.

[52] IMF Staff Country Report No. 97/88. October 1997. *Eritrea: Selected Issues*. The author is unable to get a copy of the agreement and information on its status following signature.

[53] IMF Staff Country Report No. 96/66. August 1996. *Eritrea - Recent Economic Developments*. p. 22.

[54] Trade Agreement between the Transitional Government of Ethiopia and the Government of the State of Eritrea. Signed on September 27, 1993. Asmara, Eritrea. The author could not find any information regarding the ratification of the agreement by either the Ethiopian or Eritrean governments.

[55] Article II/1-3 of the Trade Agreement.

contracting country has been one key source of dissatisfaction and accusation from the Ethiopian side.

One limitation on the free movement of goods is the restriction on goods which are in short supply.[56] Competent authorities of the respective countries are given mandate to determine on the movement of such goods.[57] The provision did not specify the kind of measure that can be taken by the competent authority with regard to movement of goods that are in short supply. Among restrictions that authorities could possibly impose, one model can be to require the use of hard currency as a medium of transaction for such goods as opposed to Birr – which is normal practice – instead of banning the movement altogether. A 1997 IMF report indicated that such approach was used by Ethiopia wherein the government required payments to be effected in foreign currencies for Eritrea's purchases of some of Ethiopia's traditional exports as well as for goods that are in short supply in Ethiopia.[58]

The agreement also envisaged the establishment of a uniform standardization system for goods and services to be traded between the two countries. These provisions suggest that the main purpose of the agreement was to ensure harmonization of trade policies of the two countries. However, as the agreement was not detailed enough, and this coupled with the tensions exhibited over control of the harmonization process, led to failure of harmonizing the trade policies.[59]

With regard to currency, the Friendship and Cooperation Agreement established a joint ministerial commission which was entrusted to ensure the implementation of Article 9; the provision calls for mutual

[56] Article II/1 of the Trade Agreement.

[57] *Ibid*.

[58] IMF, *supra note* 58.

[59] Michael Woldemariam, *supra note* 48. p. 177.

consultation on the use of the Ethiopian Birr and the exploration of possibilities of adopting a common currency by both countries.[60] The author is unable to find any information on the tasks accomplished by this organ.

On the other hand, the Trade Agreement also contains a provision regulating the use of currency. Article V provides that payments for transactions concluded in pursuance of the implementation of the Agreement will be made in Birr as long as Birr remains the common currency.[61] Moreover, Article 1 of the Protocol Agreement on Harmonization of Economic Policies provides that the Ethiopian Birr will be used until Eritrea adopts its own currency.[62]

From these provisions, one can gather that there was a basic understanding that there will be a currency union between the countries for unidentified period of time. There is, however, no detailed provision on how the currency separation is to be treated if and when Eritrea wishes to introduce its own currency.

A 'joint committee for trade', composed of representatives designated by the contracting parties, was established with a mandate to examine problems that arise in implementation of the Agreement and to handle matters that fall within the scope of the development of trade between the two countries.[63] The committee is also tasked with responsibility to review the implementation of the Agreement and to consider proposals made by either party for further expansion and diversification of trade [in goods] and services between the two countries.[64]

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[60] IMF, *supra note* 58.

[61] Article V of the Trade Agreement, *supra note* 54.

[62] Protocol Agreement on Harmonization of Economic Policies Between the Government of the State of Eritrea and the Transitional Government of Ethiopia, September 1993, Asmara.

[63] Article VI/b of the Trade Agreement, *supra note* 54.

[64] Article VI/a and c of the Trade Agreement, *supra note* 54.

4. Challenges in the Implementation of the Trade Agreements

Few years after the conclusion of the agreements, several factors were identified that hindered proper implementation of the agreements and contributed to feelings of 'being wronged' by people on each side of the border. In this section, an attempt will be made to review/summarize some of the challenges observed in implementation of the agreements.

One of the objectives of the Trade Agreement, as gathered from article II, was to ensure the free movement of goods and services between the two countries. The concept of free mobility covered goods imported from third countries. This raised issue as the two countries had different tariff rates with regard to goods imported from third countries.[65] In such scenarios, the country that maintained a higher tariff for third country products risked the import of the same goods through the country with which it has 'free movement of goods' arrangement, which, however, imposed lower tariff for the third country product.

This is a typical challenge encountered by countries that form a free trade area. The problem is usually addressed by providing for a regime on 'rules of origin'. However, having rules of origin cannot provide solution when the countries have agreed for free movement of third country products within their jurisdictions.

Another possibility is to agree on a Common External Tariff (CET); in such scheme, an equal amount of tariff will be levied on third country products. In this case, it does not matter through which border the third country product first enters as the amount of tariff is similar.

Coming to the Trade Agreement between Ethiopia and Eritrea, article II/2 simply provides that 'there shall be free movement of goods

[65] Seyoum Yohannes, *supra note* 3. p. 174.

imported from third country to respective countries of the Contracting Parties, according to the relevant laws and regulations of the Contracting Parties'.[66] No solution is proposed to address the discrepancy in tariffs levied on third country products by the two parties. This was in fact the source of grievance from both sides. Businesses in Ethiopia were complaining that the scheme gave unfair advantage to the Eritrean companies who import third country products first to Eritrea, paying a lesser amount of tariff – and then sell the same in Ethiopia at lower prices– while similar products imported by Ethiopians directly from a third country will be subjected to higher tariffs, hence pushing their prices up and making them uncompetitive.[67] Eritreans, too, were dissatisfied as they felt that Eritrea's scarce foreign exchange is used to import the products from third countries, which are then exported and sold in Ethiopia in local currency, hence benefiting Ethiopia more.[68]

The other point of controversy was the insertion of the phrase 'goods in short supply' – used to restrictively qualify the free movement of goods and services between the two countries. Eritrean authors claimed that this phrase was crafted upon Ethiopia's insistence; while aimed at serving as exception to the free flow of goods and services rule, the provision lacks clarity since, in theory, any product can be declared 'in short supply' at any time.[69]

Another provision which had been a source of contention between the countries relates to article II/3 of the Trade Agreement. The provision prohibits the re-exportation of goods and services from contracting parties to third countries. Opinion from Eritrea's side was that such

[66] Article II/3 of the Trade Agreement, *supra note* 54.

[67] Seyoum Yohannes, *supra note* 3. P. 174.

[68] Alemseged Tesfai. The Cause of Eritrean-Ethiopian Conflict. Available at:- <http://dehai.org/conflict/articles/alemsghed.html>, [accessed on October 20, 2019]. *See* also Seyoum Yohannes. p. 174.

[69] *Ibid*.

prohibition was overly restrictive which left traders at the mercy of staff of the customs administration;[70] the complaint from Ethiopia's side was related to non-compliance by Eritreans. Some studies went as far as reporting that Eritrea exported significant quantities of coffee to third countries even though Eritrea did not produce any coffee.[71] Others submitted that such re-export was not limited to coffee, but extended also to other agricultural products. While there was no official data which corroborate this fact, the overall assessment of the aggregate data on Eritrea's exports between 1994 - 1998 clearly reveals a substantial decrease in Eritrea's total export performance after the economic tie between the countries was severed in 1998.[72]

A very important opportunity that was created through the Friendship and Cooperation Agreement – which both countries failed to make use of – relates to harmonization of commercial and monetary policies. The failure is far more amplified in the monetary policy area. While both countries had maintained a *de facto* monetary union following Eritrea's secession, they have pursued different interest rate policies – providing for significant interest rate differentials.[73] There was also difference in the exchange rate policies. The National Bank of Ethiopia, tasked with the power of issuing the Birr which is also used by Eritrea, conducted weekly foreign exchange auctions to determine the official exchange rate of the Birr.[74] While Ethiopia used this official exchange rate, Eritrea used multiple exchange rates for the Birr – the official exchange

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[70] *Ibid*.

[71] Michael Woldemariam, *supra note* 48. p. 177.

[72] Worku Aberra. 2016. 'Asymmetric Benefits: The Ethio-Eritrea Common Market (1991-1998)'. 4.1 *International Journal of African Development*. p. 60. Also available at: <https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=1097&context=ijad> [accessed on June 18, 2019]. The author indicated that Eritrea's exports, expressed as percentage of GDP, decreased from 31 percent in 1994 to 10 percent in 2000, after Eritrea stopped exporting to and importing from Ethiopia. (p. 61)

[73] IMF, *supra note* 58.

[74] *Ibid*.

rate, the auction rate and the 'preferential rate' – depending on the transaction involved.[75] Arguably, the implementation of triple exchange rate regime by Eritrea while Ethiopia used only the official exchange rate had resulted in Eritrea's comfortable foreign exchange reserve position at the expense of Ethiopia.[76]

As discussed in the previous sections, one of the areas on which splitting countries discuss is related to the currency regime. Article V of the Trade Agreement declared the Birr to be the medium of payment for all transactions concluded in implementation of the Agreement as long as the Birr remains a common currency. The Protocol on Harmonization of Economic Policies, which was signed as part of the Friendship and Cooperation Agreement, declared the Birr to be used by Eritrea until it issues its own currency.[77] These provisions indicate that a monetary union will exist between the two countries for some time after the secession. While there are authors from both sides who claimed that each country had benefited to the disadvantage of the other, one point on which all agreed was that a serious tension was created in bilateral relations when Eritrea introduced its own currency by the end of 1997. The introduction of Nakfa by Eritrea meant the dissolution of the *de facto* currency union.

As the two countries were holding discussions on modalities of dissolving the *de facto* currency union, some sticky points also emerged. One such issue was the demand tabled by the Eritrean government 'to keep the redeemed notes in its possession which would have meant

[75] Worku Aberra, *supra note* 72. p. 64. 'The auction exchange rate applied to transactions between Ethiopia and Eritrea (oil refinery service and port transactions) as well as to all aid funded imports…a more depreciated preferential exchange rate was used for all other transactions ..' IMF Staff Country Report No.98/91.

[76] Worku Aberra, *supra note* 72. p. 64.

[77] Article 1 of the Protocol Agreement on Harmonization of Economic Policies between the Government of the State of Eritrea and the Transitional Government of Ethiopia. September 1993. Asmara.

that overnight Eritrea would have created a huge stock of Birr which it could then use to continue buying the necessary goods from Ethiopia without having to resort to hard currency'.[78] Moreover, when introducing the Nakfa, the expectation on the part of Eritrea was for Nakfa-Birr parity,[79] a move which did not get support from the Ethiopian side. There was also hope by Eritrea that the Nakfa will be used as one of the currencies of trade between the two countries, which was also not accepted by Ethiopia.[80] Instead, Ethiopia insisted all economic transactions and trade beyond 2,000 Nakfa should be conducted in hard currency.[81]

As submitted in the subsequent section, cross-border trade refers to the flow of goods and services across international land borders within a duly defined area. The bordering countries normally conclude agreement to regulate cross-border trade. As one purpose of such arrangement is to avail goods and services to people living in border areas, it is customary to provide in such agreement details involving the defined area, the types of goods, frequency of travels, as well as a cap on the value of goods to be imported or exported. Anything that falls outside such provision will be excluded from an agreement's ambit.

The Trade Agreement signed in 1993 does not specifically cover cross-border trade. As the Agreement aspires to have free movement of goods and services for local consumption in the respective countries, it was not as such expected to cover such matters. However, the introduction of Nakfa affects one variable in the Agreement, that Birr would be used in the trade relations, without proposing which currency to use when Eritrea introduces its own currency. What happens when

[78] Trivelli, *supra note* 16. p. 282.

[79] Ruth Iyob, *supra note* 9. p. 647.

[80] Michael Woldemariam, *supra note* 48. p. 178.

[81] *Ibid*.

any such move takes place is not specifically regulated in the Agreement.

The absence of any indication as to which currency to use, coupled with the disagreement on the Nakfa-Birr parity, seemed to have prompted the Ethiopian government to 'introduce a requirement to use hard currencies and letters of credit for payments in excess of 2,000 Nakfa'.[82] Some had considered this limitation as a regulation imposed on petty border trade.[83] But, unlike other arrangements that govern petty cross border trade, there was no limitation on the types of goods to be traded, area coverage, and number of trips a trader may take for trading purpose.

While the difference in economic policies were creating strain between the two governments, the increase in tension in the border areas, which used to be addressed through the exchange of letter between the two leaders, aggravated the problem. As can be gathered from reports on the chain of events that took place between 1993 and 1998, one cannot just label the Ethiopia-Eritrea war merely a border war. True, the conflicts in border areas could be considered as the immediate causes of the war, but the rift in economic and monetary policies pursued between the two governments had contributed a great deal for the eventual happenstance. There was more than one opportunity presented to both countries to have a friendly breakup and to forge a lasting and mutually beneficial relationship. They however failed to make use of such opportunities, and instead engaged in one of the bloodiest wars in recent history.

A look into the diplomatic relations of Ethiopia shows that it had concluded agreements with different countries to promote and govern trade, investment and other important policy areas. For example, as of

[82] IMF Staff Country Report No 98/91.September 1998. *Eritrea: Selected issues*.

[83] Ruth Eyob, *supra note* 9. p. 647.

January 2020, Ethiopia had signed 31 Bilateral Investment Treaties (BITs),[84] involving both developing and developed countries. Various trade agreements are also concluded between Ethiopia and partner countries. The main objective of these agreements is to promote and expand trade between the signatory countries and strengthen their economic relations.

In the following section, an assessment of trade agreements which Ethiopia signed with neighbouring countries will be undertaken. The purpose of such review is to offer perspective and compare and contrast the trade agreements Ethiopia signed with Eritrea with the others. The assessment reveals that the 1993 Trade Agreement had failed to incorporate important elements which are otherwise found in many other agreements. The review will also help in proposing what components should be included in any future trade agreement between Ethiopia and Eritrea.

5. Regulation of Trade Relations between Ethiopia and Neighboring Countries

Ethiopia shares a long history of diplomatic and trade relations with neighboring countries, and yet, African countries have hardly been the primary destination and source of Ethiopia's international trade, especially in commodities. As the 2017/18 Annual Report of the National Bank of Ethiopia indicates, Asia, Europe and Africa are the major export destinations for Ethiopian goods – with each constituting 39.8%, 28.7% and 20.9% respectively. From the share of exports to African countries, 89.6% was exported to Somalia, Djibouti, Sudan, Kenya, Nigeria, Egypt and South Africa. As far as data on imports is concerned, African countries were the fourth major source of

[84] https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia. This number excludes the BIT signed with India which was terminated as of March 2017. *Ibid*.

Ethiopia's imports – with 7% of total imports, following Asia (64.2%), Europe (19.3%) and America (9.4%). From among African countries, imports from Egypt, Morocco, South Africa, Sudan, Nigeria and Kenya constitute 97.2% of the total imports. Kenya and Sudan are important trade partners as they are both the source and destination of the country's import/export goods. It is in light of this significance that Ethiopia has signed a preferential trade agreement with Sudan and special status agreement with Kenya – in addition to the conventional Bilateral Trade Agreements signed with other partner countries.

5.1. Non-preferential (Conventional) Bilateral Trade Agreements

Ethiopia has signed Bilateral Trade Agreements with Djibouti, Kenya and Sudan. The agreements have the objectives of promoting and expanding trade and strengthening economic relations of the countries. The countries undertook to facilitate trade expansion through the use of COMESA and IGAD concessions and the extension of the MFN treatment in all matters relating to customs duties and foreign trade formalities. The agreement concluded with Kenya contains a provision which allows re-exportation to third countries of goods imported from the other partner country without prior approval.

As the agreements are concluded between neighboring countries, one area they addressed is cross-border trade. Cross-border trade can be defined as the 'flow of goods and services across international land borders within a reach of kilometers specified by law (duly defined area)'.[85] The cross-border trade can be formal, where the trade is carried out by legally registered traders and fulfills all the legal requirements of the trading countries, or informal, where part or all of the trading activity remains unrecorded or unrecognized by the

[85] Kaminiski B. and Mitra S., Skeins of Silk. 2010. *Borderless bazaars and border trade in Central Asia*. World Bank Monograph.

government.[86] In Africa, informal cross-border trade has been going on for so many years where 'women crossing borders with their heads and backs laden and arms overloaded with goods for sale has been a common specter...'.[87] A significant proportion of regional cross-border trade in Africa is informal. In the COMESA region, for example, informal cross-border trade contributes 40 percent of the total intra-regional trade; the amount is 30 - 40 percent in the SADC region.[88]

An issue of concern for African countries has been how to regulate and formalize cross-border trade with a view to abolishing illegal trading activities around borders. The bilateral trade agreements that Ethiopia signed with neighboring countries allow the signatories to take appropriate measures aimed at facilitating and regulating border trade. Based on this mandate, separate agreements dealing exclusively on border trade were concluded for the implementation of which directives were issued by the relevant government organs of Ethiopia.

The border trade protocol signed between Ethiopia and Sudan in 2005 defined border trade as a commercial activity which is performed by natural persons who are residing within a 90 km radius of the common border of the two parties. We can see from the definition that the 'duly defined area' is the 90 km radius. As the objective of the protocol is to avail basic tradeable commodities to bordering people, both the area within which the trade can be conducted lawfully, the types of commodities to be traded, as well as their values are provided for. The number of times a trader may cross borders is also predetermined by

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[86] Suffyan Koroma *et al*. 2017. *Formalization of Informal Trade in Africa: Trends, experiences and socio-economic impacts*. FAO Information product. Available at: <http://www.fao.org/3/a-i7101e.pdf>

[87] *Ibid*.

[88] Lily Sommer and Chris Nshimbi. 2018. 'The African Continental Free Trade Area: An Opportunity for Informal Cross-Border Trade'. 7.4 *Bridges Africa*. Available at: https://www.ictsd.org/bridges-news/bridges-africa/news/the-african-continental-free-trade-area-an-opportunity-for-informal

the protocol. Accordingly, a trader of either Contracting Party can import or export products provided under the list the value of which will not exceed Birr 2,000 or 61,404 Sudanese Dinnar per a single trip, once a week. The list of products that can be exported from Ethiopia to Sudan are fresh fruit, sorghum, maize, lentils, chick peas, horse beans, natural honey, garlic, potato, natural milk and butter, cigarette, tea, canvas, cinnamon/tea spice, local made agricultural equipment, cosmetics (local made hair oil) and kenkes/woyka. The list of products that may be exported from Sudan include fresh fruits, lady tops, palm nut, dry dates, onion, stone grain mills, local made agricultural equipment, plastic products (like rope and water container), fennel, kitchen utensils, soap, iron, matches, cosmetics (hinna, local made perfume), gum olibanum, and stick and dry cell batteries. The list is to be reviewed by the joint border trade committee – established by the protocol and consists of representatives of the relevant government offices of both countries.

In the case of the Ethiopia-Kenya border trade, the 'duly defined area' under the Petty Periphery Trade Directive No 4/1992 is a radius of 200 kms from the town of Moyale. The products that can be exported from either side of the border are also provided for in the directive with a cap on their value at 10,000 Ethiopian Birr per trip. The number of times traders may cross the border for trading purposes is limited to two entries per month.

On cross-border trade with Djibouti, the directive (Directive No.1/1995) provides the 'duly defined area' in terms of towns. Accordingly, the source as well as destination of products to be traded must be the towns of Dich'oto, Dubti, Manda, Debtbahri, Elidar, Logia, Asaita, Mile, Afabo and Afdera. While the number of trips for trading purpose is limited to twice per month, the value is not expressly indicated. In case of trading in livestock export, the number of livestock is regulated. Unfortunately, the directive is not clear as to the

value of products traded by petty merchants who wish to involve in legitimate tradable items other than live animals.[89]

5.2. Ethiopia-Sudan Preferential Trade Agreement

In 2002, the governments of Ethiopia and Sudan signed an agreement that established a free trade area. Some of the objectives of the agreement include promoting the development of economic relations between the two countries through the expansion of trade, improving living conditions, and increased productivity and financial stability. These objectives are to be achieved through the removal of tariff barriers to trade.

All industrial and agricultural products originating from both countries are covered by the agreement wherein they enjoy a preferential customs duty of zero rate (0%).[90] The parties are to rely on COMESA Rules of Origin provisions to determine if products are eligible for the preferential treatment. A Joint Committee composed of officers from the relevant government organs of both countries is established to facilitate implementation of the agreement. The joint committee is expected to meet once a year, but can also hold interim consultations upon request by either party.

5.3. Ethiopia-Kenya Special Status Agreement

The Special-Status Agreement (SSA) was signed between the governments of Ethiopia and Kenya in 2012. To improve the economic and trade relation between them, the countries identified certain sectors (areas) that are granted special status; the sectors identified are trade, investment, infrastructure, food security, and sustainable livelihood.

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[89] Habtamu Hailemeskel *et al*. 2017. 'Policy Research on Cross-border Trade: Challenges and Prospects', in Mulugeta Getu *et al* (*eds*), *Haramaya University: Pastoralist Areas Resilience Improvement Through Market Expansion (HU-PRIME) Project Research Activities*. Vol 1. p. 165.

[90] Article 4/2 of the Ethio-Sudan Preferential Agreement.

The SSA allows both countries to look for mechanisms to increase trade flows between them. For that purpose, the agreement provides for the contracting parties to work towards progressive tariff concessions, harmonized goods nomenclature and tariff lines, and take other measures to facilitate the flow of goods and vehicles across borders. The agreement also covers measures to be taken by the countries to enhance and facilitate investment activities.

A High Level Joint Tripartite Council composed of representatives from the two governments and the private sector is established with the task of providing direction and guidance on the planning, implementation, monitoring and evaluation of all activities provided for in the agreement.

6. Recent Developments in the Renewed Ethio-Eritrea Relations

The two decades long no-peace no-war situation between Ethiopia and Eritrea ended with the current Prime Minister of Ethiopia assuming power in 2018. Ethiopia's call for peace received a positive response from Eritrea who sent its delegation to hold talks in Addis Ababa. Few weeks following visit of the Eritrean delegation led by its Minister of Foreign Affairs, the Ethiopian Prime Minister paid a two-day official visit to Asmara wherein the two leaders signed the Declaration of Peace and Friendship.[91]

The joint declaration formally confirmed the end of war between the two countries and heralded the opening of a new era of peace and friendship. While envisaging the forging of close political, economic, social, cultural and security cooperation between the countries on sustainable basis, the joint declaration also calls for the resumption of transport, trade and communication links, as well as diplomatic ties and

[91] Joint Declaration of Peace and Friendship between Eritrea and Ethiopia. Signed on July 9, 2018. Asmara.

activities. Affirmation to implement the boundary commission's decision is also provided in the declaration wherein the two countries promised to jointly endeavour to ensure regional peace, development and cooperation.

A few days after the signing of the declaration, Eritrea's president, Issayas Afeworki, visited Ethiopia for the first time in two decades. This was followed by the opening of road communication through two border crossing points which saw considerable movement of goods and people in a very short span of time.[92]

In mid-September, the leaders of the two countries met in Saudi Arabia, Jeddah, at the invitation of the Saudi King where they signed the Agreement on Peace, Friendship and Comprehensive Cooperation in the presence of the King and UN Secretary General Guterres.[93] Many of the provisions of the July joint declaration signed in Asmara were carried over to the Jeddah agreement; but, additional points were also incorporated in the latter.

Accordingly, both countries committed to develop joint investment projects, including the establishment of Joint Special Economic Zones, and to combat terrorism as well as trafficking in people, arms and drugs in accordance with international covenants and conventions. The agreement provides for the establishment of a High-Level Joint Committee and sub-committees that guide and oversee the implementation of the agreement.

However, a year has already passed since the signing of this agreement – with very little visible progress made towards its implementation. As noted by some, the absence of tangible headways in implementation and institutionalization of the agreement is already creating an air of

[92] Redie Bereketeab, *supra note* 17. p. 14.

[93] *Ibid.*, p. 15.

uncertainty and suspicion.[94] To make matters worse, opened borders were closed step by step in December 2019,[95] with all border crossings, except through air transport, now forbidden. This halted the movement of persons and cross-border trade that was already re-flourishing.

While broadly speaking, the Ethio-Eritrean rapprochement could be hailed as important geo-political development, the pace at which the required changes are unfolding and the fact that most of what is being pursued is also undertaken in the absence of institutionalization and principled approaches – has exposed the process to intense criticism. Drawing on similar experience of the events that led to the conclusion of the 1993 agreement, it is submitted that what took place just before the signing of the 2018 agreement and the overall framework of the relations between the two countries fundamentally remained an affair of leaders at the helm of power.[96] Moreover, at the time of opening the borders and in endorsing the attendant decisions, there seemed to have been no concrete plan on important economic issues that have far-reaching implications – such as trade tariffs, exchange rates, banking arrangements and customs formalities.[97] If there was any, the plans were not communicated to the general public in essential details – inheriting the same transparency problems that clouded the conclusion of the 1993 agreement.[98]

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[94] Martin Plaut. 2019. 'The Glow of the Historic Accord between Ethiopia and Eritrea has Faded', *Quartz Africa*. available at: https://qz.com/africa/1662277/the-ethiopia-eritrea-abiy-isaias-peace-accord-glow-is-fading/

[95] Brook Abdu. April 27, 2019. Ethiopia Silent over Ethio-Eritrea Border Closure, *The Reporter*. https://www.thereporterethiopia.com/article/ethiopia-silent-over-ethio-eritrea-border-closure.

[96] Belete Belachew Yihun. 2018. 'The Recent Ethiopia-Eritrea Diplomatic Thaw: Challenges and Prospects'. 30.3 *Horn of Africa Bulletin*. p. 37.

[97] Michela Wrong. 2018. 'Ethiopia, Eritrea and the Perils of Reform'. 60.5 *Survival*. p. 55. Also available at: https://doi.org/10.1080/00396338.2018.1518369

[98] Belete Belachew Yihun, *supra note* 96. p. 38.

7. The Way Forward

The agreement on Peace, Friendship and Comprehensive Cooperation signed in September 2018 between Ethiopia and Eritrea provides for general framework on selected issues. One such issue is trade. Under Article 2 of the agreement, the countries have committed to promote comprehensive cooperation in trade, economy and investment fields, among others. Hitherto, Ethiopia has used the signing of trade agreements as one important avenue for promoting cooperation in trade matters in its relations with three neighbouring countries.

While a similar approach could be used in relation to Eritrea as well, the central question that needs to be considered quite seriously and beforehand would be what form and content such trade agreement should take. In this regard, there are different options from which both countries can choose – taking into account the prevailing political and economic conditions in their respective territories.

One option is to engage in a non-preferential bilateral trade agreement with the objective of promoting and expanding trade and strengthening economic relations – along the lines of the accords signed with the three neighboring countries. Substantively, such agreement will cover in detail matters relating to tariff concessions and the treatment of products and services originating from each other. Another matter that needs to be regulated in the agreement is the means/medium of payments. The trade agreements of Ethiopia with the three neighboring countries have provided for a 'freely convertible currency' as a medium of effecting payments for transactions concluded. This is particularly important. As was noticed in the recent past, when trading activities were taking place after the borders with Eritrea were re-opened, no one seemed to know the official trading relationship between Nakfa and Birr,[99] forcing people to rely on informal rates established by market

[99] Wrong, *supra note* 97. p. 55.

forces – wherein one Nakfa was exchanged for two Birr.[100] In this regard, a similar approach adopted in other trade agreements can be considered which requires the use of convertible currency and ensures that all trading activities pass through regular banking procedures.

The regulation of petty cross-border trade is another matter that should be addressed generally in the agreement, while leaving the details for an additional protocol. Here also, Ethiopia's experience with the other neighboring countries can be made use of; any such agreement must include an exhaustive list of goods that are allowed to be traded, a cap on value of the goods to be traded in a single trip, the frequency of travel for trading purposes, as well as the duly defined area since the trading regime should cover only persons living in border areas. In interview with *The Ethiopian Herald,* the Communications Affairs Director of the Ministry of Trade and Industry of Ethiopia announced that a legal framework for cross-border trade between the two countries has already been finalized and is awaiting approval from the governments of the two countries.[101] According to the Director, the agreement will have similarity with other trade agreements which Ethiopia has signed with other neighboring countries.[102]

A second option is for the countries to form a preferential trading arrangement. The Ethio-Sudan preferential trade agreement can be a good start in this regard. Ethiopia and Eritrea may choose to start with lower thresholds – as the economic implication of eliminating tariff on all industrial and agricultural products originating from them, as is the

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[100] Wazema Radio, 'ኢትዮጵያና ኤርትራ በሰላም ስምምነቱ አፈፃፀም ላይ አልተግባቡም'. May 10, 2019, available at: http://wazemaradio.com

[101] Yohannes Jemaneh. New Ethio-Eritrea Trade Deal Awaiting Final Decision. *The Ethiopian Herald*, 4 February 2020. Available at: <https://www.press.et/english/?p=18513&fbclid=IwAR1wmpxPjh-M40b35lQWmWQJ4yZEIIfT4I3HUdfkcYTRLspt0chqD5oYhlk#> [accessed on 5 February 2020]

[102] *Ibid*.

case under the Ethio-Sudan PTA, could be adverse – owing to differences in economic scales in both jurisdictions. Both may start with the exchange of preferences on selected goods and services of interest and proceed deeper as time goes by, aiming ultimately at forming a preferential trade area.

However, care has to be taken since Ethiopia is already a member of the recently launched African Continental Trade Area (AfCFTA),[103] and is also negotiating to join the COMESA Free Trade Area. The AfCFTA, an initiative of the African Union, aims, among others, at liberalizing trade restrictions on goods and services and forming a single market consisting of all African countries. So far, there is no restriction to form smaller local groups within the continent-wide free trade area; but, caution must be exercised since any preferential treatment granted within a smaller group may legally be sought after by other members of the larger group. Similar concerns/implications can also be raised in light of Ethiopia's bid to join the World Trade Organization.

The prevailing economic, political and policy factors and imperatives will dictate which of the two options Ethiopia and Eritrea may wish to consider adopting. However, certain principles need to be taken into account in adopting either of the options.

The first is transparency. Both governments should communicate in a transparent manner the proposals and choices they make between the two options or on any other alternative – and solicit substantive and endorsement-seeking feedback from the public as well as pertinent technical bodies. Whichever arrangement is opted is meant to serve the interest of the people of both countries – and as such people should be able to participate and have a say over the processes; people must be

[103] Ethiopia deposited instrument of ratification of the AfCFTA on 10 April 2019, see https://au.int/en/pressreleases/20190410/ethiopia-deposits-instruments-ratification-afcfta

consulted or notified before a final decision is made on their behalf, not after. If and when an agreement is reached, the contents should also be made public and easily traceable. Likewise, all subsequent measures (laws, regulations etc.) introduced as a result of the agreement should be made available to the public. This helps in building trust – not just between the governments but also between the people and their respective governments.

The second important point is institutionalization of the relationship. One cannot deny the role a friendly relationship between leaders of two countries plays in crafting and implementing a smooth diplomatic relations. However, bridging a relationship between countries certainly goes beyond any level of inter-personal connections; in consequence, all formal bilateral dealings need to be anchored on institutions from the start to the end. Such institutions should be involved both in the design of bilateral arrangements and in overseeing the implementation of agreements involving trade relations of the two countries.

Another trade-related measure both countries agreed to undertake under Article 3 of the September 2018 agreement is to develop joint investment projects, including the establishment of joint special economic zones. Special economic zones (SEZs) are 'geographically delimited areas within which governments facilitate industrial activity through fiscal and regulatory incentives and infrastructure support'.[104] The use of SEZs as a tool for economic development dates back to the 1960s. In Ethiopia, the need for the development of SEZs, alternatively labeled as industrial parks under Ethiopia's laws,[105] as vital tools for the

[104] UNCTAD. 2019. *World Investment Report 2019: Special Economic Zones*. United Nations Publication, also available at: https://investmentpolicy.unctad.org/publications/1204/world-investment-report-2019---special-economic-zones, p. 128.

[105] The names Special Economic Zones, Technology Parks, Export Processing Zones, Agro-Processing Zones, Free Trade Zones and the like as designated by the Investment Board

industrial transformation is underscored under the Growth and Transformation Plan of the country. As SEZs can be owned, developed and managed either by the government or the private sector or jointly, the federal government has embarked on building SEZs in different parts of the country. In recent years, government to government partnerships in owning, developing or managing SEZs have also become popular.[106] This seems the approach provided for under Article 3 of the Agreement.

Such arrangements are normally supported by a specific bilateral agreement to jointly develop a SEZ. The bilateral agreement will normally cover matters like the setting up of the cooperation framework, the division of responsibilities, and the development and management mechanisms of such zones.[107] Apart from serving as symbols of political commitment, such agreements can provide institutional framework for the arrangement created between the countries.

Still, while the agreement to establish a Joint Special Economic Zone is commendable, the matter should be taken one step further through the signing of a specific agreement that covers matters mentioned above and regulates every aspect of its functioning.

8. Concluding Remarks

After thirty years of civil war, Eritrea was separated from Ethiopia and became an independent country in early 1990. Theories on state separation or secession indicate that there are three phases in the separation process which roughly correspond to the 'before, during and after' separation scenarios. It is in the 'during' phase, known as

can be used interchangeably with 'Industrial Park'. *See* article 2 of the Industrial Park Proclamation No 886/2015.

[106] UNCTAD, *supra note* 104. p. 155.

[107] *Ibid.*, p. 156.

redefinition, that a newly formed country formulates ties with its former union and the international economy. It is again during this phase that matters related to the division of debt, budget, foreign currency, financial holdings, property etc. are settled between the two entities. As experience of the two Eastern European countries shows, the successful completion of this phase requires proper consultation between the separating countries. It is during this stage that they lay the foundation for their future peaceful coexistence.

In this article, it is shown that there were viable opportunities and conducive circumstances for the Ethiopian and Eritrean governments to establish a basis for peaceful relationships post-separation. The strong alliance the two insurgency groups had created when fighting the Dergue and the series of measures they introduced after seizing power, including the signing of bilateral agreements, were indicative of such an opportunity.

However, in spite of the opportunities thus offered, the relatively smooth initial relationship did not last for more than half a decade; a rift in economic policies and disputes over territories dragged the countries to engage in a two year long bloody war, claiming the lives of thousands of people and destroying property on each side. This was followed by a two decades long 'no peace no war' state of affair.

The year 2018 heralded a renewed relationship between the two countries; both agreed to resume diplomatic and trade relations, open borders and work together on different fronts. The Declaration of Peace and Friendship signed in Asmara was followed by a framework agreement on Peace, Friendship and Cooperation signed in Jeddah.

However, outstanding concerns remain; while the renewed agreement was signed more than a year ago, nothing concrete has taken place or is disclosed to the public in terms of taking the matter forward or in detailing the arrangements as contemplated under the bilateral accord,

although occasional assurances have been offered by government officials that a comprehensive set of covenants is being worked out.

Still, it could be submitted that the signing of the 2018 agreement has, of itself, presented both countries with a unique and hardly availed second chance to forge a lasting and peaceful socio-economic and political relationship.

In this short article, the author has tried to make one vital point – that relationship between both countries must be based on a set of principles and that the processes must be institutionalized. Both countries must learn from the past experience and enter into agreements that are well-thought through and are presented in substantial detail to ensure the creation of a sustainable and mutually beneficial relationship.

Moreover, the governments of the respective countries should regularly inform and involve their public on all matters pertaining to the conclusion of the agreements. Once signed, such agreements have to also be traceable and accessible to the general public. Institutionalization of relationships, transparency and public participation during and after the conclusion of accords can help in legitimizing the process and in creating strong foundation for sustainable relationship.

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